

Neutral Citation Number: [2000] EWCA Civ 1295
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
(JUDGE COTRAN)

Royal Courts of Justice
Strand
London WC2

Wednesday 24th April 1996

B e f o r e:

LORD JUSTICE STAUGHTON
LORD JUSTICE ALDOUS
SIR JOHN MAY

B E T W E E N :
GEORGE SAVVA
AMALIA SAVVA
Plaintiff/Appellant

- v -

KEMAL HOUSSEIN
Defendant/Respondent

(Computer Aided Transcript of the Palantype Notes of
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Official Shorthand Writers to the Court)

MR N MENDOZA (Instructed by Cornillie & Co) appeared on behalf of the Plaintiff.

MR D LONSDALE (Instructed by Johns & Saggar) appeared on behalf of the Defendant.

J U D G M E N T

LORD JUSTICE STAUGHTON: We have today an appeal from the decision of Judge Cotran in the Central London County Court, as long ago as November 1994, after a trial that lasted four days.

It must have been a very expensive proceeding and so must this appeal be, because we have had some beautifully produced transcripts of the evidence, which extend to a great number of pages and have not really been of any importance at all in this appeal.

The story begins with a lease which was granted on the 11th July 1991 by Mr and Mrs Savva, the landlords, to Mr Hussein as tenant. It was for a period of 12 years and the permitted use was for a cafe, snack bar and a place for operating mini-cabs. As is usual, there were a number of other covenants by the Tenant, Clause 4(15) dealt with what signs might be erected outside the premises. It was a covenant,

"Not to display on the outside of the premises or any part thereof including the shop front any sign or advertisement except where the premises have been let for permitted trade or professional use (but not otherwise save for the sign presently on the premises which reads Delancey cafe and Delancey cars and measures approximately 18"x18" together with the blue canopy presently erected on the premises) bearing the name of the Tenant and the nature of the trade business or profession carried on thereat by the Tenant."

Then it says that the design colour and so forth must,

"be first approved in writing by the Landlord whose consent shall not be unreasonably withheld."

Clause 4(23) dealt with alterations. It said that the

Tenant should,

"Not without the previous consent in writing of the Landlord such consent not to be unreasonably withheld to make any alterations or additions to the premises whatsoever and in the event of such consent being granted to have the plans and specifications and such alterations or additions approved by the Landlord's surveyor."

Then the Tenant is obliged to remove all the alterations and additions at the end of the term.

There were other matters which are relevant to this appeal. The lease provides in 5(d) that the landlord is,

"To keep the main walls roofs and main drains of the demised premises in good and tenantable repair and condition except so far as the Tenant shall be liable to do so under his covenant

hereinbefore contained."

Finally clause 7(b) provides,

"That if the Landlord obtains planning permission from the Local Planning Authority to build a further storey to the building of which the demised premises forms part the Tenant shall forthwith grant permission to the Landlord to erect a staircase in the corner of the demised premises"

The story about that is, that the landlord had already applied for permission to pull down the building and erect a two storey block instead of this one storey cafe and mini-cab shop; that permission had been granted. What was contemplated by clause 7(b) was not the pulling down and erection of a two storey building, but the building of a further storey above the existing building. Planning permission for that has not yet been granted.

The action in the Central London County Court came about because the Landlord served a notice under section 146 forfeiting the lease for breach of covenant.

The main heads of breach with which we are now concerned are first, the change of signs in the front of the premises. Secondly, the alteration of the facia or frontage on its left hand side as seen from the street. Thirdly, that a flue was put, by the tenant, through the ceiling and through the air-space between the ceiling and the roof, and then through the roof into the air-space above. In dealing with the terms of the lease, I should have mentioned that in the schedule setting out the demised premises it said:

"All that Ground Floor shop and premises situate and known as 9 Delancey Street, London NW1 including the Ground Floor up to and including the ceiling plaster."

In addition to the proceedings for forfeiture, the Landlord complained of trespass in respect of the roof and the air-space, and sought damages and an injunction under that head.

We have been provided with some photographs. With the help of Mr Mendoza we have followed what, in the Landlords' submission, are the breaches of covenants complained of. We were shown that at the date of the commencement of the lease there was a doorway in the middle of the front and two large windows, one on either side. There was a sign painted on the canopy, 'Delancey Cars and Snack Bar'. There was a sign sticking out into the street saying 'Delancey Cars' as described in the lease.

By April 1992 (the next set of photographs) one of the windows had been removed and replaced by a

folding door of six panels. The sign sticking out into the street had been removed and instead of it there was painted, on the remaining picture window, 'Roger Cars' and some telephone numbers. The canopy had been removed and instead there was painted along the top of the front, 'Antony's Pie and Mash House'. Antony was not the name of the tenant.

By June 1992 the fascia was no longer coloured blue but green. One cannot really tell whether the doors have changed, but there is now a large vertical sign sticking out into the street saying 'Roger Cars' and giving further details of the good things that were available inside.

Up to that point the Landlords do not complain, or cannot now complain, because those alterations had been condoned by the acceptance of rent thereafter. By the next set of photographs that we have, as of February 1993, the central doors had been altered. Instead of having two panels they had four. The left hand doors which had six panels when last seen now had two and a large picture window. The sign over the front of the fascia was large and illuminated and said, 'City Karahi'. The sign that recently had been sticking out into the street was now a sign flat against the front of the shop, different from any that had been there before. Also, by this time, the flue had been inserted to take vapours from the grill in the restaurant through the ceiling, through the void, through the roof and above that into the air-space. Those are the complaints which are now relied on.

The first question which the judge had to consider was whether those amounted to breaches of the covenants. There had been waiver, as I have mentioned, of some breaches as the matter went along. The next question would be whether there was any other waiver, and indeed any waiver of forfeiture. To my mind we do not need to enter upon those matters. I say that for this reason, The Law of Property Act 1925, s 146 provides:

"(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice-

- a) specifying the particular breach complained of; and
- b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
- c) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

In this case the question is whether the breaches, if there were breaches, were capable of remedy. They amount to doing things without the consent of the Landlord. That is what the covenant did not allow. In the case of *Billson v. Residential Apartments Limited* 60, P & CR 392, Mummery J touched on the question whether such a breach could ever be capable of remedy. He said this at page 406:

"I reject the defendant's arguments on the ground that the breach of covenant committed by making the alterations in the property without the plaintiffs' consent "first had and obtained" was not capable of remedy by the defendants. It was a breach of the covenant for the defendants to embark on alterations to the property without first applying for and seeking to obtain the plaintiffs' consent. Now that the alterations have been made without consent it is impossible for the defendants to comply with the covenant which required them first to apply for consent so that they could either obtain it or, if they did not obtain it, be in a position to contend that they were entitled to make improvements because the plaintiffs had unreasonably withheld consent. In those circumstances I hold that the breach was not capable of remedy."

When that case reached the Court of Appeal, the Vice Chancellor said:

"The judge held, first, that since the alterations had been started without prior consent of the plaintiffs the breach was irremediable. Second, he held that even if he was wrong on the first point, remedying the breach would consist, not in doing the works of reinstatement, but in stopping the works, submitting the necessary plans and specifications and then awaiting the giving or unreasonable withholding of consent.

I prefer to express no view on the judge's first ground of decision, beyond expressing some doubt as to whether he was right in holding that the breach was irremediable."

It is established law in this court that the breach of a covenant not to assign without consent cannot be remedied. That was decided in *Scala House & District Property Co. Ltd v. Forbes* [1974] QB 575. Even then relief from forfeiture was granted, so that may not be of any great consequence.

In my judgment, except in a case of breach of a covenant not to assign without consent, the question is: whether the remedy referred to is the process of restoring the situation to what it would have been if the covenant had never been broken, or whether it is sufficient that the mischief resulting from a breach of the covenant can be removed. When something has been done without consent, it is not possible to restore the matter wholly to the situation which it was in before the breach. The moving finger writes and cannot be recalled. That is not to my mind what is meant by a remedy, it is a remedy if the mischief caused by the breach can be removed. In the case of a covenant not to make alterations

without consent or not to display signs without consent, if there is a breach of that, the mischief can be removed by removing the signs or restoring the property to the state it was in before the alterations.

I would hold that all the breaches complained of in this case were capable of remedy. It follows that the notice under section 146 should have required them to be remedied. As it did not, Mr Mendoza concedes, as he has to, that the notice was not a valid one. In those circumstances there is no question of forfeiture here. There is, I suppose, still a claim for damages for breach of covenant, or there may be. But if there were breaches here they were not such as to give rise to any damages, at any rate for the time being. There was, as I have mentioned, a provision about restoring the property at the end of the term.

There remains the claim in respect of trespass. We have been referred to the definition of trespass in Clerk and Lindsell on Torts 17th edition paragraph 17-01

"Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another."

Then some examples are given in paragraph 17-02. In paragraph 17-03 it is said that:

"It may be a trespass to invade the air-space above land."

In paragraph 17-08 it is said:

"To support an action of trespass it is not necessary that there should have been any actual damage."

The judge here found that there was no trespass. But in my judgment he was not right in that. The penetration through the roof which remained the property of the Landlords was technically, at any rate, a trespass. Also, possibly, the invasion of the Landlords' air-space above the roof may have been a trespass. But for the time being it is not suggested that the landlord has suffered any loss. It is possible that he may suffer loss in the future, if the time comes when he may lawfully build on top of the existing one storey building and he wishes to do so.

There does not seem to be any present prospect of that happening, but we must make some provision for that. I would then vary the judge's judgment, not by awarding any damages for trespass, but by granting liberty to apply for an injunction or other remedy if there should be a change of circumstances.

It remains to deal with the counterclaim. This was based on what were said to be leaks in the roof and damp in the walls. It was, under clause 5 of the lease, the task of the Landlords to keep the roof and walls in good repair. It would seem that that there has been a failure to comply with that, because at one stage the Tenant had engaged workmen to repair the roof. It was said that they had not made a very good job of it. But I do not see that that relieves the Landlords of any obligation they may have had. What is said with more force by Mr Mendoza, is that the leaks were all connected with the hole that the Tenant had made in the roof to put his flue through. However, there is no finding made by the judge to that effect, and it is essential that there should be such a finding if we were to hold that the landlord was not liable to repair the roof. It simply is not there. I would accept the judge's conclusion that there had been culpable failure to repair. He awarded two remedies; the first was damages and the second was an order that the Landlord should repair. As to damages, the Tenant attempted to prove loss of profit during a period from October 1993 to August 1994 when the premises were shut due to damp. Mr Mendoza says that the cause was not that, but the fact that the Tenant, Mr Hussein, was in ill-health and unable to carry on the business. But he had the judge's finding against him on that.

In the event, the judge was not satisfied by the Tenant's figures for his loss during that period. But he did award an amount equal to 2 months' rent. He must, in my judgment, have reached that figure on the basis that the Tenant was carrying on business in the premises. The tenant must have been making at least sufficient profit to pay his rent; otherwise he would not be doing it at all. Therefore, it was a reasonable inference that he suffered a loss to that extent. That was a view that the judge, in my opinion, was fully entitled to take. I can see no objection to his awarding damages on that basis. Mr Mendoza says, "Well, the judge picked a figure out of the air because it happened to be equal to the 2 months' rent which the Tenant still owed." It may be that there is some truth in that; but it seems to me that the logic by which I think the judge reached that conclusion is perfectly justified.

Finally, the judge made an order for repair for the future. The terms of the order recorded by the Central London County Court were as follows:

"the plaintiffs do within 56 days effect or cause to be effected such repairs to the roof and walls of the premises so as to render them in good and tenantable repair and condition,"

I must admit that I am slightly surprised by an order in those terms, because it seems to me that a person is entitled to be told what he has to do if he is under threat of going to prison if he does not do it, and told in rather more precise terms than that. But Lord Justice Aldous says that this is a very common order to make, and if the Landlords have any doubt as to what they should do they can go back to the court and ask the judge to decide.

In his judgment, the judge said:

"There remains the question of what to do with the roof and the dampness on the walls. I have held that these are the landlords' responsibility, and both the plaintiffs' and the defendant's surveyors agree that the present roof needs attention or must be replaced. As to dampness on the walls, they both agree that it must be eradicated, though there is some disagreement as to whether a new damp course is necessary."

Those conclusions of the judge, and so far as he did reach conclusions, are the basis for his order. If further detail of the order is necessary, then it must be sought from a judge of the Central London County Court. For my part, I would not suppose that that really is necessary if good sense prevails, or possibly even a spirit of co-operation.

Apart therefore from adding to the order liberty to apply for an injunction or other remedy in respect of trespass, I would leave it as it stands and dismiss the appeal.

ALDOUS LJ: I agree with the judgment of Lord Justice Staughton. In particular, I believe that the breaches of the covenant relied on by the Plaintiff in this court were capable of being remedied. It follows that the section 146 notice was inappropriate. It also follows that the statement of law of Mummery J, referred to by my Lord in *Billson v. Residential apartments Limited*, cannot be supported.

In one sense a breach can never be remedied because there must have been non-compliance with the covenant for there to be a breach. That cannot be the solution. Thus, the fact there has been a breach does not determine whether it can be remedied in the way contemplated by the Law of Property Act 1925 s.146. That was decided in *Expert Clothing Service & Sales Ltd v. Hillgate House Ltd* [1986] 1

Ch. 340. Slade LJ page 357 at F:

"Breach of a positive covenant to do something, could ordinarily for practical purposes, be remedied by the thing being actually."

I can see no reason why similar reasoning should not apply to some negative covenants. An important purpose of section 146 is to give tenants, who have not complied with their obligations, one last chance to do so before the landlord re-enters. Slade LJ in *Expert Clothing*, proposed this test at page 358 at D:

"If the section 146 notice had required the lessee to remedy the breach and the lessors had then allowed a reasonable time to elapse to enable the lessee fully to comply with the relevant covenant, would such compliance coupled with the payment of any appropriate monetary compensation have effectively remedied the harm which the lessors had suffered or were likely to suffer from the breach?"

It is only if the answer to that question is "no" can it be said that the breach is not capable of being remedied.

What was proposed as the question to ask by Slade LJ, albeit in relation to a case of dispute about a positive covenant, is relevant to consideration as to whether a negative covenant can be remedied. There is in my view nothing in the statute, nor in logic, which require different considerations between a positive and negative covenant, although it may be right to differentiate between particular covenants. The test is one of effect. If a breach has been remedied then it must have been capable of being remedied.

For the reasons given by my Lord I agree with the order proposed.

SIR JOHN MAY: I agree with both judgments which have been given by my Lords. In particular, I agree with the views which they have expressed on the meaning and effect of the Law and Property act 1925 s.146, and the circumstances in which alleged breaches by a lessee of covenants in a lease are, or are not, capable of remedy.

I therefore respectfully agree that this appeal should be dealt with in the way suggested by Lord Justice Staughton.

Order: Appeal dismissed with costs.