[COURT OF APPEAL]

JERVIS v. HARRIS

[Ch. 1991 J. No. 416]

1995 Oct. 23, 24; Nov. 9

Sir Stephen Brown P., Millett and Otton L.JJ.

Landlord and Tenant—Repairs—Tenant's breach of covenant—Repairs effected by landlord under express covenant—Proceedings to recover cost of repair—Whether recoverable in damages or in debt—Whether leave of court required—Leasehold Property (Repairs) Act 1938 (1 & 2 Geo. 6, c. 34), s. 1 (as amended by Landlord and Tenant Act 1954 (2 & 3 Eliz. 2, c. 56), s. 51)

By an underlease dated 11 July 1947 the lessee covenanted to maintain the demised premises in good tenantable repair and condition. The lease authorised the landlord to enter the premises to view the state of repair and to give notice in writing to the tenant of any defects or want of repair, which the tenant was required within three months to make good. In default the landlord could do the work and recover the costs and expenses from the tenant. Following inspection and service of notice by the landlord the tenant failed to carry out repairs and refused the landlord or his workmen entry. On the trial of preliminary issues the judge declared that the covenants were enforceable and that a claim by the landlord to recover moneys expended on repair was a claim for a debt and not for damages for breach of a covenant and was therefore enforceable by the landlord without first obtaining the leave of the court under section 1 of the Leasehold Property (Repairs) Act 1938.[1]

On appeal by the tenant:—

Held, dismissing the appeal, that, where a lease provided by specific covenants for repairs to be carried out by the lessee in default of which the lessor was entitled on notice to enter the property and carry out repairs at the lessee's expense, a claim by the lessor to recover moneys expended in making good a want of repair arising from the lessee's breach of the repairing covenant was a claim for debt and not a claim for damages for breach of covenant; that the doctrine of penalties did not apply to a claim in debt; and that, therefore, the leave of the court under section 1 of the Leasehold Property (Repairs) Act 1938 was not required before the landlord could enforce his claim against the tenant (post, pp. 203G–204C, 206C–D, G–207C).

Hamilton v. Martell Securities Ltd. [1984] Ch. 266 approved.

[1] Leasehold Property (Repairs) Act 1938, s. 1, as amended: "(1) Where a lessor serves on a lessee . . . a notice that relates to a breach of a covenant . . . to . . . put in repair . . . the property comprised in the lease, and at the date of the service of the notice three years or more of the term of the lease remain unexpired, the lessee may . . . serve . . . a counter-notice . . . (2) A right to damages for a breach of such a covenant . . . shall not be enforceable by action commenced at any time at which three years or more of the term of the lease remain unexpired unless the lessor has served on the lessee . . . a notice . . . and where a notice is served under this subsection, the lessee may . . . serve on the lessor a counter-notice . . . (3) Where a counter-notice is served by a lessee under this section, then . . . no proceedings . . . shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture . . . otherwise than with the leave of the court."

Swallow Securities Ltd. v. Brand (1981) 45 P. & C.R. 328 overruled.

Decision of Morritt J. sitting as Vice-Chancellor of the County Palatine of Lancaster affirmed.

The following cases are referred to in the judgment of Millett L.J.:

Alder v. Moore [1961] 2 Q.B. 57; [1961] 2 W.L.R. 426; [1961] 1 All E.R. 1, C.A.

Apex Supply Co. Ltd., In re [1942] Ch. 108; [1941] 3 All E.R. 473

Associated British Ports v. C.H. Bailey Plc. [1990] 2 A.C. 703; [1990] 2 W.L.R. 812; [1990] 1 All E.R. 929, H.L.(E.)

Bernstein (Philip) (Successors) Ltd. v. Lydiate Textiles Ltd. (unreported), 26 June 1962; Court of Appeal (Civil Division) Transcript No. 238 of 1962, C.A.

Colchester Estates (Cardiff) v. Carlton Industries Plc. [1986] Ch. 80; [1984] 3 W.L.R. 693; [1984] 2 All E.R. 601

Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. [1915] A.C. 79, H.L.(E.)

Elite Investments Ltd. v. T.I. Bainbridge Silencers Ltd. [1986] 2 E.G.L.R. 43

Export Credits Guarantee Department v. Universal Oil Products Co. [1983] 1 W.L.R. 399; [1983] 2 All E.R. 205, H.L.(E.)

Hamilton v. Martell Securities Ltd. [1984] Ch. 266; [1984] 2 W.L.R. 699; [1984] 1 All E.R. 665

National Real Estate and Finance Co. Ltd v. Hassan [1939] 2 K.B. 61; [1939] 2 All E.R. 154, C.A.

Proudfoot v. Hart (1890) 25 Q.B.D. 42, C.A.

Sidnell v. Wilson [1966] 2 Q.B. 67; [1966] 2 W.L.R. 560; [1966] 1 All E.R. 681, C.A.

Swallow Securities Ltd. v. Brand (1981) 45 P. & C.R. 328

The following additional cases were cited in argument:

Bader Properties Ltd v. Linley Property Investments Ltd. (1967) 19 P. & C.R. 620

Baker v. Sims [1959] 1 Q.B. 114; [1958] 3 W.L.R. 546; [1958] 3 All E.R. 326, C.A.

Campbell Discount Co. Ltd v. Bridge [1962] A.C. 600; [1962] 2 W.L.R. 439; [1962] 1 All E.R. 385, H.L.(E.)

Chandris v. Argo Insurance Co. [1963] 2 Lloyd's Rep. 65

Edmunds v. Lloyds Italico & l'Ancora Compagnia di Assicurazione e Riassicurazione S.p.A. [1986] 1 W.L.R. 492; [1986] 2 All E.R. 249, C.A.

Matthey v. Curling [1922] 2 A.C. 180, H.L.(E.)

Middlegate Properties Ltd. v. Gidlow-Jackson (1977) 34 P. & C.R. 4, C.A.

Moss' Empires Ltd. v. Olympia (Liverpool) Ltd. [1939] A.C. 544; [1939] 3 All E.R. 460, H.L.(E.)

Redmond v. Dainton [1920] 2 K.B. 256

APPEAL from Morritt J. sitting as Vice-Chancellor of the County Palatine of Lancaster.

On 10 May 1994 Morritt J. sitting in Leeds ordered that the plaintiff, John Jervis, was entitled to enforce all the provisions of clause 2(10) of a lease dated 11 July 1947 and made between Bleachers Association Ltd. and Sir James Farmer Norton & Co. Ltd. without obtaining the leave of the court under section 1 of the Leasehold Property (Repairs) Act 1938

A and that any moneys due by way of reimbursement to the plaintiff pursuant to clause 2(10) were not irrecoverable as being a penalty from the defendant, Shammai Harris.

By a notice of appeal dated 26 May 1994 the defendant appealed and further sought the leave of the court to appeal from that part of the order which declared that on the proper construction of clause 2(7) the repairing liability of the defendant obliged him to carry out such works of repair B which might be necessary to ensure that the letting value of the demised premises during the term granted by the lease was £1,000 per annum, on the grounds that (1) the judge erred in his determination that the words of limitation in clause 2(7) "so that they may be at all times during the said term of the clear letting value of £1,000 per annum" operated only to modify the rebuilding obligation and the judge failed to read the clause as C one indivisible covenant on the part of the tenant; (2) the judge failed to follow the decision of McNeill J. in *Swallow Securities Ltd. v. Brand* (1981) 45 P. & C.R. 328 that the leave of the court was required to enforce the clause; and (3) the judge erred in failing to identify that a claim made by the plantiff for the costs of repairs was a penalty at law.

The facts are stated in the judgment of Millett L.J.

D

Kim Lewison Q.C. and *David N. Berkley* for the defendant. The judge wrongly held that clause 2(7) of the lease imposed two separate obligations: (1) an obligation to keep the buildings in good and tenantable repair and (2) an obligation to rebuild. He treated the words "so that they may be at all times during the term of the clear letting value of £1,000 per annum" as qualifying only the second obligation. The correct construction of the E clause is that those words qualify both obligations. Throughout the term the rent is fixed at £1,000 per annum, and the purpose of clause 2(7) is to secure the ability of the property to command that rent.

As to the plaintiff's entitlement to enforce the provisions of clause 2(10) of the lease, the policy of the Leasehold Property (Repairs) Act 1938 was to prevent landlords obtaining the benefit of the reversion when many years of the term were unexpired; to prevent landlords serving on F tenants exaggerated schedules of dilapidations; and to prevent tenants from being put to expense as a condition of obtaining relief against forfeiture. [Reference was made to *National Real Estate and Finance Co. Ltd. v. Hassan* [1939] 2 K.B. 61; *Baker v. Sims* [1959] 1 Q.B. 114; *Sidnell v. Wilson* [1966] 2 Q.B. 67 and *Associated British Ports v. C. H. Bailey Plc.* [1990] 2 A.C. 703.] All the mischiefs which the Act of 1938 was G directed to prevent will flourish if the landlord can enforce a contractual right without first obtaining the leave of the court.

The reasoning of Vinelott J. in *Hamilton v. Martell Securities Ltd.* [1984] Ch. 266 was flawed. The Act of 1938 should not be construed by reference to subsequent legislation. Vinelott J. was impressed by the argument that a landlord might find himself liable to third parties under the Defective Premises Act 1972 without any effective remedy against the H tenant. There is no such obligation on the landlord. Vinelott J. expressed the legislative purpose of the Act of 1938 too narrowly. Expenses incurred by a landlord in carrying out repairs are not recoverable as compensation for breach of a repairing covenant as they arise not from the breach but

from legislative fetters imposed on the landlord. [Reference was made to *Bader Properties Ltd. v. Linley Property Investments Ltd.* (1967) 19 P. & C.R. 620 and *Middlegate Properties Ltd. v. Gidlow-Jackson* (1977) 34 P. & C.R. 4.] *Hamilton v. Martell Securities* [1984] Ch. 266 was wrongly decided and should be overruled. For the purposes of the Act of 1938 a claim to recover the cost of repairs is a claim for damages.

As to whether the sums recoverable under clause 2(10) are in the nature of a penalty, the question is whether the contractual stipulation overcompensates the landlord for any loss which the landlord might have suffered. There is no legitimate interest which clause 2(10) is designed to protect. The lease still has centuries to run and the rent is fixed. It is plain that the landlord suffers no loss by the tenant's breach. The judge relied on a dictum of Lord Atkin in *Moss' Empires Ltd. v. Olympia (Liverpool) Ltd.* [1939] A.C. 544 as indicating that there might be a case where the contractual provisions provided for some "substitute remedy." The dictum does not support that view. The defendant's primary obligation is the obligation to repair. The judge was wrong when he said that the sums payable under clause 2(10) were payable at full value. The tenant derives no value from any expenditure on repairs where the lease contemplates that he may have to alter the buildings or to rebuild. In the circumstances, the sums recoverable under clause 2(10) are a penalty. [Reference was made to *Campbell Discount Co. Ltd. v. Bridge* [1962] A.C. 600; *Chandris v. Argo Insurance Co.* [1963] 2 Lloyd's Rep. 65 and *Edmunds v. Lloyds Italico & l'Ancora Compagnia di Assicurazione e Riassicurazione S.p.A.* [1986] 1 W.L.R. 492.]

Anthony Elleray Q.C. and *Ian Foster* for the plaintiff. The covenant contains two express obligations, namely, to repair and to rebuild. [Reference was made to *Proudfoot v. Hart* (1890) 25 Q.B.D. 42.] The lessee is obliged throughout the term to keep the premises "in good tenantable repair and condition." The rebuilding obligation expresses what would otherwise be an implied obligation. [Reference was made to *Redmond v. Dainton* [1920] 2 K.B. 256 and *Matthey v. Curling* [1922] 2 A.C. 180.] The minimum letting value of £1,000 per annum qualifies the rebuilding obligation, and the judge's construction should be upheld.

The defendant is not entitled to the benefit afforded by the Act of 1938. The court should uphold the decision of Vinelott J. in *Hamilton v. Martell Securities Ltd.* [1984] Ch. 266. [Reference was made to *Colchester Estates (Cardiff) v. Carlton Industries Plc.* [1986] Ch. 80 and *Elite Investments Ltd. v. T.I. Bainbridge Silencers Ltd.* [1986] 2 E.G.L.R. 43.] The decision in *Swallow Securities Ltd. v. Brand,* 45 P. & C.R. 328 should not be followed. Section 1(2) of the Act of 1938 applies to an action for damages for breach of a "covenant or agreement to keep or put in repair." The plaintiff's claim is not such an action. A sum which has been agreed to satisfy an obligation to repair is a debt. Section 18 of the Landlord and Tenant Act 1927 provided a statutory limit on such damages but it is settled law that section 18 has no application to a claim in debt. [Reference was made to *Moss' Empires Ltd. v. Olympia (Liverpool) Ltd.* [1939] A.C. 544.] The plaintiff has a proper interest in ensuring that the whole property is in repair. [Reference was made to *Sidnell v. Wilson* [1966] 2 Q.B. 67;

A *Bader Properties Ltd. v. Linley Property Investments Ltd.*, 19 P. & C.R. 620 and *Middlegate Properties Ltd. v. Gidlow-Jackson*, 34 P. & C.R. 4.]

Clause 2(10) is not a penalty clause as it provides for the payment of money upon the happening of a specified event other than a breach of contractual duty owed by the party liable to the party entitled to receive that sum of money. [Reference was made to *In re Apex Supply Co. Ltd.* [1942] Ch. 108; *Alder v. Moore* [1961] 2 Q.B. 57 and *Export Credits* B *Guarantee Department v. Universal Oil Products Co.* [1983] 1 W.L.R. 399.] The defendant will be asking for the cost of the repairs. The cost request cannot be a penalty: see *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* [1915] A.C. 79.

Cur. adv. vult.

C

9 November. The following judgments were handed down.

MILLETT L.J. This is an appeal by the defendant from declarations made by Morritt J. sitting as Vice-Chancellor of the County Palatine of Lancaster on 10 May 1994 at the trial of three issues ordered to be tried D as preliminary issues in the action. The second and third issues are of general importance in the law of landlord and tenant and the judge granted leave to appeal. The first issue raises a question of construction specific to the particular lease which is the subject matter of the action, and the judge refused leave. We thought it right to grant leave, not least because the lease in question has still more than 900 years to run, and the question is likely to recur from time to time during that period.

E In the action the plaintiff landlord seeks to enforce certain covenants contained in an underlease dated 11 July 1947 for a term of 999 years less 10 days from 24 December 1899. The underlease was granted at a premium of £26,000 and a rent of £1,000 per annum. It was originally granted in respect of the entire works at a site at Adelphi Street, Salford. The defendant has become the tenant of part of the site known as the F West Works at an apportioned rent of £80 per annum. The benefit of the term in respect of the remainder of the site together with the leasehold reversion to the whole are now vested in the plaintiff. The head lease was granted on 20 August 1929 for a term of 999 years from 24 December 1899. The covenants in the underlease which give rise to the preliminary issues reflect similar covenants in the head lease. It is a reasonable inference that the 1929 head lease was granted on the surrender of an G earlier lease on similar terms granted in 1899, and that the covenants which now fall to be considered had their origin in the 1899 lease.

The first of the preliminary issues ("the construction issue") concerns the true construction of the tenant's repairing covenant contained in clause 2(7) of the underlease. The second and third preliminary issues are concerned with clause 2(10) of the underlease which gives the landlord the right from time to time during the term to enter on the demised premises H to view the state of repair and to remedy any want of repair at the tenant's expense. The second preliminary issue ("the Act of 1938 issue") is whether the clause is enforceable by the landlord without the leave of the court first obtained under section 1 of the Leasehold Property (Repairs) Act

1938. The third preliminary issue ("the penalty issue") is whether the moneys due by way of reimbursement to the landlord pursuant to the clause are irrecoverable as a penalty.

1. *The construction issue*

Clause 2(7) of the underlease is in the following terms:

> "the lessees will at all times during the said term maintain, repair and keep in good tenantable repair and condition in all respects whatsoever the buildings which now are, or shall hereafter be, erected or standing upon the said premises and their respective appurtenances and will when necessary rebuild the said buildings, or any of them, so that they may be at all times during the said term of the clear letting value of £1,000 per annum."

The issue is framed as follows:

> "Whether or not on the true and proper construction of clause 2(7) of the lease the repairing liability thereunder of the defendant only obliges the defendant to carry out such works of repair, if any, as may be necessary to ensure that the clear letting value of the demised premises and the buildings thereon at all times during the term of 999 years less the last 10 days thereof granted by the lease is £80 per annum or is alternatively £1,000 per annum."

The judge answered the question in the negative.

The clause imposes two distinct obligations upon the tenant, one to repair and one to rebuild, and follows the second with qualifying words. Grammatically, therefore, the clause is capable of two possible interpretations. The question is whether the concluding words qualify both obligations or only the second of them.

The judge held that they qualify the second obligation only. He reached his conclusion for two reasons. First, the standard to which the obligation to repair is to be performed is expressed in the clause as "in good tenantable repair and condition." That standard is not by any means necessarily the same as sufficient to secure a letting value of £1,000 per annum. Neither could sensibly stand as a proviso to the other. Secondly, it was necessary to specify the event on the occasion of which the obligation to rebuild should arise, and this was achieved by the concluding words of the clause. Accordingly, the judge read these words as indicating both when the obligation to rebuild arose and also the standard to which, or the nature of the new building which, it was the obligation of the tenant to carry out. Accordingly, the judge declared that the concluding words of the clause qualified the second or rebuilding obligation but not the first or repairing obligation.

I agree with the judge and find it unnecessary to add more than a few words of my own. If the concluding words of the clause are taken to apply to the obligation to repair, then the tenant is required to keep the premises in two different and inconsistent standards of repair. This gives rise to a further question of construction. Is the tenant required to comply with both repairing obligations or with one only, and, if with one only, with which? Even if the concluding words do govern the obligation to

repair, I do not understand on what basis it could be argued that it is sufficient for the tenant to leave the premises in state of serious disrepair provided only that they are still capable of commanding a rent of £1,000 per annum. He would not thereby be performing his obligation to keep the premises in good and tenantable repair. It is no answer to say, as counsel for the defendant submits, that the standard of what constitutes good and tenantable repair is judged by reference to the class of tenant likely to take the property, and that the parties have limited that class to those persons willing to pay no more than £1,000 per annum. The expression "good tenantable repair" means such repair as, *having regard to the age, character, and locality of the property*, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it: *Proudfoot v. Hart* (1890) 25 Q.B.D. 42. The standard of repair required does not vary with the lettable value of the property (which in turn will to some extent at least depend on the standard of repair required), save in so far as this reflects its age, character and locality.

If, therefore, I were persuaded that the concluding words of the clause governed the obligation to repair as well as the obligation to rebuild, I would have held that they were words of obligation and not of limitation; that is to say, that they imposed an additional requirement upon the tenant and did not limit or qualify his obligation to keep the premises in good and tenantable repair. Another way of putting it would be to say that, just as they required the tenant to rebuild so as to achieve a minimum letting value, so they required him to achieve at least a minimum standard of repair without relieving him of the obligation to keep the premises in good and tenantable repair. But I prefer to adopt the judge's construction and hold that they do not apply to the repairing obligation at all.

2. *The Act of 1938 issue*

Clause 2(10) of the underlease authorises the landlord or the superior landlords to enter upon the demised premises from time to time during the term granted to view the state of repair and to give notice in writing to the tenant of any defects or want of repair. The tenant is required within three months to make good all such defects or want of repair of which he has been given notice, and in default the landlord or the superior landlords may do the work themselves and recover the costs and expenses of the work from the tenant on demand.

The plaintiff has caused the premises to be inspected and has served a notice specifying the wants of repair which he alleges exist on the property. The defendant has failed to carry out any of the work needed to remedy such wants of repair, and it is the landlord's intention to exercise his rights under clause 2(10) of the underlease to enter and do the work himself and recover the cost from the defendant. The defendant has refused to allow the plaintiff or his workmen to enter upon the premises, and the plaintiff has accordingly brought the present proceedings seeking, inter alia, an injunction to restrain the defendant from preventing him from entering the premises and carrying out works of repair thereon.

The question is whether the plaintiff is entitled to enforce any of the provisions of clause 2(10) without first obtaining the leave of the court

under section 1 of the Act of 1938. That section contains what are described as "Restriction[s] on enforcement of repairing covenants in long leases of small houses." The section has since been extended to apply to long leases generally whether of residential or commercial property. Section 1(1) restricts the landlord's right to forfeit the lease for want of repair. Subsections (2) and (3) of section 1 have the effect that a right to damages for breach of a tenant's repairing covenant is not enforceable by action commenced at a time when three or more years of the term are unexpired without the leave of the court. The question, therefore, is whether the landlord's right to enter the property, effect the repairs himself and then claim to recover the cost of doing so from the tenant is a claim for damages for breach of a covenant by the tenant "to keep or put in repair during the currency of the lease all or any of the property comprised in the lease."

This question has been considered at first instance on a number of occasions. It was first considered by McNeill J. in *Swallow Securities Ltd. v. Brand* (1981) 45 P. & C.R. 328. He answered the question in the affirmative. In a comprehensive and convincing judgment in *Hamilton v. Martell Securities Ltd.* [1984] Ch. 266 Vinelott J. declined to follow McNeill J. and reached a different conclusion. Since then the question has come before Nourse J. in *Colchester Estates (Cardiff) v. Carlton Industries Plc.* [1986] Ch. 80 and Judge Paul Baker Q.C. in *Elite Investments Ltd. v. T.I. Bainbridge Silencers Ltd. (No. 2)* [1986] 2 E.G.L.R. 43. On each occasion the judge followed the decision of Vinelott J. on the ground that, where the later of two conflicting decisions has been reached after a full consideration of the earlier it should normally be followed without further inquiry. Morritt J. took the same course in the present case. This is, therefore, the first occasion on which the question has been raised before this court, and we must re-examine the position for ourselves.

The short answer to the question is that the tenant's liability to reimburse the landlord for his expenditure on repairs is not a liability in damages for breach of his repairing covenant all. The landlord's claim sounds in debt not damages; and it is not a claim to compensation for breach of the tenant's covenant to repair, but for reimbursement of sums actually spent by the landlord in carrying out repairs himself. I shall expand on each of these distinctions in turn.

The law of contract draws a clear distinction between a claim for payment of a debt and a claim for damages for breach of contract. The distinction and its consequences are set out in *Chitty on Contracts*, 27th ed. (1994), vol. 1, p. 1046, para. 21–031. As there stated, a debt is a definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition; whereas damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt.

The plaintiff who claims payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He need prove no loss; the rules as to remoteness of damage and mitigation of loss are irrelevant; and unless the

A event on which the payment is due is a breach of some other contractual obligation owed by the one party to the other the law on penalties does not apply to the agreed sum. It is not necessary that the amount of the debt should be ascertained at the date of the contract; it is sufficient if it is ascertainable when payment is due. The landlord's monetary claim under clause 2(10) does not arise unless and until he has carried out the repairs; when it does arise, his claim is for an account and payment, not B for damages.

Moreover, the landlord's monetary claim under such a clause is not a claim for compensation for loss suffered by him by reason of the tenant's failure to repair but for reimbursement of expenditure which he incurred in order to avoid such loss. The difference is one of substance. The loss which the landlord suffers by reason of the tenant's failure to repair is the C diminution of the value of his interest in the property. Even before the Landlord and Tenant Act 1927 the landlord could not recover more than the diminution in the value of the reversion unless he coupled his claim with a claim for forfeiture of the lease. Even if the landlord left the lease on foot then, having recovered damages for breach of the tenant's repairing covenant, he was not bound to apply them in carrying out repairs. He could choose to leave the property unrepaired; he had been D fully compensated for the diminution in the value of his interest, and the tenant would have to live with the diminution in the value of his.

But a clause such as clause 2(10) works very differently. It enables the landlord to take remedial action himself to avoid any loss consequent on the tenant's failure to repair. Once the landlord has carried out the repairs himself, the value of his interest in the property is restored. The work of E repair enures to the benefit of the tenant as well as the landlord. The landlord is out of pocket, but that is because he has carried out repairs, not because the property is in disrepair.

Counsel for the defendant emphasises that the landlord's right under clause 2(10) to enter the property and effect the necessary repairs at the tenant's expense cannot arise unless there has first been a breach by the tenant of his repairing obligations, not only under clause 2(7) to keep F the property in repair, but also under clause 2(10) itself to effect repairs on notice. He accepts that section 1 of the Act of 1938 can have no application in the absence of any repairing covenant on the part of the tenant; but where the landlord's right to reimbursement depends on an anterior breach of his repairing obligations by the tenant, he submits, the section applies.

G I do not accept this. Leaving aside for the moment the landlord's claim to reimbursement, his contractual right to enter the property and effect the repairs himself if the tenant does not do so is plainly outside the section. Nothing in the section requires him to obtain the leave of the court either before entry or before service of notice of disrepair. Should he then decide to bring proceedings for forfeiture or damages for breach of covenant, whether to repair or to repair on notice, he must first obtain H the leave of the court under the section. But if he chooses instead to effect the repairs himself, there is nothing in the section which requires him to obtain the leave of the court before doing so. So the question is: "Does the section require him to obtain the leave of the court after having

carried out the repairs and before demanding reimbursement?" But this claim cannot sensibly be described as a claim to damages for breach of the tenant's repairing covenant. That breach has been remedied. The landlord sues in respect of an altogether different breach which occurs when the tenant fails to repay the landlord on demand the amount which he promised to pay.

The landlord's claim to reimbursement is not triggered by the tenant's breach of covenant but by his own expenditure on carrying out repairs. The fact that the property is in disrepair is not enough. The landlord must have carried out work to remedy the want of repair; and his right to do so does not depend upon the existence of any covenant on the part of the tenant, but simply upon there being a want of repair which the tenant has failed to remedy within the stated period after notice. The fact that the tenant is thereby in breach of covenant is neither here nor there. It merely means that the landlord has an alternative remedy of claiming damages for breach of covenant. But the presence of an alternative remedy which the landlord does not choose to enforce cannot affect the proper characterisation of the remedy which he does.

In reaching his conclusion that the remedy which a clause like clause 2(10) gives to the landlord is within section 1 of the 1938 Act, McNeill J. was influenced by his belief that the intended purpose and effect of such a clause is to circumvent the provisions of the section. His belief that it was a device to circumvent the section is, with respect, quite untenable. Similar clauses have been a standard feature of well-drawn leases since long before 1938: in the present case, the clause appears in a lease granted in 1929, and almost certainly owes its origin to a similar clause in a lease granted in 1899. Nor is it obvious that such a clause is within the mischief which the section was enacted to remedy. This was described at the time by Goddard L.J. in *National Real Estate and Finance Co. Ltd. v. Hassan* [1939] 2 K.B. 61, 78 as follows:

> "The mischief it was designed to remedy was speculators buying up small property in an indifferent state of repair, and then serving a schedule of dilapidations upon the tenants, which the tenants cannot comply with. I am not saying that was this case, but this is the general mischief, that the speculator buys at a very low price, turns out the tenants, and gets the reversion which he has never paid for, which is a great hardship to the tenants."

Lord Denning M.R. described the mischief in similar terms in *Sidnell v. Wilson* [1966] 2 Q.B. 67, 76. After citing this passage in *Hamilton v. Martell Securities Ltd.* [1984] Ch. 266, 278 Vinelott J. said:

> "As I understand it, the particular mischief at which, in the opinion of Lord Denning M.R., the Act of 1938 was directed was that an unscrupulous landlord would buy the reversion of a lease which had little value as a reversion and harass the tenant with schedules of dilapidations not with a view to ensuring that the property was kept in proper repair for the protection of the reversion, but to put pressure on the tenant, who might be a person of limited means, and who might not be in a position to obtain or accustomed to obtaining proper advice as to his liabilities, to the point at which he would

A accept an offer for the surrender of his lease. An unscrupulous landlord who takes that course does not need to put his hand into his pocket to carry out the repairs which he seeks to compel the tenant to carry out, and indeed in the case of a long lease, he might have no real interest in ensuring that those repairs are carried out. It is not to my mind obvious that the presumed legislative purpose of countering that mischief should be extended so as to fetter a lessor's right to B recover moneys which he has actually spent."

The judge then referred to counsel's submission that an unscrupulous lessor might similarly carry out repairs pursuant to the relevant clause, not because he genuinely wanted the repairs carried out, but in order to put financial pressure on the lessee, and commented, at p. 279:

C "It seems to me that the fact that a lessor must initially meet the cost of carrying out the repairs is itself a considerable disincentive. Whether that is so or not, I am not persuaded that this possible abuse justifies the court in treating an action to recover costs actually incurred by a lessor on repairs as if it were an action for damages for breach of a covenant to repair solely on the ground that the provision enabling a lessor to carry out repairs in the event of default by the D lessee and to recover the cost, is a device to circumvent the provisions of the Acts of 1927 and 1938."

I respectfully agree, and add only that, if Parliament had intended to deal with the suggested abuse to which counsel had referred in that case, it is remarkable that it did not deal explicitly and directly with what had E for generations been a standard form of covenant in a long lease.

Counsel for the defendant in the present case submits that Vinelott J. expressed the legislative purpose too narrowly. The section he asserts, was also designed to prevent tenants being put to expenditure which would be useless to them and of minimal value to the landlord, to prevent pressure being put upon them by the service of exaggerated schedules of dilapidations and to prevent them being put to considerable expense as a F condition of relief from forfeiture. All these mischiefs he alleges, would follow if the landlord were allowed to pursue his remedy under a clause like clause 2(10) without the leave of the court.

I would, for my part, be willing to accept that these may have been part of the mischief which Parliament sought to remedy by enacting section 1 of the Act of 1938, subject only to this important qualification, G that the expenditure in question which is said to be useless to the tenant and of minimal value to the landlord is expenditure which the landlord does not intend should be incurred. In *Associated British Ports v. C.H. Bailey Plc.* [1990] 2 A.C. 703, 714 Lord Templeman said: "Section 1 of the Act of 1938 is there to protect a tenant from a landlord whose *only* object is to turn out the tenant [many] years in advance." (Emphasis added.)

H In my view, every consideration points in the same direction, that it was not the intention of Parliament to put obstacles in the way of a landlord whose object is to secure that necessary repairs are carried out, preferably at the expense of the tenant, but if necessary at his own. If that

had been the intention of Parliament, then the Act of 1938 would have been expressed very differently.

The penalty issue

The answer to the Act of 1938 issue also disposes of the penalty issue. Clause 2(10) is not a penalty clause because it provides for the payment of a sum of money upon the happening of a specified event other than a breach of a contractual duty owed by the party liable to make the payment to the party entitled to receive it: see *In re Apex Supply Co. Ltd.* [1942] Ch. 108; *Alder v. Moore* [1961] 2 Q.B. 57; *Export Credits Guarantee Department v. Universal Oil Products Co.* [1983] 1 W.L.R. 399.

The law on penalties was extensively reviewed by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* [1915] A.C. 79, 86–87. He explained that the essence of a penalty is a payment of money stipulated as in terrorem of the offending party, and that it will be held to be a penalty if the sum stipulated is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. He added that it will also be held to be a penalty if the breach consists only in not paying a sum of money and the sum stipulated is a sum greater than the sum which ought to have been paid. This makes it clear that the doctrine does apply where the obligor's primary liability sounds in debt and not in damages; indeed this is one of the most ancient instances. Portia knew perfectly well that Shylock's pound of flesh was irrecoverable as a penalty; she did not advance this defence because she was after bigger game.

But it is well settled that the event on which the sum alleged to be a penalty becomes payable must be a breach of some other contractual obligation owed by the obligor to the obligee. That is not the case here. There is only one relevant obligation on the part of the tenant, and that is to repay the landlord his costs of carrying out repairs himself. Counsel for the defendant advanced an interesting argument based on the law relating to bonds. As at present advised, I think that a bond in a sum certain conditioned on the tenant's keeping the premises in repair, or carrying out specific works of repair required by the landlord, would constitute a penalty even in the absence of an express covenant by the tenant to do so. The condition of the bond supplies the necessary obligation. But the event which triggers the tenant's liability under a clause such as clause 2(10) is the expenditure by the landlord of money in effecting repairs, not the anterior failure of the tenant to repair. If the payment were secured by a bond, it would be a simple or single bond, not a double or conditional one. The doctrine of penalties, which operates by striking down the penalty and enforcing the condition, does not apply to the former.

In *Export Credits Guarantee Department v. Universal Oil Products Co.* [1983] 1 W.L.R. 399, 404 Lord Roskill expressly approved of the warning given by Diplock L.J. in *Philip Bernstein (Successors) Ltd. v. Lydiate Textiles Ltd.* (unreported), 26 June 1962; Court of Appeal (Civil Division) Transcript No. 238 of 1962 against extending the law by relieving against an obligation in a contract entered into between two parties which does not fall within the well defined limits in which the court has in the past shown itself willing to interfere. These words have all the more force in a

A case such as the present, where the court is asked for the first time to strike down a standard clause which has been familiar to property lawyers for generations, which has been enforced on countless occasions and which if the challenge is well founded was vulnerable as well before 1938 as after it.

Conclusion

B I would overrule *Swallow Securities Ltd. v. Brand* (1981) 45 P. & C.R. 328 and dismiss the appeal.

OTTON L.J. I agree.

SIR STEPHEN BROWN P. I have had the advantage of reading in draft C the judgment prepared by Millett L.J. For the reasons which he gives I agree that the appeal should be dismissed.

Appeal dismissed with costs, not to be enforced without leave of court.
Legal aid taxation.

D *Solicitors: Liefman Rose & Co., Manchester; James A. Singleton & Co., Worsley.*

M. B. D.

E