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Welsh v Greenwich London Borough Council

Court of Appeal

27 June 2000

Robert Walker and Latham LJJ and Bell J

Estates Gazette 9 December 2000[2000] 49 EG 118

Landlord and tenant -- Repairs -- Covenant -- Mould growth -- External walls of 9in solid brick -- Landlord's obligation to maintain in good condition and repair -- Whether obligation limited to structure and exterior -- Whether obligation to maintain condition included obligation to provided thermal insulation

The respondent had previously been the tenant of the appellant landlords under a secure tenancy of a flat in a purpose-built block constructed in the 1920s. The tenancy agreement included an obligation upon the landlords "to maintain the dwelling in good condition and repair...". The three outside walls were constructed of a rendered 9in solid brick structure with no thermal insulation. The flat suffered from "severe black spot mould growth" on various internal areas caused by the condensation of water vapour. At the hearing of the tenant's claim before the county court, it was agreed that the condensation was caused by a lack of insulation rather than disrepair and that the condensation damaged chattels but not the structure of the dwelling. The county court judge decided that the repairing obligation, in its reference to the condition of the dwelling, embraced something more than the structure and exterior in the covenant of repair implied by section 11 of the Landlord and Tenant Act 1985. He decided that there had been a breach of the obligation to maintain the flat in good condition. The landlords appealed.

Held: The appeal was dismissed. The reference to "good condition" in the repairing obligation was intended to mark a separate concept and to make a significant addition to that conveyed by the word "repair". "Good condition" was not restricted, in the agreement, to good structural condition. The mould was not a matter of amenity disassociated from the physical condition of the flat, even if there were no damage to the structure. By failing to provide thermal insulation or dry lining for the external walls, the landlords allowed excessive condensation and severe black spot mould to continue, and so failed to maintain the flat in good condition.

Per Latham LJ: The words in the repairing obligation were intended to impose an obligation different and more extensive in kind than that imposed by section 11 of the Landlord and Tenant Act 1985. "Good condition" was intended to be treated as a separate concept from the word "repair".

The following cases are referred to in this report.

Credit Suisse v Beegas Nominees Ltd [1994] 4 All ER 803; [1994] 1 EGLR 76; [1994] 11 EG 151 & 12 EG 189

Jones v Joseph (1918) 87 LJKB 510

Lurcott v Wakely [1911] 1 KB 905, CA

Norwich Union Life Insurance Society v British Railways Board [1987] 2 EGLR 137; (1987) 283 EG 846

Quick v Taff-Ely Borough Council [1986] QB 809; [1985] 3 WLR 981; [1985] 3 All ER 321; [1985] 2 EGLR 50; (1985) 276 EG 452; (1986) 18 HLR 66

Smedley v Chumley & Hawke Ltd (1981) 44 P&CR 50; [1982] 1 EGLR 47; 261 EG 775, CA

Warren v Keen [1954] 1 QB 15; [1953] 3 WLR 702; [1953] 2 All ER 1118, CA

Westcott v Hahn [1918] 1 KB 495; (1918) 34 TLR 257

> This was an appeal by Greenwich London Borough Council from a decision of Judge Gibson, sitting in Woolwich County Court, in proceedings by the respondent, Susan Welsh, for damages for disrepair against the appellants.

Simon Berry QC and Bradley Say (instructed by the solicitor to Greenwich London Borough Council) appeared for the appellants; Stephen Knafler (instructed by Powell & Co) represented the respondent.

Giving the first judgment, **Robert Walker LJ** said:

This is an appeal, with the permission of the judge, from an order of Judge Gibson made in Woolwich County Court on 7 January 1999. The judge had heard a claim for damages brought by a tenant, Mrs Susan Welsh, against her landlords, Greenwich London Borough Council (Greenwich). The judge awarded Mrs Welsh £9,000 damages for breach of an obligation to maintain the flat in good condition, and it is from that award that Greenwich appeal to this court.

Mrs Welsh and her three children (who were born in 1984, 1988 and 1990) lived in a ground-floor flat at 100 Barnfield Gardens, Plumstead Common, London SE18, from August 1990 until August 1994, when they were rehoused by Greenwich. Initially, Mrs Welsh and her husband were both tenants under a tenancy agreement, dated 7 August 1990, that created a secure tenancy. Mr and Mrs Welsh's marriage suffered stress (partly, it may be, because of the condition of the flat) and Mr Welsh left during 1993; Mrs Welsh then became the sole tenant.

The flat was a three-bedroom flat in a purpose-built, three-storey block constructed in the 1920s. It had three outside walls constructed of rendered 9in solid brick structure with no thermal insulation. The flat had been redecorated in 1990, but it quickly developed a serious problem with what the expert report of Mr Edmond Prekopp FRICS described as:

> severe black spot mould growth generally within the flat but principally at the base of the windows and at the base of the external walls and under carpets and also on the soft furnishings.

The mould was caused by condensation of water vapour. The condensation depended upon three factors: heat and moisture input, ventilation rate and the thermal properties of the structure of the building.

I should add that the expert was not called at trial -- indeed, no evidence at all was called at trial -- because of an agreement between counsel that I shall mention in a moment. But I do not feel inhibited from making this brief reference to the expert's report, the effect of which is indeed summarised in the second section of the skeleton argument on appeal for Greenwich.

Mrs Welsh had more than one tenancy agreement between 1990 and 1994, but they were all in the same form, which was a very concise form. Clause 2 contained obligations undertaken by Greenwich and clause 3 contained obligations entered into by Mrs Welsh as tenant. Greenwich agreed, by clause 2.1:

> To maintain the dwelling in good condition and repair, except for such items of repair which are the responsibility of the tenant.

And by clause 2.3:

> To keep under constant review the changing needs of tenants, to encourage transfers, and to ensure action is taken to improve properties to keep pace with such needs which the Council recognises is a continuing process.

Clause 2.3 was aptly described by Greenwich's counsel below as a "mission statement" on behalf of the social landlords. Plainly, it contains some provisions that are not enforceable in the ordinary way. Mrs Welsh agreed by clause 3.2:

> To carry out those minor repairs which are the tenant's responsibility and to keep the dwelling clean, in good condition and to prevent damage and where there is a garden to keep it tidy and to keep the hedges trimmed.

I should note that there were further references to improvements in clause 2.4 and clause 3.3.

Mrs Welsh commenced her proceedings against Greenwich in July 1997, and, in due course, they came to trial. At the start of the trial, some important concessions were agreed between counsel and announced to the judge. They are set out at the beginning of Greenwich's skeleton argument at trial, and I should read them in full because they are very important. The skeleton argument began:

> Matters that are agreed between parties:
>
> 1. That the Plaintiff"s flat was subject to damp and mould caused by condensation during the term of the tenancy.
>
> 2. That the condensation was caused by a lack of insulation and was not the result of disrepair as such.
>
> 3. The condensation damaged decorations and chattels in the Plaintiff"s flat but caused no damage to the structure of the dwelling.

The parties also agreed quantum, if liability were to be established, at £9,000.

At trial, counsel for Mrs Welsh (different counsel from that appearing in this court) made a concession about section 11 of the Landlord and Tenant Act 1985, which imposes upon the landlord a statutory duty to keep in repair the structure and exterior of the premises comprised in the tenancy. Although the pleadings had relied upon section 11, in the event, as the judge recorded, counsel then appearing for Mrs Welsh:

> accepted that the defect which gave rise to the condensation on which the claim was based was not a disrepair capable of giving rise to a breach of the covenant; and instead of asserting a breach he sought to point to a contrast between the words of the implied covenant and those of the express covenant contained in clause 2.1.

In this court, counsel now appearing for Mrs Welsh, Mr Stephen Knafler, has applied for permission to put in, out of time, a respondent's notice relying upon section 11 of the Landlord and Tenant Act 1985, and arguing, with some boldness, that the decision of this court in *Quick v Taff-Ely Borough Council* [1986] QB 809* (a decision of Lawton, Dillon and Neill LJJ) was arrived at by inadvertence, and should not be followed.

* Editor's note: Also reported at [1985] 2 EGLR 50

If that submission, however bold, raised no more than a question of law, this court might have been inclined to allow it to be raised, because the case is important, not only to Mrs Welsh but also to Greenwich and to a large number of other tenants who may have tenancy agreements in similar form. But if the point had not been conceded below, the judge would have been concerned to hear evidence and make findings about the interior of the flat (and, in particular, the extent, type and function of the plasterwork that Mrs Welsh"s counsel wishes to show to have been part of the structure of the flat). Moreover, the case was heard below on the agreed basis (which I have just read out) that the condensation caused no damage to the structure of the building. In short, Mrs Welsh's counsel is now seeking to resile from the agreed basis and to raise points upon which there is no sufficient basis in any findings of fact made by the judge. It would not be right for this court to allow that, and, in my view (with which, I understand, my lords concur), permission for the late service of a respondent's notice should be refused. Greenwich's notice of appeal, on the other hand, squarely addresses the issues (as to the correct construction of the tenancy agreement) that were argued before the judge and dealt with in his full and careful judgment.

In his judgment, the judge set out in some detail the opposing submissions as to the way in which the court should approach the construction of the tenancy agreement. Counsel for Mrs Welsh had relied upon the contrasting language of clause 2.1 and clause 3.2 and the unlikelihood (as he submitted) of there being a *lacuna*, or gap, between them; upon the perceived underlying purpose of the tenancy agreement; and upon the need, in construing a contractual document, to give effect to every part of it.

Counsel for Greenwich had rightly concentrated upon the last of these points (rightly, because the judge found it much the most important point in the case). Counsel for Greenwich submitted that the words "in good condition" (which appear both in clause 2.1 and in clause 3.2) meant, in the context of clause 2.1, good structural

condition, and did not, therefore, add significantly to the obligation to maintain the dwelling in good repair.

The judge concluded that the tenancy agreement was not drafted in a "torrential" style (the expression used by Hoffmann J in *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137 at p138). When a lease or tenancy agreement is drafted in such a style, it leaves the court with little need or scope for finding a different meaning, or shade of meaning, for every word used (although that may be compared with what Lindsay J said in *Credit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803* at p820). The relevant clause in the *Credit Suisse* case was fairly torrential: see p810A. It was (with emphasis supplied by Lindsay J):

> To maintain repair amend renew cleanse repaint and redecorate and *otherwise* keep in good and tenantable condition: ...

* Editor's note: Also reported at [1994] 1 EGLR 76

The judge was obviously right in his comment about the tenancy agreement not being drafted in such a style; it is short and apparently simple, as is appropriate for any tenancy agreement to be entered into by a local authority or other social landlord, although it is certainly not without its latent difficulties, as counsel have made clear in the course of this appeal.

The judge concluded that the words "good condition" in clause 2.1 did add significantly to what was implicit in "repair". The judge expressed his conclusion in the following paragraphs:

> I take the view that the inclusion of the structure and exterior in the statutorily implied covenant [a reference to section 11 of the Landlord and Tenant Act 1985], and its non-appearance in clause 2.1, is an important factor in the construction of the clause. In my judgment dwelling has at least the potential of connoting something more than the structure and exterior of a dwelling-house. Mr Say [who appeared below alone for Greenwich; he appears today led] is certainly right in saying that dwelling does not embrace decorations and chattels, and that good condition does not connote good design. But that does not mean that a feature of a dwelling which excites adverse comment about the quality of the design, and which is part of the causal process which leads to decorations and chattels being damaged, cannot be part of the condition of the dwelling. Turning to the facts of the case, I take the view that the uninsulated character of Mrs Welsh's flat was one of the elements which together constituted its condition. The consequence of the lack of insulation, namely excessive condensation, was also an element in the flat's condition. The damage to decorations and chattels, while not being part of the flat''s condition, was damage arising out of that condition.

After saying that he was not influenced by *Jones v Joseph* (1918) 87 LJKB 510 (a case concerned with infestation by vermin), the judge continued:

> If my analysis of clause 2.1 is correct, Mrs Welsh must succeed in respect of that clause. If the lack of insulation and the resultant condensation formed part of the condition of the flat, on any

> view of the matter the condition of the flat was not good for any significant time during the course of her tenancy, and Greenwich was in breach of the covenant to maintain the flat in good condition.

Greenwich's notice of appeal is elaborated in 17 subparagraphs. But the clear written submissions of Mr Simon Berry QC and Mr Bradley Say, as developed in Mr Berry's oral submissions, have understandably concentrated on the judge"s conclusions that I have just read.

The basic flaw in the judge's reasoning, Mr Berry has submitted, is to equate the physical make-up of the building (which is, he says, the subject matter of the obligation imposed by clause 2.1) with the amenity or efficiency of the dwelling (which is not the subject matter). The reference to amenity and efficiency is language that reflects what Dillon LJ said in *Quick v Taff-Ely Borough Council* at p818. The passages of the judgment that I have already quoted have been subjected, in Greenwich's skeleton argument on appeal, to close textual analysis. This has been backed in this court, as it was below, by citation of authority tending to show that the expression "good condition" (or "good tenantable condition") adds little to the significance of "repair": see, in particular, what was said by Fletcher Moulton LJ in *Lurcott v Wakely* [1911] 1 KB 905 at p918; and what was said by Cumming-Bruce LJ (with whom the other members of this court agreed) in *Smedley v Chumley & Hawke Ltd* [1982] 1 EGLR 47 at p49.

Against those well-known passages, Mr Knafler (for Mrs Welsh) has deployed the careful survey of the authorities made by Lindsay J in the *Credit Suisse* case, and his conclusion at pp821-822 that "otherwise keep in good and tenantable condition" added to, and was not circumscribed by, the obligation to repair. (It should be noted that Lindsay J emphasised the word "otherwise" in the expression that I have quoted, and it seems to have made a significant contribution to his conclusions.) Mr Knafler has also deployed the same general contextual points as were taken below on behalf of Mrs Welsh.

Mr Berry has joined issue with those contextual points. He has drawn particular attention to the fact that the phrase "in good condition" occurs not only in the landlords' obligation in clause 2.1 but also in the tenant"s obligation in clause 3.2. The words must therefore, he has submitted, have a different meaning in the two contexts where they occur; in clause 2.1, he submitted, they mean good structural condition (or good repair), whereas in clause 3.2 they are concerned with decoration, cleanliness and minor matters -- what Denning LJ in *Warren v Keen* [1954] 1 QB 15 at p20 called "the little jobs about the place which a reasonable tenant would do". However, going on from there, Mr Berry has also sought to extend clause 3.2 to all works of repair or maintenance of the interior of the flat -- a construction that was not, I think, argued below, and that I find impossible to accept. Mr Berry also submitted that if his construction left a *lacuna* or gap -- an area of work for which neither landlords nor tenant were responsible -- that was no sufficient reason for rewriting the tenancy agreement and making, in effect, a new bargain for the parties. Mr Berry pointed out that there will often be a similar gap in cases where the Landlord and Tenant Act 1985 applies. That is no doubt so, and it is something of a paradox that the implied condition as to fitness for human habitation in section 8 of that Act applies only to tenancies at low rents; had Mrs Welsh been paying a sufficiently small sum in rent so as to come within section 8, the landlord's statutory obligations would have been more extensive. They would also have been more extensive if she had had a furnished tenancy.

In this case, counsel on both sides have researched the law very thoroughly indeed and, in a field that is densely strewn with authority, they have cited a large number of reported cases for the assistance of the court. But the language of repairing covenants, and the commercial and social contexts within which they occur, are very variable. A decision on the language of one clause is never decisive, and may sometimes not even be helpful, as to the meaning of another clause, even though it uses some of the same words: see, for instance, the well-known observations of Scrutton LJ in *Westcott v Hahn* [1918] 1 KB 495 at pp511-512; also the observations of Hoffmann J in *Norwich Union*, at p138, that questions of construction are frequently a matter of impression and are not readily susceptible of precise explanation.

The tenancy agreement in this case is in a very short and simple form suitable for a letting by social landlords. Its drafting style, so far from being torrential, is exceedingly sparse. For my part, I am satisfied that the reference to "good condition" in clause 2.1 is intended to mark a separate concept and to make a significant addition to what is conveyed by the word "repair". The occurrence of references to "good condition" in clause 3.2, as well as in clause 2.1, requires the court to recognise that the context of clause 2.1 ("to maintain the dwelling") is different from that of clause 3.2 (cleanliness and "minor repairs which are the tenant's responsibility").

However, I am not persuaded that the judge fell into error in the crucial passage in his judgment that Mr Berry has criticised. The context of clause 2.1 is different from that of clause 3.2, but not, in my judgment, to the extent of restricting "good condition" to good structural condition. The contrast that Mr Berry has sought to draw between structure (or physical make-up), on the one hand, and amenity (or efficiency), on the other hand, is an intelligible contrast, but only, I

think, towards the extreme ends of the contrast. Where there is severe black spot mould growth:

> generally within the flat but principally at the base of the windows and at the base of the walls and under carpets and also to the soft furnishings

(as the expert put it in his first report, annexed to his main report), that cannot, in my judgment, be regarded merely as a matter of amenity disassociated from the physical condition of the flat, even if there were, as counsel agreed, no damage to the structure. It is perhaps regrettable that (no doubt because of the concessions agreed by counsel) the judge did not make rather more precise findings about the physical condition of the interior of the flat. Nevertheless, in my judgment, the judge was right to conclude that, by failing to provide thermal insulation or dry lining for the external walls, Greenwich allowed excessive condensation and severe black spot mould to continue, and so failed to maintain the flat in good condition.

Mr Knafler referred not only to English authorities but also to some cases in which the European Court of Human Rights has considered the significance of environmental pollution in the context of Article 8 of the European Convention on Human Rights. I do not find it necessary to comment on that part of Mr Knafler"s submissions, and, on the whole, I think it is better not to make any unnecessary comments on that topic.

For those reasons, I would dismiss this appeal.

Agreeing, Latham LJ said: I agree.

In my judgment, the words used in clause 2.1 of the tenancy agreement are intended to impose an obligation different, and more extensive in kind, than that which is imposed by virtue of section 11(1) of the Landlord and Tenant Act 1985; and the use of the word "dwelling" in the clause is in contradistinction to the obligations implied pursuant to that section, which are to deal with the structure and exterior of the dwelling. It seems to me, further, that the phrase "good condition" is intended to be treated as a separate concept from the word "repair", even though there may be overlap. As far as the phrase "good condition" is concerned, it seems to me to concentrate the mind upon the state of the dwelling, whereas "repair" is looking at the matter more from the perspective of the need to do particular repairing work.

In coming to the conclusion that, on the agreed facts, it is incontrovertible that the dwelling was not in good condition, I do so bearing in mind the context in which the phrase "good condition" must be

construed in this contract. As my lord has already said, this is a contract between a local authority, as the providers of social housing, and a tenant, in circumstances where one would not expect the tenant to be taking legal advice. I therefore consider that such a term should be approached upon the basis that one should, so far as possible, give to it the meaning that the ordinary person in the street would accept as being the sensible construction of the phrase. It seems to me that the judge approached it properly in that regard, and has produced a solution to the meaning of the clause that will accord with the ordinary person's understanding of the phrase and also the ordinary person's sense of fairness.

For those reasons, it seems to me, like my lord, that the judge was correct in the conclusion to which he came, and I would dismiss this appeal.

Bell J agreed and did not add anything.

Appeal dismissed.