[2001–02 Gib LR 77]

GOODMAN and GOODMAN v. ATTORNEY-GENERAL

SUPREME COURT (Schofield, C.J.): October 26th, 2001

Landlord and Tenant—repair, fitness and alteration—landlord's obligations—if tenancy agreement silent, obligation may be implied on landlord to repair exterior, to match correlative express obligation on tenant to maintain interior—landlord's breach of obligation gives rise to damages to tenant including damages for distress, discomfort and embarrassment where appropriate

The plaintiffs brought an action against the Government for damages resulting from damage caused by damp in their Government flat.

The tenancy agreement did not state who was responsible for keeping the exterior of the property in good repair but the plaintiffs had an express obligation to maintain the interior. They annually spent considerable sums on redecorating and repairing the damage caused by damp. Heavy rains required them to deal with puddles and damaged fixtures and fittings. During the winter they avoided inviting guests to the flat because of their embarrassment at its state and the stress of their living conditions led to family tensions. The Attorney-General was involved in the action as the Government was the plaintiff's landlord.

The plaintiffs submitted that it was the landlord's duty to resolve the problems with the flat.

Held, giving judgment for the plaintiffs:

(1) The condition of the interior of the flat was due to the poor repair of the exterior. In general, no covenant would be implied on the part of the lessor of an unfurnished house or flat, that it be reasonably fit for habitation or that he would do any repairs but such an obligation could arise where it was necessary to make the agreement work. An obligation would be implied here, as the parties at the time of making the agreement would have regarded the landlord as responsible for the maintenance of

the exterior, since such an obligation would be necessary to enable the plaintiffs to fulfil their obligation to keep the interior in tenantable repair (para. 6; paras. 9–10; para. 13).

(2) The landlord was liable for the damage caused to the interior of the flat by the poor maintenance of the exterior. The plaintiffs would also be awarded damages for the distress, discomfort and embarrassment they had suffered for several years as a result of the damp conditions. Their distress was reasonably foreseeable by the landlords and they would be awarded substantial damages under this head (para. 14; para. 16; para. 18).

Cases cited:
(1) *Adami* v. *Lincoln Grange Management Ltd.*, [1998] 1 E.G.L.R. 58; (1998), 30 H.L.R. 982, distinguished.
(2) *Barrett* v. *Lounova (1982) Ltd.*, [1989] 1 All E.R. 351, applied.
(3) *Calabar Properties Ltd.* v. *Stitcher*, [1984] 1 W.L.R. 287; [1983] 3 All E.R. 759, applied.
(4) *Perry* v. *Sidney Phillips & Son*, [1982] 1 W.L.R. 1297; [1982] 3 All E.R. 705, applied.
(5) *Westminster (Duke)* v. *Guild*, [1985] 1 Q.B. 688; [1984] 3 All E.R. 144; (1983), 267 E.G. 762, applied.

P. Peralta for the plaintiffs;
A.A. Trinidad, Senior Crown Counsel, for the Crown.

1 **SCHOFIELD, C.J.:** The plaintiffs, Mr. and Mrs. Goodman, have from June 24th, 1991 been the tenants of a Government flat at No. 16 MacMillan House, Gibraltar. Despite the problems that they have had with the flat, which are the subject of this action, they like the flat and have not applied to be re-housed. They have gone to the expense of redecorating it, indeed, the surveyor's report says that the flat is furnished to a high standard throughout and is kept in very good condition by the plaintiffs. The flat has a good view and is in close proximity to Mr. Goodman's work. Rather than apply to be re-housed, the plaintiffs say that the Government, their landlord, can resolve the problems with the flat and, indeed, maintain that it is the landlord's duty to do so.

2 The problem with the flat is a problem which affects many properties in Gibraltar to a greater or lesser degree, that of damp. In the plaintiffs' case they say the situation over the period of their tenancy has been intolerable. The plaintiffs' evidence is that when they took possession of the flat it was in a very poor state and they spent approximately £2,000 in putting it in good order. Indeed, the plaintiffs were required to carry out certain decorations and repairs in accordance with cl. 2(7) of the tenancy agreement, the terms of which I shall return to. They noticed some signs of damp when they moved in, but it soon became obvious to them that the

flat was seriously affected by water penetration. The plaintiffs described to me how the task of fixing and repairing the damage caused by damp became a seasonal event. In his witness statement, Mr. Goodman describes how the onset of heavy rains requires him and his wife to cope with puddles and damaged fixtures and fittings, and that they constantly battle to collect water or prevent its ingress with such things as towels. During the winter they avoid inviting friends or relatives to the flat because of their embarrassment at its state. They have expended money annually on redecoration and the stress of their living conditions has led to tensions between them. Mrs. Goodman said she painted and redecorated her living-room two weeks before the hearing.

3 In October 2000, as a result of a joint request by the parties to this action, Brian Francis, a chartered surveyor, carried out an investigation of the flat to assess its condition with a view to addressing the issues of damp and water penetration. His findings, opinion and conclusion are as follows:

> "*Findings*
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> The internal surfaces of the external walls on the north elevation were relatively dry. Moisture content levels did not exceed 15%. Two of these walls are tiled, *i.e.* the kitchen and bathroom and readings were well below 14%. The third wall (Bedroom 2) is in cement sand plaster and is also within acceptable levels.
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> Protimeter readings on the internal surfaces of the external walls on the south elevation recorded a much higher moisture content level. In some cases, *e.g.* next to the TV point, readings were well in excess of 28% and in two cases they almost reached saturation point, *i.e.* above 60%, indicating very damp conditions.
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> Other areas where the moisture content readings were well in excess of acceptable levels were as follows:
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> (a) around window jambs and soffits;
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> (b) in the corner of the lounge next to the television in the lounge; and
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> (c) in the main bedroom around the window and corner.
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> Upon external observation of this south elevation wall, I found areas of defective render and horizontal cracks, particularly at lintels and cills which had spalled and fallen off. The external paint was also found in a very poor state generally.
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> I was able to inspect the apartment above No. 16, which I believe has been vacant for a long time. The walls of this apartment are

excessively damp, to the extent that the plaster has deteriorated in several places.

Opinion

Having regard to the fact that the walls were proved after several months of dry weather, it is my opinion that the high level of moisture content found on the south elevation wall indicates that this wall is suffering from inherent dampness, which will only worsen during the rainy season.

In my opinion, the south wall is much more exposed to the prevailing south westerly rains, which are usually accompanied by strong winds thereby driving rainwater through all external cracks and fissures in the render.

In my opinion, the dampness on the internal surfaces of this external wall is therefore primarily due to rainwater penetration at the critical points above lintels, where horizontal cracking is evident. The tiled copings over the windows are also cracked and missing in places.

It is therefore my opinion that the external fabric of the building is in dire need of render repairs and redecoration with a good external quality masonry paint and until the fabric is weatherproofed the internal surfaces of external walls, particularly on the south elevation, will continue to suffer from dampness.

Conclusion

The dampness on the internal surface of the external south elevation is due to rainwater penetration, which in spite of the thickness of these walls, occurs through cracks and fissures in the external render. It would appear that some of the cracks are due to corrosion of steelwork, *e.g.* at lintels, but there is also the possibility of the cracks being caused by thermal movement.

The condition of the affected internal surfaces would be far worse if these areas had not been treated regularly by redecoration. This was evident in the apartment above No. 16, which has been unoccupied for a long time.

It is, I believe, beyond my brief to specify the nature of the remedial measures required but it is evident that the external fabric of the building, particularly on the south elevation, is not at the moment weather proof."

4 In the light of this report, which supports the plaintiffs' evidence as to the extent of their problems with damp and water penetration, I am unimpressed by the landlord's suggestion that the plaintiffs are

exaggerating the extent of the problems. It is true that the landlord has carried out works on MacMillan House and in 1991 demolished the old balconies and fabricated new ones. I also accept the evidence of Mr. Buttigieg, the Director of Buildings and Works, that between 1993 and 1994, MacMillan House was repainted with a superior type of paint, which had waterproofing properties. Be that as it may, this did not, according to the evidence which I accept, resolve the problems of damp within the flat.

5 The defence called Kevin Desoisa, an Environmental Health Officer, who carried out an inspection of the flat, along with other flats in MacMillan House, in May 1994. He recorded medium damp around the windows of two bedrooms and slight damp in the living-room. Mr. Desoisa's evidence did not detract from the force of the evidence of the plaintiffs or Mr. Francis. He said that a very rapid inspection of the building was requested by his Minister. It was a visual inspection and not the thorough inspection carried out by Mr. Francis. Furthermore, his inspection was carried out in May, not in winter, and we do not know in what state of redecoration the flat was.

6 In short, I believe the evidence of Mr. and Mrs. Goodman as to the condition of their flat. I am also satisfied that the condition of the interior of the flat is due to the poor repair of the external fabric of the building.

7 Is it the responsibility of the Government, as landlord, to keep the outside of the property in good repair? It is common ground between the parties that the tenancy agreement entered into between them on June 24th, 1994, is silent on the question. The flat is let unfurnished. The tenancy agreement provides for the weekly payment of rent, which is inclusive of general rate and water rate, and provides that where the landlord provides a service for keeping refuse bins, refuse chutes, passages, staircase, yard, patio or other common parts swept and clean, the plaintiffs will pay the landlord a weekly contribution towards the cost, to be determined by the housing manager. It is accepted that the plaintiffs have fulfilled their obligations under the agreement. Clauses 2(7), (8) and (9) of the plaintiffs' covenants are worthy of repetition. It is the plaintiffs' responsibility:

> "(7) To keep the interior of the premises and all fittings and fixtures therein in tenantable repair and to carry out all internal decorations and repairs as set out on the second schedule hereto and upon determination of this tenancy to deliver the premises in tenantable repair in accordance with the provisions of this clause. In the event that the tenant fails or neglects to leave the premises in such tenantable repair, the landlord may carry out the said repairs or any of them and the tenant shall pay to the landlord the cost of repairs so carried out.

(8) To permit the landlord or his agents, with or without workmen or other persons, to enter upon and view the state of repair of the said premises at any reasonable hours in the daytime and if in respect of any of the matters specified in cl. 2(7) of this agreement, the landlord shall give notice in writing to the tenant of any repairs, decorating or cleaning required to be done to carry out same at his own expense with all reasonable dispatch to the satisfaction of the landlord. In the event that the tenant fails, neglects or refuses to carry out to the satisfaction of the landlord within a reasonable period, which period shall be decided by the landlord in his absolute discretion, any or all of the matters specified in the said notice, the landlord shall elect to carry out the said repairs or any of them and in such case the tenant shall pay to the landlord the cost of repairs as carried out.

(9) To permit the landlord or his agent, with or without workmen, at all reasonable times to enter the premises to repair the inside or outside of the building."

8 I should, perhaps, add that the second schedule referred to in cl. 2(7) sets out a substantial list of decorations and repairs to be carried out by the plaintiffs and it will be remembered that Mr. Goodman said that the amount of money he put into the flat when they took possession of it was about £2,000. For its part, the landlord agreed to give the plaintiffs quiet enjoyment of the flat. As I say, the tenancy agreement is silent about repairs to the exterior of MacMillan House.

9 In *Duke of Westminster* v. *Guild* (5) the English Court of Appeal adopted the general rule stated in Woodfall, *Landlord & Tenant*, 28th ed., as follows ([1985] 1 Q.B. at 697, *per* Slade, L.J.):

"In general, there is no implied covenant by the lessor of an *unfurnished* house or flat, or of land, that it is or shall be reasonably fit for habitation, occupation or cultivation, or for any other purpose for which it is let. No covenant is implied that the lessor will do any repairs whatever . . ."

10 However, the court did acknowledge that an obligation which is not expressed in a tenancy agreement can arise when it is necessary to make the agreement work and said that in some instances it will be proper for the court to imply an obligation against a landlord, to match a correlative obligation expressly imposed on the tenant.

11 *Duke of Westminster* v. *Guild* was followed by the Court of Appeal in *Barrett* v. *Lounova (1982) Ltd.* (2), which involved the interpretation of a tenancy agreement relating to an end-terrace house. The agreement contained a covenant by the tenant to keep the inside of the premises in good repair. The agreement contained no covenant by either landlord or

tenant to keep the outside of the premises in repair. As a result of disrepair to the exterior of the house, extensive water penetration caused damage to the interior of the premises. The court implied an obligation on the part of the landlord to repair the outside of the premises. After referring to the general rule stated in Woodfall and considering the decision in *Duke of Westminster* v. *Guild*, Kerr, L.J. had this to say ([1989] 1 All E.R. at 356–357):

> "So it follows that a repairing obligation on the landlord can clearly arise as a matter of implication. But that leaves the question already mentioned, which I find difficult and on the borderline, whether the terms and circumstances of this particular lease enable such an implication to be made. As to that, although I have not found this an easy case, I agree with the conclusion of the recorder. In my view the clue lies in what Slade L.J. referred to as a 'correlative obligation', in this case one which is correlative to the express covenant by the tenant to keep the inside and fixtures in good repair, order and condition.
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> The considerations which lead me to that conclusion are the following. It is obvious, as shown by this case itself, that sooner or later the covenant imposed on the tenant in respect of the inside can no longer be complied with unless the outside has been kept in repair. Moreover, it is also clear that the covenant imposed on the tenant was intended to be enforceable throughout the tenancy. For instance, it could not possibly be contended that it would cease to be enforceable if the outside fell into disrepair. In my view it is therefore necessary, as a matter of business efficacy to make this agreement workable, that an obligation to keep the outside in repair must be imposed on someone. For myself, I would reject the persuasive submission of counsel for the landlord that both parties may have thought that in practice the landlord (or possibly the tenant) would do the necessary repairs, so that no problem would arise. In my view that is not a businesslike construction of a tenancy agreement. Accordingly, on the basis that an obligation to keep the outside in a proper state of repair must be imposed on someone, three answers are possible.
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> First, that the tenant is obliged to keep the outside in repair as well as the inside, at any rate to such extent as may be necessary to enable him to perform his covenant. I would reject that as being unbusinesslike and unrealistic. In the case of a tenancy of this nature, which was to become a monthly tenancy after one year, the rent being paid weekly, it is clearly unrealistic to conclude that this could have been the common intention. In that context it is to be noted that in *Warren v Keen* [1953] 2 All E.R. 1118, [1954] 1 Q.B.

15 this court held that a weekly tenant was under no implied obligation to do any repairs to the structure of the premises due to wear and tear or lapse of time or otherwise and that it was doubtful whether he was even obliged to ensure that the premises remained wind and watertight. Any construction which casts on the tenant the obligation to keep the outside in proper repair must in my view be rejected for these reasons, and also because there is an express tenant's covenant relating to the inside, so that it would be wrong, as a matter of elementary construction, to imply a covenant relating to the outside as well.

The second solution would be the implication of a joint obligation on both parties to keep the outside in good repair. I reject that as being obviously unworkable and I do not think that counsel for the landlord really suggested the contrary.

That leaves one with the third solution, an implied obligation on the landlord. In my view this is the only solution which makes business sense. The recorder reached the same conclusion by following much the same route, and I agree with him. Accordingly I would dismiss this appeal."

12 In *Adami* v. *Lincoln Grange Management Ltd.* (1), the Court of Appeal said that *Barrett* v. *Lounova* (2) must be taken to be decided on the special facts of the case, and that no principle can be discerned from it which requires the implication of an obligation on the part of a lessor to keep the structure of the block of flats, which were the subject of that action, in good repair. However, the facts in *Adami* are very different from the facts in this case. In *Adami* the court was dealing with a lease of over 260 years at a nominal rent, which contained elaborate provisions for insurance on a block of flats which suffered subsidence.

13 The facts of *Barrett* v. *Lounova* are so close to the facts of the current case that I consider I must follow it. If the parties had been asked at the time the tenancy agreement was being entered into whether someone was to be responsible for the maintenance of the exterior of MacMillan House, the answer would have been "of course someone must be." And indeed such an obligation on the part of someone would be necessary to make possible the plaintiffs' obligation to help keep the interior of the flat in tenantable repair. The only possible answer to the next question of "who is then responsible?" would be "the landlords."

14 Having determined that the landlord is liable, I must now determine the question of damages. The plaintiffs have submitted a schedule of costs of replacement windows and curtains and of waterproofing material and paint totalling £1,425. As I understand it, Mr. Trinidad, for the landlord, is not disputing this figure.

15 The statement of claim makes reference to a claim for injury, by way of ill-health, to the plaintiffs and their daughter, but I understand that no claim for such damages is being pursued.

16 However, Mr. Peralta, for the plaintiffs, seeks to persuade me to award an amount of damages for the mental distress the plaintiffs have suffered. So far as the facts are concerned, I am satisfied that the plaintiffs have suffered distress and discomfort over a period of years, in having to live in damp conditions and constantly having to redecorate the flat. I am satisfied that they are, seasonally, embarrassed at having guests to the flat and that there has been family tension over the problem. I am also satisfied that the plaintiffs have spent a great deal of time and effort in contacting those whom they considered would be able to resolve their problems and remedy the faults. In *Calabar Properties Ltd.* v. *Stitcher* (3), an amount of £3,000 was awarded to a tenant for the "disappointment, discomfort, loss of enjoyment and bouts of ill-health which [the defendant's husband] suffered during the five years he was occupying what was supposed to be a high-class flat" and which were due to the landlord's persistent refusal to fulfil its repairing covenant.

17 In *Perry* v. *Sidney Phillips & Son* (4), an award for the distress and discomfort suffered by the plaintiff as a result of the defendant surveyor's negligence in failing to report serious defects in the condition of a house which the plaintiff purchased, was approved. The Court of Appeal held that the plaintiff's anxiety, worry and distress at finding that the house, which the surveyor had reported as free from damp, was in need of considerable repair, was reasonably foreseeable, and the court approved an award of compensation on that head. However, the court was keen to stress that the award should be modest and not excessive.

18 In all the circumstances of this case, I am satisfied that the plaintiffs' mental distress was reasonably foreseeable by the landlords and I award them £4,000 damages on this head.

19 My total award to the plaintiffs is therefore £5,425.

Judgment for the plaintiffs.