

Queen's Bench Division

Before:

Mr Justice FORBES

Between:

RAVENSEFT PROPERTIES LTD

V

DAVSTONE (HOLDINGS) LTD

Ronald Bernstein QC and S Burnton (instructed by Forsyte, Kerman & Phillips) appeared on behalf of the plaintiffs;

J Colyer QC and K M J Lewison (instructed by Thornton, Lynne & Lawson) represented the defendants.

1. Giving judgment, FORBES J said: In this case, the plaintiffs, Ravenseft Properties Ltd, sue the defendants, Davstone (Holdings) Ltd, substantially on repairing covenants in a lease in which the plaintiffs are the landlords and the defendants, tenants. The building is part of a complex at Notting Hill Gate in London. The part of the building with which we are concerned is firstly a 16-storey block of maisonettes, and secondly a four-storey block of flats, those buildings being known as Campden Hill Towers and Campden Hill Flats respectively. Campden Hill Flats plays only a subordinate part in this matter and I shall concentrate very largely on Campden Hill Towers. That building is a modern, rectangular structure made with a reinforced concrete frame. It looks, if I may be excused the analogy, like nothing more than a set of pigeon-holes, or perhaps to use a marine analogy, a flag locker, and the square section pigeon-holes each contain one maisonette on two floors. The edges of the pigeon-holes are veneered, if I may pursue the analogy, with a cladding of Portland stone. This stone is about 3in thick and 8in wide and runs upwards along each of the vertical divisions and horizontally along each of the horizontal ones. At the edges of the structure there are slightly wider bands of stone running vertically. The same treatment occurs on both the eastern and the western elevations. The building was built between 1958 and 1960 and it was let in 1960 to a predecessor of the defendants by a predecessor of the plaintiffs. 2. In 1973 the stones in the cladding on the eastern elevation were observed to be loose and in some danger of falling, and emergency measures were taken to secure the more dangerous of the stones.

The plaintiffs notified the defendants of this situation and called upon them to carry out the necessary work to repair and secure the stone work. The defendants, while agreeing that the work was necessary, disputed any liability to pay for it under the repairing covenants. The plaintiffs thought, quite rightly, that the matter was urgent, and the plaintiffs and the defendants accordingly agreed that the plaintiffs should give the orders and assume the primary liability for the remedial work necessary and leave the question of the liability of the defendants over for later determination. The work was put in hand. Initially I think the defendants paid half of the earlier bills but later stopped paying, and the sum in dispute is now claimed by the plaintiffs in this action. 3. I do not think it is necessary to go into great detail about the cause of the difficulty which arose with the stone. The main concrete frame and the stone cladding have different coefficients of expansion. The result was that in certain sections some of the stones were being bowed away from the concrete frame.

The potential danger can be realised if it is understood that if the stone cladding is pinned or fixed in some way to the main frame at 10ft intervals, 100th of an inch of difference in the extent of expansion in 10ft will result in a bowing of one inch in the centre of that part of the stone work. There were three stones to each floor, six that is to each maisonette, and every third stone was what has been called a 'booted' stone; that is that it was, in section, 'L' shaped, with the projection of the 'L' running back into a channel or piece cut out of the main frame, so that the booted stone was held in that position. The stones, including the booted stones, were intended to be tied back into the main frame by metal straps of some kind, but in fact many of the ties were either not there or misapplied in the eastern elevation.

Besides the ordinary shrinkage of the frame which occurs over the first few years after construction with a concrete frame building of this kind, there are also other movements which take place in a concrete frame structure during the life of the building and it will be seen, therefore, that a difference in expansion coefficient between the cladding and the frame is likely to cause difficulties where the ends of the stones abut on to the horizontal cladding, where in effect they will be prevented from movement in a vertical direction. In this case the bowing of the stones was principally due to lack of expansion joints, but there was a subsidiary cause of failure and that was the omission to tie in the stones properly. As I understand the evidence, if the stones had been tied in properly, any individual stones would have been unlikely to fall, despite the movement of the frame relative to them. The movement would, however, possibly or probably cause cracking and chipping of the stones with, of course, an attendant degree of danger of the fall of smaller pieces of stone, but not the whole stones themselves.

When a full inspection was made of the building and the very large number of untied stones were found in the eastern elevation, it was decided that the only safe way of dealing with that was to take down all the stone cladding on this elevation and replace it with proper ties and also with expansion joints. I should mention here that the top three storeys of the building were slightly out of plumb. The frame was leaning backwards slightly and the stones were set plumb, so that the distance between the back of the stones and the front of the frame increased a little in the top three or four storeys. The expansion joints were effected by cutting off half an inch from the top of each stone which lay under a booted stone, in other words every third stone on the elevation, and filling the gap with a plastic expansion absorbing material. On the western elevation and on Campden Hill Flats the symptoms were not so severe.

Nevertheless in view of the potential danger, two out of each lift of three stones were pinned to the frame by inserting metal dowels through the stones into the frame at a downward angle, and once again the top half inch of every third stone was removed and an expansion joint placed in the gap. It was not necessary, however, as I understand the evidence, on the western elevation of Campden Hill Towers and on Campden Hill Flats, to remove the cladding stones in order to carry out this remedial work.

4. Throughout the work the defendants' surveyors joined in the inspection of the work from time to time with the plaintiffs' consulting engineers and at no time was there any suggestion that the work being done was unnecessary, though, of course, the defendants maintained their argument that they were not liable under the repairing covenants.

5. The necessity for placing expansion joints in a construction of this kind was not realised by architects or structural engineers at the time the building was constructed and it was not engineering practice at that time to include expansion joints when a construction of this type was being carried out. It was only in 1961, when the publication of the Building Research Station's Annual Report for 1960 pointed out the difficulty and danger, that the problem was recognised, and that report suggested sensible remedies. By 1973-74 when this remedial work was carried out it could be said to have become standard practice in constructing a building in this way to include expansion joints of this type.

6. I should turn now to the repairing covenants in the lease. It is, in fact, an underlease, but I do not think I need bother at all about the headlease. There are three sub-clauses to which I need refer and only three. They appear in clause 5 of the underlease, which is the main clause concerned with the tenants' covenants. Subclause 6, to repair, reads in this way: when where and so often as occasion shall require well and sufficiently to repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty amend and keep the premises and every part thereof (including all fixtures and additions thereto) and all floors walls columns roofs canopies lifts and escalators (including all motors and machinery therefor) shafts stairways fences pavements forecourts drains sewers ducts flues conduits wires cables gutters soil and other pipes tanks cisterns pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever (damage by any of the insured risks excepted so long as the Lessor's policy or policies of insurance in respect thereof shall not have become vitiated or payment of the policy moneys be refused in whole or in part in consequence of some act or default of the Lessee) and to keep all water pipes and water fittings in the premises protected from frost and to be responsible in all respects for all damage caused to the premises or to the said buildings or any part thereof or to the neighbouring property or to the respective owners or occupiers thereof through the bursting overflowing or stopping up of such pipes and fittings occasioned by or through the neglect of the Lessee or its servants or agents.

7. I have read that in full to indicate that it is one of those clauses in which the ingenuity of the draftsman has been given full rein in an attempt to cover every conceivable eventuality.

8. Then we pass to subclause 11: to permit the Superior Lessors and the Lessor at all reasonable times during the said term to enter upon the premises and every part thereof to view the state and condition of the same and to take any measurements plans or sections thereof and of all defects decays and wants of reparation there found to give to the Lessee notice in writing in manner hereinafter prescribed.

And subclause 12: within three months next after every such notice as aforesaid (or immediately in case of urgency) well and sufficiently to repair and make good all such defects decays and wants of reparation to the premises at the Lessee's own cost absolutely Provided Always that if the Lessee shall fail to comply with the requirements of any such notice as aforesaid it shall be lawful for the Lessor (but without prejudice to the right of re-entry hereinafter contained) to enter upon the premises at any time after the expiration of such three months or immediately in case of urgency and execute such repairs and works and the cost thereof (including any surveyors' or other professional fees incurred) shall be repaid by the Lessee to the Lessor on demand.

9. In addition to those three covenants, and subclause 6 and subclause 12 are specifically pleaded in the statement of claim as giving rise to causes of action, there was also an agreement between the parties to which I have already very briefly referred, namely that the work should be done and that there should be an argument, if necessary, about the cost of it later. Now that is pleaded in paragraph 10 of the statement of claim in these terms:

Further on or about January 24 1974 it was agreed *inter alia* between the plaintiffs and the defendants by their agents that the work of repairing and making good the said defects decays and wants of reparation should be carried out as a matter of urgency by the plaintiffs' contractors and that the cost of such works should be paid by the defendants if they were liable for the sum under the terms of the said underlease. The works of repair and making good were commenced pursuant to the said agreement.

10. Now that paragraph is admitted in the defence, so that it seems to me it is quite unnecessary for me to look further than at the allegation as set out in the statement of claim and admitted in the defence. There is correspondence of around that period which supports that paragraph, but I do not think it is necessary in view of the admission on the pleadings to advert to that further.

11. Now despite somewhat lengthy cross-examination of the plaintiffs' witnesses, there is here no dispute on fact and the defendants called no evidence. In these circumstances the plaintiff landlords claim to be reimbursed by the defendant tenants the cost of the work carried out and

they put their claim under three headings. First, under the repairing covenant, clause 5(6); secondly under the covenant to pay the cost of repairs carried out by the landlord under clause 5(12); and thirdly under the agreement of January 24 1974. In fact, both counsel agree that the agreement adds nothing new as it merely requires the tenant to pay what it is due under either clause 5(6) or clause 5(12).

12. The tenants' defence is two-fold. Mr Colyer says, first, that there is in that branch of landlord and tenant law concerned with repairing covenants, a doctrine of inherent defect which is applicable to such covenants to repair. This is that where wants of reparation arise which are caused by some inherent defect in the premises demised, the results of the inherent defect can never fall within the ambit of a covenant to repair. Secondly, he says if that proposition is wrong the covenantor is still not bound to pay for any works which, in fact remedy the inherent defect. The landlords answer that broadly in this way. Mr Bernstein says there is no such thing as a doctrine of inherent defect. The question is simply this, 'is what the tenant is asked to do fairly represented by the word 'repair'?' and this question is to be judged as a matter of degree in each case.

13. The leading cases on the matter have been referred to by both counsel and I need only, I think, list them at this stage and then consider at any rate some of them in a little more detail later. They are *Proudfoot v Hart* (1890) 25 QBD 42; *Lister v Lane and Nesham* [1893] 2 QB 212; *Wright v Lawson* (1903) 19 TLR 203, 510; *Lurcott v Wakely and Wheeler* [1911] 1 KB 905; *Calthorpe v McOscar* [1924] 1 KB 716; *Pembery v Lambdin* [1940] 2 All ER 434; *Sotheby v Grundy* [1947] 2 All ER 761; *Collins v Flynn* [1963] 2 All ER 1068 and *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612. All these cases are, I think, very well known and I do not intend to recite the facts of the judgments in detail, though there are one or two matters which will have to be considered more carefully. Of these cases it seems that it is unnecessary to consider further the cases of *Proudfoot v Hart* and *Calthorpe v McOscar*. They are concerned with questions of the standard of repair required under a repairing covenant rather than what is included in the term 'repair.'

14. One should start with the case of *Lister v Lane and Nesham* and the frequently quoted passage from the judgment of Lord Esher MR at p 216. If a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing, and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair.

15. From this passage and the case in general Mr Colyer derives this proposition. If it can be shown that any want of reparation has been caused by an inherent defect, then that want of reparation is not within the ambit of a covenant to repair. Inherent defect he defines as an omission of something in the original design. A defect in the quality of workmanship or materials is not, he says, an inherent defect. The want of reparation in this present case, Mr Colyer says, was the failure to reconstruct the wall; in *Lister's* case, by providing the whole house with underpinned foundations and that want of reparation was directly due to the omission of proper foundations in the original construction.

16. I started with *Lister's* case and the well-known passage from Lord Esher's judgment, but Mr Colyer says that *Lister's* case itself was founded on *Soward v Leggatt* (1836) 7 C & P 613, and it is necessary to look briefly at that case. There the floor joists were repaired by laying them on bricks rather than on mud, as the original floor joists had been laid, and Mr Colyer seeks to found an argument from that, that any work to a building which involves a different method of construction must be regarded as giving to the landlord a different thing from that which the tenant took. But such a broad proposition cannot, I think, survive close consideration of the later

case of *Lurcott v Wakely and Wheeler*. It should be remembered that in that case the court was dealing with the rebuilding of the eastern external wall of a house in Hatton Garden and that what had happened was that the premises had been certified as being in a dangerous state by the district surveyor and that later, in compliance with a demolition order, under the London Building Acts, the plaintiff had taken down the wall to the level of the ground floor, and then, in compliance with a further notice by the district surveyor, had pulled down the remaining wall and rebuilt it with concrete foundations and damp courses in accordance with the requirements of the Act. The question was whether the tenant was liable under the repairing covenant for this work and it is clear that the wall originally lacked concrete foundations and damp courses, and that the insertion of these features in the rebuilt wall was the result of statutory notices by the local authority. Both Sir Herbert Cozens-Hardy MR and Buckley LJ regarded the matter as a question of degree rather than as one of method of construction, and clearly the method of construction was wholly different. In any event, Mr Colyer's first point depends on causation, and *Soward v Leggatt* was not concerned with direct causation but turned on whether the work was an improvement or not, which is Mr Colyer's second rather than his first point.

17. Turning to *Wright v Lawson* Mr Colyer explains that in the same way as he explained *Lister's* case. There, he says, the want of reparation complained of by the landlord was the failure to provide a bay window supported on pillars but this failure in turn was directly due to the absence of sufficient stability in the house to support a cantilever bay window. Mr Colyer accepts that the only case in which this doctrine was argued was *Collins v Flynn*. It is necessary therefore to look at that case but before doing so one should, I think, look at *Sotheby v Grundy* because Sir Brett Cloutman deals with *Lister's* case and *Sotheby's* case in a sense together.

18. Now the facts in *Sotheby* were not unimportant. The house which was the demised premises in that case was found in 1944 to have bulged and fractured walls and the house was condemned as a dangerous structure and demolished by the council. Expenses incurred by the council were recovered from the landlord who sought to recover them from the tenant as damages for breach of a repairing covenant, so the case itself was not directly concerned with work of repair but with the cost of demolition due to failure to repair. The evidence showed that in fact the house was built, in defiance of the requirements of the Metropolitan Building Act 1855, entirely without footings or, in some places, on defective footings and in consequence, and because of the defective footings, there was every likelihood that the house would, in fact, fall into a dangerous state in which it did fall. 'That very wise and experienced judge,' as Sachs LJ in the *Brew Bros* case called him, Lynskey J found that the wants of reparation were caused by what he called 'the inherent nature of the defect in the premises' but nevertheless felt it incumbent upon him to consider as a matter of degree whether the finding that the tenant was liable for the works required would be asking the tenant to give the landlord something different in kind from that which had been demised. This is clearly to reject, or overlook, any argument that a want of reparation caused by inherent defect could not in any circumstances be within the ambit of the repairing covenant.

19. Now looking at the case of *Collins v Flynn*, Sir Brett Cloutman deals with these points at pp 1073 and 1074, starting at 1073 (f). The last case that is really in point is *Sotheby v Grundy*. This was the case of the condemned house built in or about 1861, the main walls having been built either without footings or defective footings. The foundation had settled and this could have been avoided only by underpinning and substituting a new foundation. On the authority of Lord Esher's judgment in *Lister v Lane and Nesham*, it was held that the tenant was not liable for the cost of demolition. The expenses were incurred because of the inherent nature in the defect of the premises, and, therefore, did not come within the terms of the repairing covenant. Plainly the doctrine of liability for the defects in the subsidiary part could have nothing to do with that case. The case, it seems to me, was on all fours with *Lister v Lane and Nesham*. Oddly enough Lynskey J does introduce it in what I think is an obiter passage. He said, 'It may be that the inherent nature of the building may result in its partial collapse. One can visualise the floor of a building collapsing, owing to defective joists having been put in. I do not think *Lister v Lane* would be applicable to such a case. In those circumstances, in my opinion, the damage would fall within

the ambit of the covenant to repair, but, as I say, it must be a question of degree in each particular case';

20. And the learned Official Referee went on to talk about what he described as 'obiter joists,' referred to also in *Lister's* and *Lurcott's* cases.

21. Then at page 1074(d):

I now come to the crucial point. Do the words 'repair' and 'renew' import a liability to rebuild with newly-designed foundations and footings the pier supporting the girder, which in turn carries a great part of the rear wall and a part of the side wall in addition? This is manifestly a most important improvement which, if executed by the tenant, would involve him in rendering up the premises in different condition from that in which they were demised and on the authority of Lord Esher MR in *Lister v Lane and Nesham* I do not think that the tenant is under any such obligation.

Furthermore, although a suggestion of liability for removal of an inherent defect in a subsidiary part seems to have been touched on in *Sotheby v Grundy*, I do not think that the obiter remarks of Lynskey J as to defective joists have any bearing on the present case.

22. In these passages it seems to me that Sir Brett misdirects himself on the ratio of *Sotheby's* case. The question of whether the inherent nature of the building might result in its partial collapse was not *obiter* at all. It was part of the ratio in this sense that, treating the question as a matter of degree, a partial collapse, in the view of Lynskey J, would have been of a degree which brought it within the tenant's covenant to repair, whereas a total collapse would put it outside. As, therefore, it was not a matter of part only, but of putting in new foundations in the entire building, the learned judge found it was not within the ambit of the covenant. In so far as he appears to be misdirecting himself on the ratio of *Sotheby*, the persuasive authority of Sir Brett Cloutman's judgment in *Collins* must be considerably eroded.

23. The only other cases in the list are *Pembery v Lambdin* and *Brew Bros*. Now *Pembery* was clearly a case of inherent defect, but the court did not there decide that the plaintiff failed because there existed a doctrine such as that put forward by Mr Colyer. One can, I think, epitomise Slesser LJ's judgment in that case in this way. The plaintiff failed because her argument, if correct, would have involved ordering the defendant to give her a different thing from that which was demised. This is clearly, in my view, a decision arrived at by considering the question as one of degree. *Brew Bros v Snax*, though a case where the defect was not inherent (see Harman LJ's *arguendo* at p 622), was nevertheless a case where at any rate a doctrine of inherent defect such as that suggested by Mr Colyer was put forward in argument by the landlord (see p 618G), and countered for the tenants (see p 622B). But both Sachs LJ at p 640 and Phillimore LJ at p 646 appear to indicate that, whether or not the case of any want of reparation is an inherent defect, the question must still be regarded as one of degree in each case.

24. This necessarily brief review of authorities indicates quite clearly to my mind that apart from *Collins*, which I consider of doubtful authority, the explanation of the ratio in *Lister's* case as giving the tenant a complete defence, if the cause of the want of reparation is an inherent defect, has never been adopted by any court, but on the contrary, in *Pembery v Lambdin* and *Sotheby v Grundy*, the court, when dealing with wants of reparation caused by inherent defect, chose to treat the matter as one of degree, which in *Brew Brothers* the court effectively said that every case, whatever the causation, must be treated as one of degree.

25. I find myself, therefore, unable to accept Mr Colyer's contention that a doctrine such as he enunciates has any place in the law of landlord and tenant. The true test is, as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised.

26. In deciding this question, the proportion which the cost of the disputed work bears to the value or cost of the whole premises may sometimes be helpful as a guide. In this case the figures have not been finally worked out in complete detail. I have, however, the evidence of Mr Clark, the contracts manager for Stone Firms Ltd, the contractors who actually carried out the work. He was not himself responsible for any of the work, as he joined that company after the work was completed. He is, however, familiar with that company's methods of charging and so on, and he has studied the drawings and the analysed quotations produced by the company. From these he has been able to give me, not a detailed and accurate costing, but a reliable, broad, estimate of the cost of that part of the remedial work relating solely to the insertion of expansion joints. It is, as he said, an indication of the order of magnitude of the evidence was called and I accept Mr Clark's estimate that the cost would have been in the region of £ 5,000. The total cost of the remedial works was around £ 55,000, the balance of £ 50,000 being for refixing the stones and other ancillary works which was not, as I find, necessary to cure any defect of design, but to remedy what was originally defective workmanship. For comparison, the cost of building a structure of this kind in 1973 would have been in the region of £ 3m, or rather more. I find myself wholly unable to accept that the cost of inserting these joints could possibly be regarded as a substantial part of the cost of the repairs, much less a substantial part of the value or cost of the building. Mr Colyer urges me not to consider cost and that may, perhaps, in some circumstances, be right. He argues that the result of carrying out this improvement is to give back to the landlord a safe building instead of a dangerous one and this means the premises now are of a wholly different character. Further, he argues that because they are of a wholly different character, the work on expansion joints, the work necessary to cure the inherent defect, is an improvement of a character which transforms the nature of the premises demised, and, therefore, cannot fall within the ambit of the covenant to repair. I cannot accept this. The expansion joints form but a trivial part of this whole building and looking at it as a question of degree, I do not consider that they amount to such a change in the character of the building as to take them out of the ambit of the covenant to repair.

27. I pass to Mr Colyer's second point, namely that the tenant is not liable under the repair covenant for that part of any work of repair necessary to remedy an inherent defect. Again it seems to me that this must be a question of degree. In the case of *Lurcott v Wakely and Wheeler*, the wall was defective in the sense that it had no proper footings or damp course. When it was rebuilt, concrete footings and damp course were provided. The court nevertheless found the tenant liable for the whole cost of the work including these improvements. Mr Colyer seeks to distinguish that case because, he says, in *Lurcott* the improvements were necessary to comply with the requirements of the statute. Here there was no such requirement and the expansion joints were included merely as a matter of moral duty.

28. It is quite clear to me from the evidence of both Mr Sculley and Dr Michael, the two expert structural engineers who gave evidence, and the only evidence I have on this point, that no competent professional engineer would have permitted the remedial work to be done without the inclusion of these expansion joints. By this time it was proper engineering practice to see that such expansion joints were included, and it would have been dangerous not to include them. In no realistic sense, therefore, could it be said that there was any other possible way of reinstating this cladding than by providing the expansion joints which were, in fact, provided. It seems to me to matter not whether that state of affairs is caused by the necessary sanction of statutory notices or by the realistic fact that as a matter of professional expertise no responsible engineer would have allowed a rebuilding which did not include such expansion joints to be carried out. I find myself, therefore, bound to follow the guidance given by Sir Herbert Cozens-Hardy MR in *Lurcott's* case at p 914. It seems to me we should be narrowing in a most dangerous way the limit and extent of these covenants if we did not hold that the defendants were liable under covenants framed as these are to make good the cost of repairing this wall in the only sense in which it can be repaired, namely, by rebuilding it according to the requirements of the county council.

29. Because of the view I have formed, I have not thought it necessary to consider certain further submissions by Mr Bernstein. These were based on the special words used in the covenants in the underlease. I have already mentioned the plethora of words used to describe the obligations of the tenant in clause 5, subclause 6. In clause 5, subclauses 11 and 12, there are very many fewer words, but they include the important word 'defects.' The view I have formed is, of course, relative to the use of the word 'repair,' and that by itself seems to me to be sufficient to render the tenant in this case liable for the whole cost of remedial works. It is not, therefore, necessary to pursue the question of whether, if it had not been so, other words used would have been sufficient to fix the tenant with liability.

30. I accordingly consider that the plaintiffs are entitled to judgment for the proper cost of the entire works in this case.

Judgment was given for the plaintiffs with costs.