

DEROGATION FROM ORTHODOXY IN DEROGATION FROM GRANT

When it comes to repairs, the common law is astonishingly generous to landlords. They have no liability to repair the premises which they have let to tenants unless this is spelt out in the lease. There is generally no duty to ensure that the premises are in repair at the commencement of the lease. No warranty of fitness for purpose will be implied, nor one of habitability except where the premises are furnished or in course of construction at the time of letting. A reservation of a right of entry to carry out repairs does not impose any duty upon the landlord to carry them out.¹

The generosity does not end there. Almost inevitably, since they are drafted by the landlord's advisers, the terms of a tenancy agreement impose repair obligations upon the tenant. Usually at a minimum the tenant undertakes to keep the interior in repair. "Keep" includes "put", so the tenant who has taken premises which they discover suffer from defects must first put them right and then maintain the premises in a tenantable state, the only common concession being that they are not responsible for fair wear and tear.²

Even where the tenant's repairing obligations are limited, it does not follow that the landlord undertakes to perform all other repairs. So, unless the lease specifically so provides or some implied term can be spun out of the particular facts, the landlord need not perform structural or external repairs or those involving capital expenditure. Of course sensible owners would carry out such repairs, to protect their investment if not to placate the tenant, but if they refuse to do so, there are no implied repairing obligations arising from the relationship of landlord and tenant which the courts can call upon in order to force them to do so.³

The main, almost the only, implied obligations upon landlords recognised by the common law are those for quiet enjoyment and non-derogation from grant. Attempts to deploy these covenants in aid of a tenant suffering from the poor condition of premises have been judicially resisted, repeatedly and at a high level.

Should the state of the premises cause bodily injury to the tenant, or his family or guests, the common law is similarly unhelpful. The law of negligence, so supple and fecund elsewhere, has hardly been allowed into the landlord-tenant relationship. Only neighbours and passers-by who have been

¹ Authority for the propositions in this paragraph may be found in *Halsbury's Laws of Hong Kong* (Butterworths, 2000), Vol 17, 235.287–292.

² *Ibid.*, 235.306–307.

³ *Ibid.*, 235.287.

injured as a result of the defective state of the premises can expect compensation from the owner.⁴

Some minor relief has been given, through the medium of an implied term, where the landlord owns the common parts of the building and the tenant has been injured by defects in those parts, and, through the medium of a duty of care, where the landlord has designed and built the premises which turn out to be defective. Also, where the premises are under construction at the time of the lease, a warranty of fitness for purpose is implied and where a misrepresentation has been made or collateral warranty given, appropriate remedies can be given.⁵ However, these are particular situations and it is notoriously difficult to persuade a court to imply a term, especially where the parties have entered into a lengthy and apparently comprehensive agreement such as a lease tends to be. So the injustices have had to be addressed by statute; in particular, legislation which imposes upon landlords repairing obligations or liability for defective premises. Hong Kong, however, has not enjoyed this privilege. No equivalent of the English Defective Premises Act 1972 has been introduced, despite the obvious need for one and despite the general adoption of such legislation throughout the common law world, and when in 2002 the Legislative Council decided to impose some new implied terms upon the landlord-tenant relationship, it thought only of the protection of landlords.

Formidable obstacles therefore seemed to confront the tenant, Alpino Limited, in the recent case of *Tat Ming Trading Ltd v Alpino Ltd*,⁶ as it sought to justify its withholding of part of the rental from the landlord of its duplex flat, Tat Ming Trading Limited. The tenancy agreement contained no covenant by the landlord to repair. Though the law was apparently against the tenant, the facts were certainly sufficient to stir the sympathy of the judge. Water had leaked through a wall of an en suite bathroom onto a landing; this had caused the wooden floors there to bulge and buckle and electricity to fail in the bedrooms, forcing the tenant and his family to sleep in one room. The bathroom shower was out of use for a substantial period. The landing floor was dangerous. Apparently the cause was faulty workmanship in the floor of the shower, or at least that was suggested by one of the experts; curiously the judge made no finding between this and the suggestion of another expert that the leakage was the result of careless use of the shower. Repeated appeals to the landlord for assistance in remedying the defects were ignored. The tenant's solution, as so often, was to withhold a proportion of the rent: he did so to

⁴ *Ibid.*, 235.287 and 235.327–328.

⁵ *Ibid.*, 235.287 and 235.291.

⁶ HCA No 1659 of 2004 Burrell J; 14.2.06.

gain attention rather than to fund the carrying out of repairs. This worked in the sense that the landlord then sued for the unpaid rent.

The tenant's defence therefore properly would have been a set-off of the value of the expense of carrying out the repairs, a debt which could also form the basis of a counterclaim for damages. Set-off is permitted in equity if there is a sufficiently close connection between the rent and the debt. Normally there would be such a connection where the tenant has carried out landlord's repairs. However, before there can be a right to set-off there must, of course, be a debt due to the tenant. In the absence of any duty upon the landlord to repair and of any expenditure by the tenant upon the repairs, there could be no debt and no set-off.

The judge's way around this was to reason that in the agreement (evidently a printed form) rent had originally been expressed to be payable "without any deduction" but these three words had been crossed out, so the parties must have contemplated deductions. That is sensible enough, but he went on to suggest that the non-payment was a deduction rather than a set-off. The trouble with this is that there is no true contrast between the two: a deduction is legitimate only if it is founded on a debt which the tenant has discharged on the landlord's behalf and which he may set off against the rent due, the classic example being the payment of rates.⁷ Expenditure upon repairs might constitute such a deduction and set-off, but it requires that the landlord be legally obliged to do those repairs and that the tenant has instead done and paid for them. Alpino Limited had not done the repairs (it wanted the landlord to do them), still less paid for them, hence there was nothing to deduct – and no sum to counterclaim, nothing to set-off and no defence.

Where, then, was the obligation to repair that could have formed the basis of the deduction, or more properly the set-off? There was nothing expressed in the lease. Burrell J found it in the implied covenant not to derogate from grant and the implied covenant for quiet enjoyment. This has attraction, for the landlord had let the flat for residential use and the water seepage rendered the flat less fit for that use than it would have been if in good repair. In doing so, however, the judge challenged orthodoxy, and did so at the same time as purporting to apply it.

That orthodoxy is that neither of these covenants can impose upon a landlord positive duties to repair which he would not otherwise be obliged to perform. In the context of derogation from grant, the grant is in the terms of the lease so it is difficult to see that a landlord could be in derogation from that grant by not carrying out repairs unless the lease imposed upon him some duty to repair. This was expressed in the leading case, *Duke of Westminster v*

⁷ *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1992] 2 EGLR 252, [1993] 46 EG 184, CA (Eng).

Guild,⁸ a Court of Appeal decision from England, where Slade LJ said: “The express covenant for quiet enjoyment and the implied obligation against derogation from grant cannot in our opinion be invoked so as to impose on landlords positive obligation to perform acts of repair which they would not otherwise be under any obligation to perform.” Burrell J was aware of this; indeed he quoted another part of Slade LJ’s judgment to the effect that omissions by the landlord are capable of constituting a breach of the covenant of quiet enjoyment only if they are under a duty to do something. How then did he manage to find that the landlord’s failure to act was a derogation from grant and arguably also a disturbance of quiet enjoyment?

Burrell J found that there was an omission by the landlord in failing to investigate the tenant’s complaints and, further or alternatively, in failing to repair the defects. This rendered the premises substantially less fit for the purpose for which they were let and constituted a breach of the implied covenant not to derogate from grant. It was also, he held, arguably a breach of the covenant for quiet enjoyment because by his omissions the landlord caused disturbance to the tenant’s full enjoyment of the premises.

The weakness in this reasoning is that there could have been an “omission” only if there was a legal duty. What was that duty? This was a duty to investigate and repair, according to the judge. And where was that duty to be found? It was to be found in the implied covenants, according to the judge. But in order for those covenants to apply there has first to be a duty to do something, as Slade LJ made clear. There appears to be a link missing from the reasoning.

The missing link is the source of the duty to investigate and repair. The duty of which Slade LJ spoke was a legal one, in other words one which arises from the terms of the lease. The duty to respond and to investigate declared by the judge was not to be found in those terms: it was rather a moral obligation arising in common courtesy to respond to the tenant’s pleas for assistance. The judge seems to have been so irritated by the obdurate attitude of the landlord that he promoted that moral obligation into a breach of legal duty and thence into a breach of the implied covenants. In the result he imposed upon the landlord a positive obligation to perform acts of repair which the landlord would not otherwise have been under an obligation to perform – precisely the function which Slade LJ said the implied covenants were not designed to achieve.

One can readily see why the implied covenants for quiet enjoyment and against derogation from grant are not to be extended into the field of repairs. If there are repairing duties upon the landlord derived from the lease, the

⁸ [1985] QB 688.

cause of action is for breach of those duties, not of the implied covenants. If there are no such repairing duties, interpreting the implied covenants so as to impose obligations to repair is to rewrite the contract between the parties. This is what Burrell J appears to have done in this instance.

The judge's approach is either a bold initiative which provides a foundation for reform of decades-long deficiencies in the law of landlord or tenant or it is a well-intentioned heresy. One would like to think that it is the former, but one fears that it is the latter.

An attempt to employ the implied covenants as obligations to repair in disguise was rejected by the House of Lords in *Southwark London Borough Council v Mills*,⁹ a decision which was apparently not brought to the attention of Burrell J. There the approach of the Court of Appeal in *Duke of Westminster v Guild* was specifically approved: any duty upon the landlord to repair must be found in terms other than the implied covenants; the courts must not use the implied covenants as a medium for reform of the law of repairs. Their lordships also emphasised that quiet enjoyment did not mean fit for purpose and that the implied covenants are prospective in nature so that they cannot apply to problems existing at the time of letting.

The irony is that Burrell J's attempt to fit the law to justice was probably unnecessary. Early in the judgment he mentions in passing that the premises were let furnished. One of the exceptions to the rule that there is no implied warranty of habitability at the commencement of the lease is where the premises are furnished when let. Signs of dampness in the landing floor had been noticed by the tenant from the beginning of his tenancy and the judge found that the leakage pre-dated the lease. So it seems that the premises were not really fit from the outset. Indeed the judge alludes at one point to the landlord's obligation to provide premises in a habitable condition and at another to the premises being rendered less fit for the purpose for which they were let. There was therefore no need to resort to the implied covenants of quiet enjoyment and non-derogation from grant.

So it would have been better had this decision been made on the point of breach of the warranty of habitability and fitness for purpose and not about repairs, or derogation from grant or quiet enjoyment. Orthodoxy would thus have been restored and reform left to the legislators.

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⁹ [2001] 1 AC 1.

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