

THE ROYAL COURT OF THE ISLAND OF JERSEY

19th June, 1991.

Before: Commissioner F. C. Hamon
Jurat D. E. Le Boutillier
Jurat J. J. Orchard

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BETWEEN DAVID MALLET LE CORNU
AND PLAINTIFFS
JOHN EDWARD LE CORNU
AND C.I. HEAT PUMP BUREAU LIMITED FIRST DEFENDANT
AND MICHAEL GORDON GLOVER SECOND DEFENDANTS
AND MICHAEL BLACK

Advocate R. A. Falle for Plaintiffs
Advocate P. C. Sinel for Defendants

The Plaintiffs in this case own a substantial, if somewhat ageing, property, No. 26 Great Union Road. It comprises a house divided by a passageway into two shops with two flats above, a cottage at the rear and what is euphemistically called "a garden". The first defendant is a company which holds the whole of the property on lease from the 25th December, 1982 to the 24th December, 1991, (that is, a "paper" lease).

The second defendants are jointly referred to as the Guarantors in an Order of Justice which, by reason of alleged breaches of covenant requests this Court to cancel the lease and order the first defendant to give up vacant possession to the plaintiffs; the Court is also asked to condemn the so-called guarantors (we have to examine their standing in this judgment) jointly and severally with the company to pay damages for breach of contract to the plaintiffs for the alleged breaches of contract.

The defendants deny the allegations of breach, put the initial obligation to put the property into a state of repair (and the consequences for not so doing) upon the plaintiffs and counterclaim in damages both specific (because of the loss of a tenant) and general.

Let us immediately say that the prayer of the Order of Justice goes too far in one particular regard. This Court has no power to order possession. It may cancel a lease but delay is within the jurisdiction of the Petty Debts Court. That Court has sole jurisdiction to determine delay under the Loi (1946) concernant l'expulsion des Locataires Réfractaires (as amended in 1948).

There is one other preliminary matter of inexactitude. It may well be in order to action the principal debtor (if debt is established) together with the guarantors. What the Court cannot do is to make an order in the terms requested in the prayer. It is now too well established in our law that the remedies against the first defendants must be exhausted before a claim can be made against the second defendants. There is case law on the point - it was not cited to us and we have not researched it - but both counsel agreed that C. S. Le Gros in his *Droit Coutumier de Jersey* page 218 "De la caution" well encapsulates the rule when he says: "Dans le cas de la caution conventionnelle, les biens du principal obligé doivent être discutés avant ceux de la caution". The situation would not apply if the first defendants were insolvent. We heard no evidence in this regard and the matter is not pleaded. However Mr. Falle argues in the plaintiffs' reply that the terms of clause 22 of the lease waive this common law right. We shall deal with this argument later.

Without dealing at this time with the law that was supplied to us by counsel (and apart from the short extract from Le Gros and the helpful case of *Hotel Beau Rivage Company Limited v. Careves Investments Limited* Unreported January 1984 both counsel relied entirely on English law) we must deal with one important matter.

At this point we must say that the court, not without some hesitation, has had to carry out its own researches. That there is precedent for what must be an unusual (and perhaps unsatisfactory) course of action goes without saying.

In the Viscount v. Woodman & Arthurs (1972 - 1973) Jersey Judgments 2085 at page 2092 the Court said this: "As is regrettably becoming more frequently the case, it is left for the Court to discover for itself, unaided, the legal grounds for its decision". This case obviously does not fall into that extreme category.

It does, however, fall into a similar format as the case of Donnelly v. Randalls Vautier Limited unreported 19th April, 1991, where the learned Deputy Bailiff said (at page 9): "The Court, although it is entitled to rely heavily upon English authorities, particularly in this kind of case, must always have regard, first and foremost, to Jersey law and it is disappointing to note that neither counsel has deemed it appropriate to cite Jersey authority".

We can see that there may be grave pitfalls in a Court carrying out its own researches. The whole purpose of an adversarial system is that the Court can weigh in the balance opposing views of fact and law and having heard each side reach a considered opinion. The criticism may be levied (and it would be a

perfectly fair criticism) that if the Court is not satisfied that it has all the law available for it to make a decision it should suggest a course of action to counsel and if necessary adjourn until the proper researches have been made and the legal arguments can be put. We do not say this in criticism of what may or may not have been done by this Court in the past. We merely say that there is a perfectly acceptable alternative to the Court carrying out its own researches (if the circumstances are right) which was apparent to us at trial. No two circumstances may be the same in this matter.

This particular case has been beleaguered by delay. It was originally set down for three days in February of this year. There were several adjournments during the three days as it became apparent that discovery of documents had been hopelessly inadequate (and we would recommend to counsel not only the Practice Direction of the 21st June, 1990 (90/2) but also the Judicial Greffier's guidelines that accompany it) but also the length of trial had been quite seriously miscalculated. It is only now that the adjourned case could be heard four months later and where we had to take up again the continued cross-examination of the second defendants. Matters did not end there. Final addresses had to be postponed when it was discovered, during the first day of the resumed hearing, that unbeknown to the plaintiffs the defendant had been carrying out extensive remedial and decorative works to their property. An

adjournment was asked for and granted. Consequently a day was lost and the case was only concluded at 5.00 p.m on the third day. A further adjournment could have been many months in the future. In the circumstances we feel prepared to deal with a part of law that was not argued before us and which concerns the exercise of our discretion on the cancellation of a lease for breach of condition.

Although not cited to us there was, in the bundle of authorities, the Fort Regent Development Committee v. The Regency Suite Discotheque and Restaurant Limited (unreported 4th December, 1990). We use much of what was said in that case in aid for this present statement of law. At page 3 of that judgment was said this:

"Both Mr. Pallot and Mr. Fielding have given much assistance to this Court in setting out the legal authorities upon which we can rely. On one matter both parties were agreed. If the Court is to cancel (particularly a long term lease which is as the one before us) then there must be more than a technical breach. The substance of the breach must prejudice the lessor in a real way, 'La Cour n'est pas tenue de prononcer immédiatement la résiliation; elle peut accorder au défendeur un délai pour s'exécuter, et apprécier si l'inexécution est suffisamment grave pour entraîner la résolution, ou si elle ne justifie que des dommages intérêts' (Hamon v. Fisher's Grocery Stores (1962) 253 Ex 415 p 3-4)."

As the Court said in Bailhache (née Hubert) v. Williams (néé Lewis) et autre (1968 JJ 1067 at page 1079)

"Circumstances can well be such that it is just and equitable to order the cancellation of the lease, but it is unjust and inequitable where the effect of making such an order is to impose an excessive penalty".

The obligations of the tenant arise, according to Pothier (Traité du contrat de Louage: Siffrein edition) at page 354 in three ways:

"Les engagements du conducteur, dans le contrat de louage, naissent aussi ou de la nature du contrat, ou de la bonne foi qui doit y régler, ou des clauses particulières qui y ont été opposées."

A tenant who misuses a property cannot claim the right to continue to enjoy its use. As Pothier says: (paragraph 323 at page 447):

"Le locataire qui ne remplit pas ses obligations en n'usait pas, comme il le doit, de la maison qui lui a été louée, ne doit pas, en vertu de quelque clause que ce soit, demander que le propriétaire lui continue la jouissance dont il mésuse."

There must, however, as we have said, be good reason to cancel a lease. Dalloz said at paragraph 300 of his Répertoire de législation de Doctrine et de Jurisprudence (Paris 1853): "Du reste, l'on comprend que la résiliation ne peut être prononcée que dans les cas graves".

We must consider, therefore, whether the breaches of covenant are such as to warrant, in our discretion, cancellation but also to bear in mind the defence that has been pleaded that there was a schedule of dilapidations prepared to which the lease is subject and which placed the plaintiffs under an obligation to carry out works which were a prerequisite to any works being carried out on the property by the defendant.

Let us for a moment examine the facts as they have been presented to us.

For many years the property was owned by the father of the two defendants who by his Will of Realty registered on the 21st June, 1947 gave the reversionary ownership to his two sons (the plaintiffs) and the life interest to his widow who has died since the inception of the present lease.

For many years the tenant of 26 Great Union Road was an English Company, The National Cash Register Company Limited (NCR). Their final paper lease came into effect on the 1st November, 1973 and was to terminate on the 1st November, 1982. The first plaintiff, Mr. David Le Cornu, told us that NCR had been excellent tenants albeit not very efficient at paying rent. Mr. Le Cornu told us that he was amazed at how much money they had spent on the property. The 1973 lease, on any reading, contains obligations

which if carried out to the letter would have put the property into a pristine condition at the commencement of any new tenancy provided that the property was regularly repaired and decorated. Attached to the lease and incorporated into it by way of a schedule is a specification of redecorations and remedial works which the lessee company is to undertake "as soon as possible after the commencement of the lease" and at its entire expense.

In that part of the schedule headed preliminary items we read under the heading "Description of the work" -

"The work entails the complete internal and external redecoration of the cottage property together with remedial work to floors, walls, ceilings, roofs, etc., and sundry redecorations and remedial works to the remainder of the property".

In relation to the cottage the lessee company is obliged :

"To cut out cracks and make good render to walls and stacks, wire brush and apply two coats of sandtex as described."

Because it is relevant to what we have to decide we can say at this stage that one site inspection revealed a particularly long and deep crack in the cottage wall caused by root growth. The crack actually penetrates the cottage wall. Mr. John Lyon, a corporate quantity building and civil engineering surveyor, told us that this vicious crack, which had at some time been obscured by ivy, had been disguised prior to 1982. Weather action would have caused it to

deteriorate. Of one thing this Court can be certain on hearing the evidence and viewing the property. The crack in the wall pre-dated the lease currently under dispute. There are other similar factors. We shall deal with them in their turn.

It is clear from their evidence that neither of the plaintiffs was involved in any regular visits of the property to determine its condition. Even when dealing with NCR Mr. David Le Cornu told us that it "was not his function to visit the property" and he only gathered such impressions as he had from spasmodic visits. Mr. John Le Cornu shared his brother's apparent lack of interest in the property although he had called at the property on various occasions while NCR were tenants. The clear impression that we formed was that the plaintiffs were content to rely on property agents to manage the property and on lawyers to negotiate on their behalf.

Certainly NCR did not leave the property with the entire blessing of the plaintiffs. There was some acrimonious correspondence between Mr. D. K. Letto the Managing Director of William A. Bull & Co. and NCR over the fact that the property was still tenanted. Indeed (in a bundle of documents which only came to us during trial as their existence was revealed) Mr. Letto writing to the lawyers acting for NCR on the 4th May, 1983 said this:

From the outset it was made clear that NCR was responsible for giving up vacant possession of the whole property under the terms of the lease"

and later in the same letter he says:

NCR were under a clear duty under the lease to give up the premises unoccupied at the expiration of the lease. This they clearly failed to do and should be liable for damages for that failure".

It will be noted that this correspondence was entered into three months after the defendants had entered into possession albeit five months before the lease was actually signed.

This correspondence was still proceeding between Mr. John Le Cornu and his legal adviser in February 1985.

Be that as it may, on the 9th November, 1982, Mr. Letto had met with a Mr. Joyce the Building Inspector of NCR and accepted the property back in a good state of repair.

An advertisement was prepared. The document that we saw has a photograph of the front of the building (we were given the coloured photograph from which it was printed) and over the somewhat puzzling heading "SALE" appears these words" "a leasehold shop/workshop with living accommodation. A nine year lease is offered at £5,100 per annum".

This offer was seen by Mr. Maurice Glover a director of the first defendant who was, at the time, actively seeking larger premises for the company's expanding business. Mr. Glover knew Mr. Letto and telephoned him.

He inspected the property with Mr. Letto on the 8th November, 1982. It was an inspection from the outside. He spoke with his fellow director. Mr. Black visited the property on the 29th November, 1982. The lease was entered into but not signed. A further meeting was held on the 19th January, 1983. Mr. Letto particularly remembered the day because the intense cold of the day fixed it in his memory.

We now come to a complete conflict of evidence which goes to the very root of the argument.

Mr. Black told us that at the meeting with Mr. Letto certain defects were discussed. Mr. Letto made notes of the defects which were particularly obvious and, according to Mr. Black, was told that they would be distributed as a permanent record. Mr. Black told us that thereafter he phoned William A. Bull & Co. twice a week after the defendant had moved in asking for this schedule. He even called in and asked to see Mr. Letto. He did not speak or see him until a crucial event occurred in the Autumn of 1986.

Mr. Black told us that the defendant had done virtually nothing to the property for the reason that to redecorate would have covered a number of items pointed out to Mr. Letto. Nothing substantial could be done until the schedule was prepared.

Mr. Black recalled many of the defects that he had pointed out to Mr. Letto. By way of example at the rear of the premises and on the left hand side facing the cottage there was cracking in the wall so that water had penetrated the interior which had led to wet rot to the window frame. The repair had been carried out by means of a piece of plywood disguising the rotten timber underneath. At the inspection Mr. Black recalled Mr. Glover putting a knife blade into the timber to show that it was rotten. These several defects (which included the fact that the upstairs floors had not been decorated for many years) were, according to the evidence of Mr. Black, noted down by Mr. Letto so that they would not form part of any adverse claim at any later time. Mr. Black told us that Mr. Letto wrote them down and said that he would produce a schedule to show existing defects. Mr. Black admitted under cross-examination that he had not sent a single letter to Mr. Letto - his feelings were that he had believed the agents to be honourable, that the defendant had trusted them and that that trust had been betrayed. He had himself made some rough notes but these had been mislaid.

Mr. Glover also remembered the meeting with his fellow director and with Mr. Letto. He agreed that Mr. Letto had said that he would make a list but had never supplied it. Mr. Glover recalled that there was water dripping in that part of the property tenanted by Mr. Allaire. Mr. Letto had said that this and - for example - the indents in the floor were minor items and that one could allow for wear and tear (this despite the fact that, as we shall see, fair wear and tear were expressly excluded from the lease). Mr. Glover told us that Mr. Letto made a list and said that he would come back with it by way of schedule and either NCR would pay or the landlords, who were a reasonable Jersey family, would take matters into consideration when the defendant came to re-decorate.

Mr. Letto's evidence could not be more at variance. He too recalled the meeting. He noted one or two matters (for example he recalled the fact that one or two of the tiles in the right hand shop (opposite the newsagents) were pitted). The tenants felt that something must be done. Mr. Letto told us "that we noted one or two things that had been brought to our attention and we left. Nothing was said that was of any importance and there was no conception of any legal consequences attaching to this meeting".

Whilst he agreed that there had been some telephone calls to his office he was adamant that the suggestion made by Mr. Black that he had made some 35 calls was quite untrue.

He could not accurately recall making a note but might well have done so to cover the very minor matters that were raised. In his view the whole of the exterior of 26 Great Union Road was left in exemplary condition by NCR.

We must examine such documentary evidence as is available.

On the 1st December, 1982 Mr. Letto wrote to Mr. Glover enclosing the original lease between NCR and the plaintiffs. Certain deletions had been made. The letter states: "All the other clauses are those that the landlord proposes to carry forward".

We must presume (the documentation presented to us is not arranged in any other manner than one that is confusing) that the plaintiffs' lawyers sent a lease to the defendant. We have it in our bundle but not the letter that accompanied it.

On the 18th January the defendant sent a letter containing six suggested amendments to the lease. That letter includes the words "M. G. Glover is NOT the beneficial owner of C. I. Heat Pump Bureau Limited". By letter dated the 31st January some, but not all, of these amendments were agreed. In particular the suggestion that "fair wear and tear excepted" be added to the paragraph dealing with the condition of the property at the termination of the lease is met with these words: "The proposed alteration to the fourteenth paragraph will not be acceptable because in a full repairing lease it would, of course, totally negate the full repairing covenants."

The penultimate paragraph of the letter reads as follows:

"So far as the twenty-second paragraph is concerned, as is normal, a director's guarantee is required and we are not quite clear whether Mr. Glover is, in fact, not the beneficial owner, a director, or whether some other person should stand as a director/guarantor. Perhaps you would clarify this point".

The letter on our file is marked, in Mr. Letto's handwriting "Agreed by Mr. Black 10/2/83". On the 25th February, 1983 the amended lease signed by the plaintiffs was sent to Mr. Glover at the company's address at Great Union Road. It contains an attestation clause for Mr. Glover to sign as guarantor (paragraph 22 remains unaltered). On the 8th April a reminder was sent and a letter sent on the 5th September, 1983 threatens eviction.

There is, however, an explanatory note on the file copy of that letter written by Mr. Letto. It reads:

"Phone call. Waiting for you to prepare an up-to-date last page of lease - your responsibility!!"

On the 9th September the amended page was sent by Mr. Letto.

Paragraph 22 now reads:

"It is further agreed that Messrs. Maurice Gordon Glover and Michael Black as directors of C.I. Heat Pump Bureau Limited, hereby personally guarantee the rental payments and all of the covenants of the Lessee Company herein contained without reservation of any kind."

This time, however, the attestation clause has been omitted.

We can most profitably deal with this clause and its effect at this stage of our judgment before we turn to consider the later events and their judicial consequences.

There are certain matters which are clear. The second defendants well understood the implication of a guarantee.

Mr. Glover told Mr. Falle in cross-examination that he had personally guaranteed the lease although he later said that he had not signed the guarantee and assumed that it would come with the schedule of conditions.

We cannot accept that contention. The hand written note on the letter of the 5th September states quite clearly that the second defendants are waiting for the existing guarantee clause which mentions only Mr. Glover to be amended to include both Mr. Glover and Mr. Black. It was so amended. The attestation clause was, by clear mistake, omitted. The parties signed.

As Lord Denning MR said in *Amalgamated Investment & Property Co. Ltd. (In Liquidation) v. Texas Commerce International Bank Ltd.* (1981) 3 All ER 577 at 584 "All these (i.e. maxims on estoppel) can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands".

It would, in our view, be unconscionable for the defendants to say that they did not intend to guarantee the lease personally. It is perhaps fortunate that they were the sole directors of the company and signed on behalf of the company under the common seal. It is, in our view, beyond understanding that counsel for the plaintiffs did not seek for discovery of the relevant minute of the company to ascertain the resolution that preceded the sealing (and signature) of the lease on the 20th September, 1983.

Mr. Falle goes further. The pleadings state that the wording of the guarantee clause avoids the droit de discussion. We are not prepared to say that the words "without reservation of any kind" avoid the general common law rule without far more detailed argument. It might be argued that such a contention is against public policy; it might contrarily be argued that "la convention fait la loi des parties". On this point the court will not carry out its own researches and our judgment is simply that the lease (despite the inelegance of its drafting and the mistaken omission of an attestation clause) constitutes a guarantee validly enforceable against the second defendants.

For four years virtually nothing was done to the property until Mr. John Le Cornu attended at the plaintiffs' premises. He was dealing with the defendant on a business matter. The company had previously carried out work at his home. Surprisingly, neither Mr. Black nor Mr. Glover knew that he was one of the company's two landlords. Mr. Black told us that when he realised that he was at last confronting one of his landlords he drew his attention to certain items which included the fact that a ceiling had come down in the small showroom. (This, said Mr. Black, was one of the items pointed out to Mr. Letto but which had since become progressively worse).

It appears from Mr. Black's account that Mr. John Le Cornu was somewhat alarmed by what he saw. Further discussion ensued. Mr. Le Cornu wisely kept his own counsel, his comment, according to Mr. Black, being "I note what you say".

Matters thereafter progressed. The elusive Mr. Letto activated now by Mr. Le Cornu appeared from his apparent hibernation. Mr. John Lyon was commissioned to prepare a survey. That survey with the photographs attached to it shows a property in a perilous state of repair. Mr. Black was unrepentant. His letter of the 4th December, 1986 is almost congratulatory. We set it out in full"

W. Bull & Company,
St. Ives,
Colomberie Parade,
St. Helier.

21158/31663.
MB/PDQ/Sp.

4th December 1986.

Dear Mr. Letto,

Thank you for your letter of the 14th November 1986, which has been amongst others awaiting my return from holiday.

As you are aware, we have been waiting for this list of dilapidations since we all went around the building at the end of December 1982, although we think that several more items could have been added. Nevertheless this does seem to be the list for which we have been pressing you for over a long period of time. In fact from the diary, some 35 telephone calls have been made to your office to expedite this list.

You will recall being told that when Mr. J. Le Cornu visited this office some months ago to obtain some fire spares, specifically the subject of the smaller showroom was raised - roof and ceiling - together with other unremedied defects as per the list, and he told us that the entire list had been shown to his advocate with a view to action being taken against the former tenants, N.C.R., who had been on a fully repairing(sic) lease and it was advised that such legal action would not be productive.

We would draw your attention to the fact that not only those dilapidations you list, plus others agreed should have been corrected prior to our moving in, but we should have had totally vacant premises. For this was the published and advertised state of the property, and there was no reduction made in the rent advertised to take this or any other factors as listed into account. We signed the lease in good faith and with the knowledge that any defects that arose after our tenure commenced were our responsibility, but in no way are we responsible for those prior.

Just for the record, we are unable to sub-let the small showroom as the ceiling is down, as predicted in in(sic) the begining(sic), and in consequence have lost 6 months rent.

Action to deal with defects is now imperative, and we look forward to your dealing with them after all this time.

Yours sincerely,

M. Black, Director.
p.p. C.I. Heat Pump Bureau Ltd.

"

A schedule of the 26th July and the 12th August was updated on the 15th January, 1991.

It covers a massive range of remedial and decorative work. Can this be the "list" that Mr. Letto noted down in 1982? We have no doubt that it is not. We cannot conceive that any sensible person could assume that it was. We must, however, consider if there was a document of some kind. Mr. Letto, under cross-examination said that he could not now recall with any certainty that there was such a document.

There clearly was some document in existence at some time. On the 13th May, 1987 Mr. Letto wrote to his lawyer in these terms"

"Subsequently, once C.I. Heat Pump Bureau were in occupation Mr. Maurice Glover invited me to inspect the building with him and identified a number of defects that he considered to have been inadequately dealt with by N.C.R. We were unable to progress with Le Masurier, Giffard & Poch and it was agreed that these minor items would simply be noted between Mr. Glover and ourselves so that at the enunciation of the lease their presence at the commencement would have been noted. A couple of years passed before there was a need to refer back to this list and, for whatever reason, by that time we were unable to find a copy of same. What is obvious, though, is that this schedule condition would not have affected the bulk of the items that we noted when we inspected the building on behalf of Mr. Le Cornu a few months ago."

then goes on to give examples of how the property has deteriorated.

We find the evidence of Mr. Letto surprising. He had prepared some sort of list. We accept that he did not consider it of any great moment. Mr. Sinel accused him of incompetence but we can see no reason why he would have behaved as he did unless the list were, indeed of small moment in relation to the overall obligations of the lessee.

One must also question what action the defendant took during its initial four year tenure of the property. We appreciate that this was a small business and that, as Mr. Black told us, he did not employ a secretary and typed his own letters but we do find it remarkable that he did not see fit to commit himself to one single letter while he allowed the property to deteriorate around him.

The obligations of the tenant (notwithstanding the defence raised) were exacting.

We should say in passing that we find the defendant's letter of the 16th April, 1987 to the plaintiffs' legal adviser to be evasive.

Two passages occur to us :

"Following a discussion with Mr. Le Cornu to see whether he had a copy of the list we compiled it was suggested to Mr. Letto that if he visited the property with our help pointing out those defects that existed in 1982 his memory might be jogged."

and the second passage :

"As we said, Mr. Letto agreed to the suggestion that he visit the premises so that with our help he could at long last finalise the list of defects that existed prior to our taking possession. We had naturally our own rough list compiled at the time of the original meeting and thus we were able to brief Mr. Letto when he visited us last September regarding those exact defects."

It must also be recalled that the original meeting with Mr. Letto took place some four weeks after the defendant had taken possession of the property and the meeting only lasted, according to his evidence, for half an hour.

In the letter of the 16th April the defendant mentions missing coping under the chimney stack. Mr. Letto says that this was the first time that he had heard of the problem of coping around the chimney. He could now remember the slight indentations in the floor, a slight area of "blowing" in the ceiling to the small shop, a small area around the right hand window that required perhaps sixty pence of timber and some slight rising damp around the left hand side door of the showroom.

Although Mr. Letto described his letter of the 13th May, 1987 as a little clumsy in its phraseology, it contains this sentence. "We were unable to progress with Le Masurier, Giffard & Poch" (NCR's lawyers)"and it was agreed that these minor items would simply be noted between Mr. Glover and ourselves so that at the termination of the lease their presence at the commencement would have been noted".

We do not find that Mr. Letto in 1986 was preparing the original list of dilapidations when he had a report on the property prepared. Mr. Letto went to the property when approached by an agitated Mr. John Le Cornu disturbed by what he had seen and heard in the defendant's showroom.

What then of the exacting obligations of the lessee:-

Clause 3 of the lease binds the first defendant to keep the property both internally and externally in good repair and condition.

Clause 4 of the lease binds the first defendant to paint the exterior of the property during the third, sixth and last year of the lease.

Clause 5 of the lease binds the first defendant to paint the interior of the property during the fifth year of the lease.

Clauses 14 and 20 gives the plaintiffs rights to enforce the relevant clauses of the lease.

These are old premises. At the beginning of the judgment we described them as "somewhat ageing".

What are the obligations of a lessee under such a covenant. Counsel referred us to Hotel Beau Rivage Company Limited v. Careves Investments Limited unreported January 1984.

The present clause 3 reads :-

"3. The lessee company will at all times during the said lease keep the whole of the demised premises both internally and externally including the main walls, main timbers, structure and roof and the sanitary and water pipes and apparatus and all landlord's fixtures and fittings therein in good and substantial repair and condition and keep the windows of the demises premises clean and in good condition and replace all cracked or broken glass."

In the Hotel Beau Rivage case the Court said at page 3 :

"We take the matter of repairs first. Mr. Clyde Smith submitted that we should distinguish between the obligations which were two fold. The first which existed during the tenure of the lease was to keep the premises in good and substantial repair and the other, which came into force at its expiration, at which time, but not before, Mr. Reynold's 1971 Schedule would become relevant, dealt with the condition of the properties at that time. The purpose of the second covenant, he said, was to ensure that, at the end of the leases the Plaintiffs did not get back properties that were substantially different from what they had let at the beginning of the leases. In other words on the authority of Lurcott -v- Wakeley and others 1911 - 1913 All England Reports Reprint at page 41, the tenant had to keep an old house in order and not a new one. As Fletcher Moulton LJ said on page 45 of that case.

"What is the meaning of keeping old premises in good condition? I can see no difficulty in deciding the meaning of that. It means that considering that they are old premises they must be in good condition as such premises. Just let me take a parallel case. Supposing it is a case of a ship. A man who covenants to keep the Mauretania in good condition must, of course, keep her in a perfection of condition by reason of the fact that she is a vessel of her class and new. Supposing a man covenants for a year to keep a tramp that has been at sea for fifteen years in good condition, he must do it just as much as the man who covenanted to keep the Mauretania in good condition. But the keeping in good condition in the second case will mean something very different from what it did in the former case; it will be in good condition for a vessel that is of that age and nature. I desire to state that for my own part I feel no reluctance to give the full effect to this consideration in interpreting these covenants. I think we have to consider what they oblige the tenant to do in the case of an old building. I wish to say that, while the age and the nature of the building can qualify the meaning of the covenant, they never relieve the tenant from his obligation. If he chooses to covenant to keep in good condition an old house, he must do it whatever be the means necessary for him to employ in so doing. He can never say: "The house was old, so old that it relieved me from my covenant to keep in in(sic) good condition." If it was so old that to keep it in good condition would require replacement of part after part until the whole was replaced, then by making a covenant that he would do it he took the burden of doing it on his own back. I have looked at the cases, and with the exception of one to which I shall presently refer and which I think can be explained on other grounds, I find no case which suggests that the age and nature of a structure relieves the tenant from the duty of maintaining it if he has undertaken to maintain it."

Moreover, the age character and locality of the premises should be taken into account. See Proudfoot -v- Heart 1886 - 1890 All England Reports Reprint at page 782.

On the question of "repair" both counsel referred us to Halsbury's laws of England 4th Edition Volume 27 paragraphs 285 and 286. Certain passages are of particular interest:-

"Where the demised building is erected on inherently defective foundations the tenant is not liable to substitute new foundations."

"There is no rule in English law by which a tenant is excused from liability under his covenant to repair merely because the work results from an inherent defect ... On the other hand although under his covenant to repair the tenant is not bound to improve the building so as to give the landlord something different from what he demised, he must do such repairs as are suitable for the building having regard to its age and class at the time of the demise and he must replace any parts, including the floor or roof, or external walls, which become defective or dangerous owing to the lapse of time or the effect of the elements."

"If he has expressly covenanted to put a house into tenantable repair and to keep it in such repair and it is not tenantable repair at the commencement of the tenancy, the tenant must do the necessary repairs notwithstanding that the building is thereby put in a better condition than when the landlord let it."

"Good tenantable repair is such a repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant who would be likely to take it, accordingly the tenant must do such repairs as are necessary to preserve the premises and to make them suitable for a new tenant."

Perhaps the most helpful of the passages from Halsbury were to be found in paragraph 284 where the learned authors state something which is probably axiomatic.

"Where the premises were old at the time of the demise, the tenant must keep and deliver them up in a fit state of repair as old premises. He is under no duty under his covenant to bring the premises up to date, but the fact that the premises happen to be old in no way relieve him from the burden of his covenant."

Mr. Sinel also drew our attention to the case of Collins v. Flynn (1963) 2 All ER 1068 at page 1074 where Sir Brett Cloutman V.C., Q.C. said this "I feel that I can give a separate meaning to the word "renew" only by holding that it includes rebuilding the whole property demised; and I think that if this were intended much stronger and more specific words would have to be used. However, this is of no importance, since I regard the word "repair" as apt to cover the renewal of a part of the premises, and, therefore, so far as the words of the covenant are concerned I regard the obligation of the defendant lessee as being similar to that in the case cited where only the word "repair" is used."

So, having perforce to turn our backs on Pothier and Dalloz and the rich veins of our customary law we are able to reach a conclusion. But before so doing we have to recall that virtually at the eleventh hour, the defendant disclosed that it had commenced work on the property using Mr. Lyon's schedule of dilapidations as a guide.

For these reasons we are not minded to order that the lease should be cancelled. We would, however, say this. We can see some reasoning in the behaviour of the defendant. However, Mr. Black was not illiterate and could so easily have saved himself from the burden of litigation by writing a letter to Mr. Letto. We cannot believe that, even if the defendant regarded the initial report from Mr. Letto as being of crucial importance (and this feeling was never communicated either to Mr. Letto or to the landlords) it took any reasonable steps to make its feelings properly known. To sit in a property for four years (and we appreciate that certain work was done) while the property deteriorated literally around its corporate ears is not a reasonable action. Nor can we avoid the fact that the defendant entered into a fully repairing lease and then unilaterally declined to carry out those covenants. If one is to protest under these circumstances then it is, in our view, incumbent on the defendant to make its protest known. This could so easily have been done at the time that the signed lease was returned to the lessors.

Some common sense will have to be exercised on both sides. The words used in clause 5 ("the interior painting clause") are "usually or requiring to be so painted". We would not feel that the upper rooms of Mrs. Fuccio's flat fall into that category. They have certainly not been decorated for very many years. We do not conceive that NCR caused them to be decorated albeit that company was covered by the same covenant.

We do not find for the defendant on its counterclaim. It had obligations under the covenant which for reasons real or imaginary it failed to fulfill. There is little purpose in having a sense of grievance without disclosing it to the other side. That the defendant, in our judgment, failed to do. We find, on a matter of fact, that those small points raised in the half hour meeting that took place between Mr. Glover and Mr. Black one month after the first defendant had moved into the premises did not justify the almost complete failure of the first defendant to carry out its obligations.

The lease falls in on the 25th December. If the work is not carried out by the 25th October to the satisfaction of the plaintiffs we will be prepared to consider a further application to cancel the lease. It seems to us virtually impossible to order specific items to be carried out. If the work is not completed to the satisfaction of the plaintiffs then if a further application for cancellation is made we will consider, in the light of this judgment whether that which has not been completed is reasonable. We hope that counsel will assist their clients in resolving any problems.

Authorities

- Hotel Beau Rivage Limited -v- Careves (10th January, 1984)
Jersey Unreported.
- 4 Halsbury Vol. 27, paras. 284-300.
- Brew Brothers -v- Snax (1970) 1QB 612.
- Collins -v- Flynn (1963) 2 All ER 1068.
- Sotheby -v- Grundy (1947) 2 All ER 761.
- 4 Halsbury Vol. 20, paras. 101-183.
- Emmett on Title (19th Ed'n) Vol. 2, paras. 26.174-26.189.
- Le Gros: "Droit Coutûmier de Jersey" pp. 218-221: "De la
caution".
- Amalgamated Investments and Property Company Limited (in
liquidation) -v- Texas Commerce International Bank Limited
(1981) 3 All ER.
- Treitel: The Law of Contract (6th Ed'n): p.94.
- Viscount -v- Woodman & Arthurs (1972) JJ 2085.
- Donnelly -v- Randalls Vautier Limited (19th April, 1991) Jersey
Unreported.
- Fort Regent Development Committee -v- The Regency Suite
Discothèque Limited (4th December, 1990) Jersey Unreported.
- Bailhache (née Hubert) -v- Williams (née Lewis) et autre (1968)
JJ 1067.
- Pothier: "Traité du contrat de louage" para. 323: p.447.
- Dalloz: "Répertoire de Législation de Doctrine et de
Jurisprudence" (1853) para. 300.