Jervis v. Harris

[1996] 1 E.G.L.R. 78

Sir Stephen Brown P., Millett and Otton L.JJ.

Court of Appeal

C–148 The plaintiff landlord sought to enforce certain covenants contained in an underlease dated to July 11, 1947 for a term of 999 years, less 10 days, from December 24, 1899. The underlease, granted at a premium of £26,000 and a rent of £1,000 per annum, was originally granted in respect of the entire works at the site in question. The defendant had become the tenant of part of the site at an apportioned rent of £80 per annum. The benefit of the term in respect of the remainder of the site, together with the leasehold reversion to the whole, was vested in the plaintiff. The head lease was granted on August 20, 1929 for a term of 999 years from December 24, 1899. By clause 2(10) of the underlease the landlord was authorised to enter the premises to view the state of repair and to give notice of any wants of repair. In default of the tenant remedying the same within three months, the landlord may undertake the work and recover the costs from the tenant. The tenant failed to comply with a notice served by the landlord requiring repairs to be carried out. The landlord intended to do the repairs and recover the costs from the tenant. The tenant refused to allow the landlord to enter and contended that the landlord first required leave of the court under section 1 of the Leasehold Property (Repairs) Act 1938 to enforce clause 2(10) and, further, that such a clause was a penalty. Clause 2(7) of the underlease provided as follows:

> " . . . the lessees will at all times during the said term maintain, repair, and keep in good tenantable repair and condition in all respects whatsoever the buildings which now are, or shall hereafter be, erected or standing upon the said premises and their respective appurtenances and will, when necessary, rebuild the said buildings, or any of them, so that they may be at all times during the said term of the clear letting value of £1,000 per annum."

HELD: (1) The tenant's liability to reimburse the landlord for its expenditure on repairs was not a liability in damages for breach of the repairing covenant nor was it a claim to compensation for breach of the tenant's repairing covenant.

(2) The landlord's claim sounds in debt and not damages. The decision in *Swallow Securities Ltd v. Brand* (1983) [Digest] is overruled.

(3) Clause 2(10) was not a penalty clause because it provided for the payment of a sum of money on the happening of a specified event other than a breach of a contractual duty owed by the party entitled to receive it.

(4) (*Obiter*) Clause 2(7) imposed two distinct obligations on the tenant, one to repair and one to rebuild. The concluding words of the clause qualified the second, or rebuilding, obligation and not the first or repairing obligation.

Text Cross Reference: 11–12.

Cross-reference to other digested cases.

The following digested cases were cited in this judgment:
Associated British Ports v. Bailey [1990] – considered. C–008

Elite Investments Ltd v. TI Bainbridge Silencers Ltd [1986] – considered. C–082
Hamilton v. Martell Securities Ltd [1984] – approved. C–120
Swallow Securities Ltd v. Brand [1981] – overruled. C–284

This decision has since been cited in the following digested cases:
Rainbow Estates Ltd v. Tokenhold Ltd [1998] – considered. C–239