All England Law Reports/1998/Volume 2 /Rainbow Estates Ltd v Tokenhold Ltd and another - [1998] 2 All ER 860

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CHANCERY DIVISION

LAWRENCE COLLINS QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

19, 20, 29, 30 JANUARY, 4 MARCH 1998

Landlord and tenant - Breach of covenant to repair - Specific performance - Jurisdiction to make order requiring tenant to repair - Circumstances in which order will be made.

The plaintiff was the freeholder of a listed building, which was occupied by the two defendants under leases expiring in 2004 granted by the former freeholder of the property. The defendants covenanted in the leases to keep and maintain the property in good and tenant-like repair throughout the term and to permit the landlord and its agents reasonable access to examine the condition of the premises. The defendants maintained, however, when the premises subsequently fell into disrepair, that the leases were subject to two agreements which had been entered into prior to the signing of the leases, under which repairs were to be the responsibility of the landlord and the cost of work undertaken by the tenants could be deducted from the rent, and, therefore, that no rent was due under the leases and that they had no repairing obligations. The plaintiff thereupon brought proceedings to recover arrears of rent and determine who was responsible for the repairs. The judge held that, on the assumption that the agreements and the leases were genuine documents, where there was a conflict between a lease and a prior agreement, the rights of the parties were governed by the lease and that in any event there was no credible evidence that the agreements and the leases were part of one transaction. He accordingly found that the tenants were responsible for repairs and were in arrears with their rents, and stood the matter over for further argument on the form of relief. At the resumed hearing the question arose whether the court had power to grant an order for specific performance of a tenant's repairing covenant.

Held - The court had power, in appropriate circumstances, to order specific performance of a tenant's repairing covenant, and there were no constraints of principle or binding authority against the availability of the remedy; and even if want of mutuality were a decisive factor, the availability of the remedy against the tenant would restore mutuality as against the landlord, and the problems of defining the work and the need for supervision could be overcome by ensuring that there was sufficient definition of what had to be done in order to comply with the order of the court. Subject to the overriding need to avoid injustice or oppression, specific performance would be granted where it was the appropriate remedy, and that would be particularly so in cases where there was substantial difficulty in the way of the landlord effecting repairs (eg he had no right of access to do so) and the condition of the premises was deteriorating. However, the court should exercise great caution in granting the remedy and should, in particular, ensure that it was not used to effectuate or encourage the mischief which the Leasehold Property (Repairs)

[1998] 2 All ER 860 at 861

Act 1938 was intended to remedy, namely that of speculators or unscrupulous landlords buying the reversion of a lease which had little value, and then harassing the tenant with schedules of dilapidations in order to put pressure on him. In the instant case, there was no adequate alternative remedy, since the leases contained no forfeiture clause or proviso for re-entry, or a term allowing the landlord to enter the premises to carry out the works himself and there was evidence of serious disrepair and deterioration of the property. Moreover,

the schedule of works to be carried out was sufficiently certain to be capable of enforcement. Accordingly, in those unusual circumstances, an order for specific performance was appropriate (see p 868 *f* to p 870 *h* and p 871 *h*, post).

Notes

For landlord's remedies for breach by the tenant of his repairing covenant, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 368-374.

For the Leasehold Property (Repairs) Act 1938, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 89.

Cases referred to in judgment

City of London v Nash (1747) 3 Atk 512, 26 ER 1095.

Co-op Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1997] 3 All ER 297, [1998] AC 1, [1997] 2 WLR 898, HL.

Gordon v Selico Ltd (1986) 18 HLR 219, CA.

Grist v Bailey [1966] 2 All ER 875, [1967] Ch 532, [1966] 3 WLR 618.

Henderson v Arthur [1907] 1 KB 10, CA.

Hill v Barclay (1810) 16 Ves 402, [1803-13] All ER Rep 379, 33 ER 1037, LC.

Jervis v Harris [1996] 1 All ER 303, [1996] Ch 195, [1996] 2 WLR 220, CA.

Jeune v Queens Cross Properties Ltd [1973] 3 All ER 97, [1974] Ch 97, [1973] 3 WLR 378.

Mosely v Virgin (1796) 3 Ves 184, 30 ER 959.

Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2) [1998] 1 All ER 305, [1997] 1 WLR 1627, HL.

Peninsular Maritime Ltd v Padseal Ltd [1981] 2 EGLR 43, CA.

Posner v Scott-Lewis [1986] 3 All ER 513, [1987] Ch 25, [1986] 3 WLR 531.

Price v Strange [1977] 3 All ER 371, [1978] Ch 337, [1977] 3 WLR 943, CA.

Rayner v Stone (1762) 2 Eden 128, 28 ER 845.

Redland Bricks Ltd v Morris [1969] 2 All ER 576, [1970] AC 652, [1969] 2 WLR 1437, HL.

Regional Properties Ltd v City of London Real Property Co Ltd, Sedgwick Forbes Bland Payne Group Ltd v Regional Properties Ltd [1981] 1 EGLR 33.

Tito v Waddell (No 2), Tito v A-G [1977] 3 All ER 129, [1977] Ch 106, [1977] 2 WLR 496.

Tustian v Johnston [1993] 2 All ER 673.

Verrall v Great Yarmouth BC [1980] 1 All ER 839, [1981] QB 202, [1980] 3 WLR 258, CA.

Wolverhampton Corp v Emmons [1901] 1 KB 515, CA.

Summons

The plaintiff landlord, Rainbow Estates Ltd, who in earlier proceedings had been successful in establishing that the defendant tenants, Tokenhold Ltd and

Herman Herskovic, were responsible under the terms of their leases of Gaynes Park Mansion, Epping, Essex for the repairs outstanding to the property despite an agreement which they claimed had been entered into prior to the leases under the terms of which repairs were the responsibility of the landlord, and were in arrears with rent, applied to the court for an order for specific performance. The summons was heard in chambers but judgment was given by Lawrence Collins QC in open court. The facts are set out in the judgment.

Mark Warwick (instructed by Philippsohn Crawfords Berwald) for the plaintiff.

Helen Soffa (instructed by Turners, Bournemouth) for the defendants.

Cur adv vult

4 March 1998. The following judgment was delivered.

LAWRENCE COLLINS QC.

I. Introduction

I gave judgment in this matter on 10 December 1997, when I decided that the defendants were bound by tenants' repairing obligations in leases of Gaynes Park Mansion, Epping, a grade II listed building. The summons was stood over for further argument on the form of the relief. I am asked to decide whether the court has power (and, if so, under what conditions) to grant an order for specific performance of a tenant's repairing covenant, which is not the subject of modern authority, although a recent Law Commission report has recommended legislation to give the court power to decree specific performance of a repairing obligation in any lease or tenancy: see *Landlord and Tenant: Responsibility for State and Condition of Property* (Law Com No 238) (1996).

II. Background

The facts as they appear from the documents are set out fully in my judgment of 10 December 1997, and I summarise them here for convenience. The plaintiff, Rainbow Estates Ltd (Rainbow), is the freeholder of Gaynes Park Mansion, Epping, Essex, a grade II listed building. The first defendant, Tokenhold Ltd, is the leaseholder of the mansion (excluding its eastern annex) and the second defendant (Mr Herskovic) is the leaseholder of the eastern annex.

In 1976 Mr Herskovic and his brother bought the mansion, and subsequently the freehold was transferred to Venrich Ltd, a £100 company owned by Mr Herskovic and his brother. In about 1989 Barclays Bank advanced money on the security of the mansion. In 1993, when Barclays Bank was considering enforcing its charge on the property, Mr Herskovic and his brother revealed to the bank the existence of two leases of the property. Each of the leases was dated 15 December 1987, and each was granted by Venrich: one was to Tokenhold, and comprised the mansion other than the eastern annex: the other was to Mr Herskovic and comprised the eastern annex. In each case the tenants were granted leases until 14 December 2004 at a rent of £5,000 pa, with the tenants covenanting 'to keep and maintain the property in good and tenant-like repair throughout the term' and 'to permit the landlord

and its agents at all times reasonable access to examine the condition of the premises'. When Barclays' solicitors made inquiries about the leases from Messrs Turners, who had acted for Venrich on the Barclays loan, they told Barclays' solicitors that they, Turners, had been unaware of the existence of the leases.

In June 1991 Venrich was struck off the Companies Register for failure to comply with filing requirements, and at some time in 1995 Barclays Bank applied to have it restored in order to present a winding-up petition and appoint a liquidator. In 1996 the liquidator sold the property to Senator Properties Ltd (Senator) for £150,000, which on 5 November 1996 then transferred it to Rainbow, for £230,000.

Subsequently, in the course of correspondence and in these proceedings Tokenhold and Mr Herskovic maintained that no rent was due under the leases, and that there was no repairing obligation on the tenants, because the leases were subject to two agreements dated 17 November 1987 under which the repairs were to be the responsibility of the landlord, Venrich, and under which the cost of work undertaken by the tenants could be deducted from the rent.

In my judgment, I decided (on the assumption that the agreements and the leases were genuine documents): (a) that there was a conflict between the agreements and the leases; (b) that, in general, where there is a conflict between a lease and a prior agreement, the rights of the parties are governed by the lease; (c) that there was no credible evidence that the agreements and the leases were part of one transaction. The consequence was that the defendants were responsible for repairs and were in arrears with the rent. I noted that a prior agreement may be relied on to seek rectification of the later agreement on the basis that the later agreement did not properly give effect to the real agreement between the parties: *Henderson v Arthur* [1907] 1 KB 10 at 13; but I also noted that in the present case there was no suggestion of mistake.

III. The rectification claim

The defendants now seek to amend their defence by adding a plea that the leases were intended to embody the agreements, but failed to do so by failing to provide that the tenants' duties and responsibilities were limited to cleaning, handyman work and repairs, gutter cleaning, grass and hedge cutting, refuse and rubbish clearance, electricity supply, hot water supply, and central heating maintenance; and that the leases were drawn up and signed under a mutual mistake of fact that keeping and maintaining the property in tenant-like repair meant not allowing the property to fall into disrepair rather than putting it into repair; and a draft amendment to the prayer seeks rectification of the leases so as to embody the agreement actually made or their true intentions.

In my earlier judgment I recorded the unsatisfactory nature of the evidence on behalf of the defendants about the execution of the agreements and the leases. The evidence on the present application does not even begin to address the question of mistake or the origin or execution of the documents. All that Mr Herskovic says is that his brother gave copies of the agreements and the leases to Barclays in 1989, and he produces a copy letter dated 8 June 1989 from his brother and sister-in-law to Barclays referring to the leases. Both he and Miss Maxwell (the defendants' solicitor) rely on the price (£150,000) on the sale

by the liquidator to Senator as indicating knowledge that the freeholder was responsible for repairs. But the price does not tend to indicate knowledge, and has nothing at all to do with mutual mistake.

I refuse the application because (a) the defendants seek leave to defend in circumstances where I have already heard an application under RSC Ord 14 in which evidence of mistake should have been adduced; in the course of that application the defendants did not seek leave to defend on any such basis as is now put forward; (b) the evidence in support of the application to amend and/or for leave to defend does not present any factual basis whatever for the exercise of the discretion to rectify; there is no evidence about the inception and execution of the documents; and there is no evidence that the parties intended the leases to carry out the terms of the agreements and not to vary them; and (c) in any event the remedy is not available if it would prejudice a bona fide purchaser for value without notice, and there is nothing in the assertion that the price paid for the property by Senator indicates that Senator (and still less Rainbow) knew that the repairing obligation fell upon the landlord.

IV. Specific performance of landlord's repairing covenant

Until relatively recently it was generally accepted that repairing covenants could not be specifically enforced, whether they were landlord's covenants or tenant's covenants. The decision on which that view rested was the decision of Lord Eldon LC in *Hill v Barclay* (1810) 16 Ves 402, [1803-13] All ER Rep 379. In refusing a tenant relief against forfeiture for breach of a repairing covenant, Lord Eldon LC said that the landlord--

> 'may bring an ejectment upon non-payment of rent: but he may also compel the tenant to pay the rent. He cannot have that specific relief with regard to repairs. He may bring an action for damages: but there is a wide distinction between damages and the actual expenditure upon repairs, specifically done. Even after damages recovered the landlord cannot compel the tenant to repair: but may bring another action. The tenant therefore ... may keep the premises until the last year of the term; and ... the most beneficial course for the landlord would be, that the tenant, refraining from doing the repairs until the last year of the term, should then be compelled to do them.' (See 16 Ves 402 at 405, [1803-13] All ER Rep 379 at 380.)

But, said Lord Eldon LC: 'The difficulty upon this doctrine of a Court of Equity is, that there is no mutuality in it. The tenant cannot be compelled to repair.'

The view that the landlord's covenant could not be specifically enforced came to be based on the theory that there was no mutuality because the tenant's covenant could not be specifically enforced, or because the works could not be adequately defined, or because effective compliance could not be obtained without the constant supervision of the court: cf *Fry on Specific Performance* (6th edn, 1921) pp 42-50, 222-223.

But today there is little or no life in these reasons. First, as regards the requirement of mutuality, it is now clear that it does not follow from the fact that specific performance is not available to one party that it is not available to the other: want of mutuality is a discretionary, and not an absolute, bar to

specific performance. The court will grant specific performance if it can be done without injustice or

unfairness to the defendant: *Price v Strange* [1977] 3 All ER 371 at 383, [1978] Ch 337 at 357 per Goff LJ. Second, as regards the need for precision in the terms of the order, it is--

> 'a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong ... it is, taken alone, merely a discretionary matter to be taken into account ... It is, however a very important one.' (See *Co-op Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297 at 304, [1998] AC 1 at 14 per Lord Hoffmann.)

So also, the objection to an order for specific performance based on the need for the court's constant supervision is designed to avoid repeated applications for committal which are likely to be expensive in terms of cost to the parties and the resources of the judicial system, but as regards orders to achieve a result, Lord Hoffmann said ([1997] 3 All ER 297 at 303, [1998] AC 1 at 13):

> 'Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order ... This distinction between orders to carry on activities and to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants (see *Wolverhampton Corp v Emmons* [1901] 1 KB 515 (building contract) and *Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97, [1974] Ch 97 (repairing covenant)).'

In particular, it became settled that the court will order specific performance of an agreement to build if (a) the building work is sufficiently defined; (b) damages would not compensate the plaintiff for the defendant's failure to build; and (it seems) (c) the defendant is in possession of the land so that the plaintiff cannot employ another person to build without committing a trespass: *Snell's Equity* (29th edn, 1990) p 595. The analogy with agreements to build was relied on by Pennycuick V-C in *Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97, [1974] Ch 97 in deciding that the court could specifically enforce a lessor's repairing covenant. In that case tenants complained of a failure by the landlord to reinstate properly a stone balcony at the front of a house in Westbourne Terrace, London W2, comprising four flats. The tenants sought an order that the landlord should reinstate the balcony in the form in which it existed prior to its partial collapse. Pennycuick V-C ([1973] 3 All ER 97 at 99, [1974] Ch 97 at 99) acknowledged that common sense and justice required the grant of the relief. But he acknowledged the view in some textbooks that 'specific performance will never be ordered of repairing covenants in a lease', and said:

> 'So far as the general law is concerned, apart from a repairing covenant in a lease, it appears perfectly clear that in an appropriate case the court will decree specific performance of an agreement to build if certain conditions are satisfied.'

The conditions were that the work was sufficiently defined by the contract; damages would not be an adequate remedy; and the defendant was in possession, and so the plaintiff could not have the work done without committing a trespass. These conditions were fulfilled, and after referring to the statement of Lord Upjohn in *Redland Bricks Ltd v Morris* [1969] 2 All ER 576 at 580, [1970] AC 652 at 666 that the court must be careful to ensure that the defendant knows exactly what he has to do so that in carrying out an order he can give contractors the proper instructions, Pennycuick V-C said there was no difficulty about that, but a difficulty arose from the decision of Lord Eldon LC in *Hill v Barclay*. In holding that there was no reason in principle why an order should not be made against a landlord to do some specific work, he said (obiter) of *Hill v Barclay*:

> 'Now that decision is, I think an authority laying down the principle that a landlord cannot obtain against his tenant an order for specific performance of a covenant to repair.'

In concluding that the landlord's covenant could be the subject of an order for specific performance, he said:

> 'Obviously, it is a jurisdiction which should be carefully exercised. But in a case ... where there has been a plain breach of a covenant to repair and there is no doubt at all what is required to be done to remedy the breach, I cannot see why an order for specific performance should not be made.' (See [1973] 3 All ER 97 at 99-100, [1974] Ch 97 at 101.)

More recently orders have been made against a landlord to enforce a covenant to employ a resident porter; what had to be done was capable of definition, and enforcing compliance would not involve superintendence by the court to an unacceptable degree: *Posner v Scott-Lewis* [1986] 3 All ER 513 at 519-522, [1987] Ch 25 at 33-37; and against a landlord requiring removal of dry rot, on the basis that, notwithstanding the difficulty of working out the appropriate order, damages would not be an adequate remedy: in particular, the condition of the premises was continually deteriorating: *Gordon v Selico Ltd* (1986) 18 HLR 219. See also *Peninsular Maritime Ltd v Padseal Ltd* [1981] 2 EGLR 43 (interlocutory mandatory injunction to use best endeavours to put a lift into working order) and *Tustian v Johnston* [1983] 2 All ER 673 at 681.

These decisions show that there is no longer any life in the proposition that the court will not grant specific performance against a landlord of a covenant to repair either because of lack of mutuality or because of the supposed need for constant supervision; and in the case of dwellings, there is now a statutory jurisdiction to order specific performance of a landlord's repairing covenant. Section 17 of the Landlord and Tenant Act 1985 (replacing s 125 of the Housing Act 1974) provides:

> '(1) In proceedings in which a tenant of a dwelling alleges a breach on the part of his landlord of a repairing covenant relating to any part of the premises in which the dwelling is comprised, the court may order specific performance of the covenant whether or not the breach relates to a part of the premises let to the tenant and notwithstanding any equitable rule restricting the scope of the remedy, whether on the basis of a lack of mutuality or otherwise ...'

V. Specific performance of tenant's repairing covenant

Is there any reason in principle why an order for specific performance should not be made against a tenant in appropriate circumstances? It would not be profitable to consider whether the statements in the older authorities that tenant's repairing covenants were not specifically enforceable were ratio or dicta: in *Rayner v Stone* (1762) 2 Eden 128, 28 ER 845 the basis of the decision was that the work could not be sufficiently defined; in *Hill v Barclay* the actual decision was that the tenant could not obtain relief against forfeiture for breach of the repairing covenant, and one (of several, alternative) reasons was lack of mutuality, in the sense that if there were relief from forfeiture, the landlord would have to bring successive actions for damages since 'the landlord cannot compel the tenant to repair ... there is no mutuality in it. The tenant cannot be compelled to repair' and otherwise the tenant would 'have the option, against the will of the landlord, of keeping the lease upon those terms; from time to time breaking the covenant, which he cannot be compelled to perform' (see (1810) 16 Ves 402 at 405-406, [1803-13] All ER Rep 379 at 380). See also *City of London v Nash* (1747) 3 Atk 512, 26 ER 1095 and *Mosely v Virgin* (1796) 3 Ves 184, 30 ER 959 (dicta suggesting tenant's repairing covenants could not be specifically enforced).

The statement in *Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97 at 99-100, [1974] Ch 97 at 100 that 'a landlord cannot obtain against his tenant an order for specific performance of a covenant to repair' was obiter, as was the remark by Oliver J in *Regional Properties Ltd v City of London Real Property Co Ltd, Sedgwick Forbes Bland Payne Group Ltd v Regional Properties Ltd* [1981] 1 EGLR 33 at 34 that there was 'grave doubt whether ... a tenant's covenant is capable of specific performance', although he went on to acknowledge that *Hill v Barclay* 'may logically be much weakened as an authority, if indeed it ever was more than a mere dictum' by the decision of Pennycuick V-C.

According to 27(1) *Halsbury's Laws* (4th edn reissue) (ed Colyer et al) para 368: 'Specific performance of a tenant's repairing covenant will not ordinarily be granted', citing *Hill v Barclay*, but the editors go on:

> 'This has long been stated by textbook writers to be the law but the jurisdiction to grant specific performance of contracts to do building works has developed and there seems no reason in principle why such an order should not be made if the works are sufficiently defined ... and the order is not being sought as a means of circumventing the statutory restrictions on the recovery of damages ... It may be that the remedy will often be inappropriate because

> damages will be a sufficient remedy; but this may not be so where the landlord has no right of entry and the property is deteriorating rapidly ...'

Dowding and Reynolds *Dilapidations: The Modern Law and Practice* (1995) pp 555-559 suggest that there is no reason in principle why specific performance should not be granted: first, there is no logical reason for distinguishing between covenants to repair and other contractual obligations; second, if specific performance can be granted of a landlord's covenant there is no reason for a different rule for a tenant's covenant; third, there is no reason to distinguish between building obligations (for which specific performance can be granted) and repairing obligations; fourth, even if the older cases do decide that specific performance of a tenant's obligation can never be granted,

the law relating to specific performance has developed significantly. See also Woodfall *Landlord and Tenant* (1994) para 13.099, Jones and Goodhart *Specific Performance* (2nd edn, 1996) p 189 and Spry *Equitable Remedies* (1990) p 116.

Like the editors of *Halsbury's Laws* and of *Woodfall*, *Dowding and Reynolds* suggest (p 561) that the court will not allow the remedy of specific performance to circumvent the protection which the Leasehold Property (Repairs) Act 1938 was intended to confer on tenants: although the 1938 Act does not apply to a claim for specific performance, they suggest that the court would be reluctant to make an order where an action for damages or forfeiture would be subject to the restrictions imposed by the 1938 Act and where the circumstances are such that leave would not be granted. The effect of the 1938 Act is that, in the case of a tenancy of not less than seven years with three years or more unexpired, forfeiture or claims for damages for breach of repairing covenants are not available until certain conditions have been fulfilled. The court will only grant leave if the landlord can prove that one of the conditions specified in s 1(5) of the 1938 Act has been fulfilled, and if the court is satisfied in the exercise of its discretion that leave ought to be granted. The conditions are (in summary): (a) that the immediate remedying of the breach is required for preventing substantial diminution in the value; (b) that the immediate remedying of the breach is required to give effect to any enactment, or court order; (c) where the lessee is not in occupation, that the immediate remedying of the breach is required in the interests of the occupier; (d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or (e) that there are special circumstances which, in the opinion of the court, render it just and equitable that leave should be given.

In my judgment, a modern law of remedies requires specific performance of a tenant's repairing covenant to be available in appropriate circumstances, and there are no constraints of principle or binding authority against the availability of the remedy. First, even if want of mutuality were any longer a decisive factor (which it is not) the availability of the remedy against the tenant would restore mutuality as against the landlord. Second, the problems of defining the work and the need for supervision can be overcome by ensuring that there is sufficient definition of what has to be done in order to comply with the order of the court. Third, the court should not be constrained by the supposed rule that the court will not enforce the defendant's obligation in part: this is a problem raised by paras 9.10 and 9.13 of the Law Commission Report *Landlord and Tenant: Responsibility for State and Condition of Property*, but it is not raised elsewhere as an objection; it is by no means clear that there is such a principle, and in any event if there is such a principle, it applies where the contract is in part unenforceable *(Jones and Goodhart* pp 57-61); it does not mean that the court cannot in an appropriate case enforce compliance with a particular obligation such as a repairing covenant.

Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy. This will be particularly important if there is substantial difficulty in the way of the landlord effecting repairs: the landlord may not have a right of access to the property to effect necessary repairs, since (in the absence of contrary

agreement) a landlord has no right to enter the premises, and the condition of the premises may be deteriorating.

In all cases the court must be astute to prevent oppression, even if tenants are no longer (as they were said to be in *Rayner v Stone* (1762) 2 Eden 128 at 130, 28 ER 845) for the most part of 'mean and low circumstances'. The leading texts suggest that the remedy should not be available to circumvent the restrictions on the recovery of damages or forfeiture under the 1938 Act. The 1938 Act, however, does not apply to decrees of specific performance, and it would not be right to treat the legislation as covering the remedy when it does not in terms apply. That would be an impermissible extension of a statute to cover a case where it is not applicable. What the court should do is to prevent specific performance from being used to effectuate or encourage the mischief which the 1938 Act was intended to remedy. The object of the 1938 Act was to remedy the mischief of speculators or unscrupulous landlords buying the reversion of a lease which had little value, and then harassing the tenant with schedules of dilapidations, not with a view to ensuring that the property was kept in proper repair for the protection of the reversion, but to put pressure on the tenant: see authorities cited in *Jervis v Harris* [1996] 1 All ER 303 at 309-310, [1996] Ch 195 at 204-205. Although the court should not use the provisions of s 1(5) of the 1938 Act as if they were applicable, it should be astute to ensure that the landlord is not seeking the decree simply in order to harass the tenant: in so doing, the court may take into account considerations similar to those it must take into account under the 1938 Act.

It follows that not only is there a need for great caution in granting the remedy against a tenant, but also that it will be a rare case in which the remedy of specific performance will be the appropriate one: in the case of commercial leases, the landlord will normally have the right to forfeit or to enter and do the repairs at the expense of the tenant; in residential leases, the landlord will normally have the right to forfeit in appropriate cases.

VI. The present case

The present case has the following unusual features. First, as regards the appropriateness of the remedy of specific performance, there is no adequate alternative remedy. The leases, unusually, contain no forfeiture clause or proviso for re-entry: consequently breach of a repairing covenant will not entitle the landlord to forfeit the leases. Nor do the leases contain a term allowing the landlord access to the premises other than for the purpose of examining their condition: consequently the landlord cannot enter the premises, carry out the works and recover the cost from the tenants. The first defendant is a £100 company and the second defendant's means are unknown. There is no evidence as to the value of the repairs involved, but I was told by counsel for Rainbow that it was in the order of £300,000 and counsel for the defendants did not object to that figure, which does not seem at all unrealistic in the light of the photographs of the mansion in the evidence.

There is evidence of serious disrepair and deterioration of the property. The statement of claim had annexed a substantial schedule of dilapidations. The counterclaim relied on the same schedule for the purposes of the defendants' claim that Rainbow was responsible, under the terms of the November 1987 agreements, for repairs. The affidavit by Rainbow's solicitor in support of its Ord 14 application exhibited the surveyor's report and

schedule of dilapidations and deposed that 'the property has become seriously dilapidated' and that the extent of the disrepair was apparent from the report. The report noted that there was 'very considerable disrepair', and that the schedule concentrated on those defects which affected the value of the reversion, those which if not properly repaired would lead to more extreme damage, and those which would be the subject of local authority enforcement notices. There is nothing in the evidence served on behalf of the

defendants in the Ord 14 application which suggests that the contents of the schedule are denied: indeed, on the contrary, the affidavit of Miss Maxwell (the defendants' solicitor) expressly relied on the defendants' counterclaim, and suggested that it was a matter for evidence 'as to who is liable for such repairs'. Only on 28 January 1998 did Mr Herskovic depose that repairs were in hand, and that if an order is made the defendants will have no opportunity to challenge the schedule by introducing their own surveyor's evidence or querying the costings. This falls a long way short of raising triable issues as regards the breach of the repairing obligations, especially in the light of the fact that until then the defendants had been relying on precisely the same schedule of dilapidations.

Evidence has been filed by Rainbow that the Epping Forest District Council has served notices pursuant to the Housing Act 1985 and the Environmental Protection Act 1990. The effect of non-compliance with the notices under the Housing Act 1985 is that if neither the landlord nor the tenant does the work, the council may do so, and its costs are, until recovered, a charge on the premises to which the notice relates: 1985 Act, Sch 10, para 7(1). The same result applies if an abatement notice under the Environmental Protection Act 1990 is not complied with: 1990 Act, s 81A(4). Rainbow provided a schedule showing that there is a considerable overlap between the dilapidations schedule produced by its surveyors and the works required by the Epping Forest District Council under the 1985 and 1990 Acts.

The schedule of works required is sufficiently certain to be capable of enforcement, particularly in the light of the unusual feature that the defendants themselves relied on Rainbow's schedule of dilapidations in making their own counterclaim in reliance on what they claimed were the landlord's obligations under the agreements. As I have said, the defendants' evidence on the Ord 14 application did not challenge Rainbow's evidence verifying the statement of claim and exhibiting the schedule of dilapidations.

Consequently, the lack of any serious alternative remedy, the absence of any real dispute about the repairs required, the scope of the repairs and the deterioration of the state of the property, and the notices served by the Epping Forest District Council together strongly point to specific performance being the appropriate remedy.

Nor is there any force in the grounds on which the defendants rely to resist an order for specific performance. First it is said that because damages could not be awarded if the requirements of the Leasehold Property (Repairs) Act 1938 are not met, then specific performance could not be ordered. There is no logical or legal basis in this argument. In any event, even if the requirements of s 1(5) of the 1938 Act should be applied by analogy, or as discretionary grounds to prevent oppression, it is plain that several of the grounds could be made out, especially ground (a) (to prevent substantial diminution in value);

ground (b) (to give effect to enactments etc); and ground (d) (increased expense due to postponement of work).

I do not accept the argument (based on *Tito v Waddell (No 2)*, *Tito v A-G* [1977] 3 All ER 129 at 311, [1977] Ch 106 at 326) that the order would be made in vain in support of a merely transient interest: first, there is no longer any absolute rule that specific performance will not be granted to protect transient interests: *Verrall v Great Yarmouth BC* [1980] 1 All ER 839, [1981] QB 202; secondly, the fact that Rainbow hopes, or intends, to sell the property at a profit does not mean that the order would be in vain. Nor can it be said (relying on *Grist v Bailey* [1966] 2 All ER 875, [1967] Ch 532) that the order should be refused because there was a common mistake by the parties to the action as to the terms of the tenancy (ie it can be inferred from the price paid that Rainbow knew that the repairing obligation fell on the landlord). The evidence put forward by the defendants is that the liquidator of Venrich Ltd (the original freeholder owned by Mr Herskovic and his brother) sold the property to Senator for £150,000, and that shortly afterwards Senator sold the freehold to Rainbow for £230,000; and that in January 1997 Rainbow was advertising the freehold for sale at £575,000. The inference drawn is that the liquidator of Venrich Ltd sold the property, and Senator bought the property,

on the basis that the freeholder was responsible for repairs. But there is no reason for that inference to be made, and if it be the case that Rainbow obtained a bargain, that is no impediment to the making of the order if its object is legitimate: in any event, the fact that Rainbow has put the property on the market for a much higher price than it paid does not prove anything if (as I was told by counsel for Rainbow) there has been no purchaser interested in such a price.

Finally, it is suggested that because the leases contain options for the lessees to purchase the freehold (although there is no provision for a price or the fixing of a price and the options are not registered) it would be unjust to grant specific performance of the repairing covenants. But the question of the validity or enforceability of the options is not one for decision at this stage. There is no suggestion that the options have been exercised. The defendants counterclaim for declarations that they have options to purchase the freehold, which Rainbow denies. This unresolved claim does not make it unjust to grant specific performance of the repairing covenants; although in general the court will not compel a defendant to perform his obligations specifically if it cannot ensure that any unperformed obligations of the plaintiff will be specifically performed *(Price v Strange* [1977] 3 All ER 371 at 392, [1978] Ch 337 at 367-368), here there is no evidence of unperformed obligations of Rainbow and, even if the options are valid, the repairing obligations are capable of independent enforcement.

In my judgment, therefore, in the unusual circumstances of this case an order for specific performance is appropriate, subject (as in *Gordon v Selico Ltd* (1986) 18 HLR 219 at 241-242) to liberty to apply to a master, who is to have discretion to make directions for the working out of the order.

VII. Interest on overdue rent

The court has a discretion to award interest on a debt as from the date the cause of action accrued: see s 35A(1) of the Supreme Court Act 1981 and *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER

305, [1997] 1 WLR 1627. The cause of action accrued when the rent became due, and an assignee of the reversion is entitled to the rent: Law of Property Act 1925, s 141. Accordingly, interest may be, and will be, awarded as from the dates the rents were due.

Order accordingly.

Celia Fox Barrister.

RAINBOW ESTATES LTD. v. TOKENHOLD LTD. AND ANOTHER

[Ch. 1997 R. No. 2329]

1998 Jan. 19, 20, 29, 30; March 4

Lawrence Collins Q.C. sitting as a deputy High Court judge

Landlord and Tenant—Repairs—Tenant's breach of covenant—Condition of property deteriorating—No provision in lease for landlord to enter and carry out repairs or for forfeiture or re-entry—Whether jurisdiction to order specific performance of tenant's repairing covenant—Whether order to be granted

The plaintiff was the freeholder of a listed building of which the defendants were lessees. The defendants had covenanted to keep and maintain the property in good and tenant-like repair throughout the term, and to permit the landlord access to examine the condition of the property. There was no provision in the leases permitting the landlord to enter the premises to carry out any repairs and no forfeiture clause or proviso for re-entry. The property was in a serious state of disrepair and its condition was deteriorating. The plaintiff brought proceedings in respect of the state of repair of the property and claiming five years' arrears of rent. The judge rejected a claim by the defendants that their leases were subject to agreements between the defendants and the original landlord who had granted the lease, which provided that the repairs were to be the responsibility of the landlord and that the cost of any work undertaken by the tenants could be deducted from the rent, and held that the tenants were responsible for carrying out the required repairs, which were clearly and comprehensively listed in the schedule of works, and that they were in arrears with their rents.

On the questions whether the court had power to grant an order for specific performance of a tenant's repairing covenant and, if so, under what conditions:—

Held, that, subject to the overriding need to avoid injustice or oppression, there was no constraint preventing the court from ordering specific performance of a tenant's repairing covenants where damages were not an adequate remedy, particularly where the condition of the property was deteriorating but the lease contained no provision for forfeiture or re-entry and did not permit the landlord access to the premises to enable him to carry out the repairs himself; that, although the Leasehold Property (Repairs) Act 1938 did not apply to decrees of specific performance, the court should be astute to ensure that the order was not being sought by the landlord simply to harass or otherwise put pressure on the tenant, and in so doing could take into account considerations similar to those in section 1(5) of the Act of 1938; that, where the court granted a decree, it had to ensure that the required work was sufficiently clearly defined to enable the defendant to comply with the order; and that, in the circumstances, it was appropriate to grant the plaintiff an order for specific performance (post, pp. 72H–73A, C–D, E–H, 76D).

Dicta of Goff L.J. in *Price v. Strange* [1978] Ch. 337, 357, C.A. and of Lord Hoffmann in *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] A.C. 1, 13–14, H.L.(E.) applied.

Jeune v. Queens Cross Properties Ltd. [1974] Ch. 97 considered.

A The following cases are referred to in the judgment:

City of London v. Nash (1747) 3 Atk. 511

Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd. [1998] A.C. 1; [1997] 2 W.L.R. 898; [1997] 3 All E.R. 297, H.L.(E.)

Gordon and Teixeira v. Selico Ltd. and Select Managements Ltd. (1986) 18 H.L.R. 219, C.A.

Grist v. Bailey [1967] Ch. 532; [1966] 3 W.L.R. 618; [1966] 2 All E.R. 875

B *Henderson v. Arthur* [1907] 1 K.B. 10, C.A.

Hill v. Barclay (1810) 16 Ves. 402

Jervis v. Harris [1996] Ch. 195; [1996] 2 W.L.R. 220; [1996] 1 All E.R. 303, C.A.

Jeune v. Queens Cross Properties Ltd. [1974] Ch. 97; [1973] 3 W.L.R. 378; [1973] 3 All E.R. 97

Morris v. Redland Bricks Ltd. [1970] A.C. 652; [1969] 2 W.L.R. 1437; [1969]

C 2 All E.R. 576, H.L.(E.)

Mosely v. Virgin (1796) 3 Ves. 184

Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd. (formerly Edward Erdman (an unlimited company)) (No. 2) [1997] 1 W.L.R. 1627; [1998] 1 All E.R. 305, H.L.(E.)

Peninsular Maritime Ltd. v. Padseal Ltd. [1981] 2 E.G.L.R. 43, C.A.

Posner v. Scott-Lewis [1987] Ch. 25; [1986] 3 W.L.R. 531; [1986] 3 All E.R.

D 513

Price v. Strange [1978] Ch. 337; [1977] 3 W.L.R. 943; [1977] 3 All E.R. 371, C.A.

Rayner v. Stone (1762) 2 Ed. 128

Regional Properties Ltd. v. City of London Real Property Co. Ltd. [1981] 1 E.G.L.R. 33

Tito v. Waddell (No. 2) [1977] Ch. 106; [1977] 2 W.L.R. 496; [1977] 3 All E.R.

E 129

Tustian v. Johnston [1993] 2 All E.R. 673

Verrall v. Great Yarmouth Borough Council [1981] Q.B. 202; [1980] 3 W.L.R. 258; [1980] 1 All E.R. 839, Watkins J. and C.A.

Wolverhampton Corporation v. Emmons [1901] 1 K.B. 515, C.A.

F The following additional cases, supplied by the courtesy of counsel, were cited in argument:

Dallman v. King (1837) 4 Bing.N.C. 105

Extraktionstechnik Gesellschaft für Anlagenbau m.b.H. v. Oskar (1984) 128 S.J. 417, C.A.

Francis v. Cowlcliffe Ltd. (1976) 33 P. & C.R. 368

General Tire & Rubber Co. v. Firestone Tyre & Rubber Co. Ltd. [1975]

G 1 W.L.R. 819; [1975] 2 All E.R. 173, H.L.(E.)

Hipgrave v. Case (1885) 28 Ch.D. 356, C.A.

Johnson v. Agnew [1980] A.C. 367; [1979] 2 W.L.R. 487; [1979] 1 All E.R. 883, H.L.(E.)

Leggott v. Barrett (1880) 15 Ch.D. 306, C.A.

Lindsey Trading Properties Inc. v. Dallhold Estates (U.K.) Pty. Ltd. (1993) 70 P. & C.R. 332, C.A.

H *Rabin v. Gerson Berger Association Ltd.* [1986] 1 W.L.R. 526; [1986] 1 All E.R. 374, C.A.

Stoddart v. Union Trust Ltd. [1912] 1 K.B. 181, C.A.

Swift (P. & A.) Investments v. Combined English Stores Group Plc. [1989] A.C. 632; [1988] 3 W.L.R. 313; [1988] 2 All E.R. 885, H.L.(E.)

Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd. [1902] 2 K.B. 660, C.A.

Westminster (Duke of) v. Guild [1985] Q.B. 688; [1984] 3 W.L.R. 630; [1984] 3 All E.R. 144, C.A.

SUMMONS

By a summons dated 20 August 1997 the plaintiff, Rainbow Estates Ltd., sought against the first defendant, Tokenhold Ltd., and the second defendant, Herman Herskovic, summary judgment pursuant to R.S.C., Ord. 14 for, inter alia, payment of arrears of rent claimed by the plaintiff to be due and specific performance of the defendants' repairing covenants and in the alternative an order pursuant to R.S.C., Ord. 14A and/or Ord. 18, r. 19 that certain paragraphs be struck out from the defendants' defence.

On 10 December 1997 judgment was given in the plaintiff's favour. The summons was stood over for further argument on the form of relief, and in particular on the question whether the court had power to order specific performance of a tenant's repairing covenant.

The summons was heard in chambers but judgment was given by Lawrence Collins Q.C. in open court.

The facts are stated in the judgment.

Mark Warwick for the plaintiff.

Helen Soffa for the defendants.

Cur. adv. vult.

4 March. LAWRENCE COLLINS Q.C. handed down the following judgment.

Introduction

I gave judgment in this matter on 10 December 1997, when I decided that the defendants were bound by tenants' repairing obligations in leases of Gaynes Park Mansion, Epping, a grade II listed building. The summons was stood over for further argument on the form of the relief. I am asked to decide whether the court has power (and, if so, under what conditions) to grant an order for specific performance of a tenant's repairing covenant, which is not the subject of modern authority, although a recent Law Commission report has recommended legislation to give the court power to decree specific performance of a repairing obligation in any lease or tenancy: Landlord and Tenant: Responsibility for State and Condition of Property (1996) (Law Com. No. 238).

Background

The facts as they appear from the documents are set out fully in my judgment of 10 December 1997, and I summarise them here for convenience. The plaintiff, Rainbow Estates Ltd., is the freeholder of Gaynes Park Mansion, Epping, Essex, a grade II listed building. The first defendant, Tokenhold Ltd., is the leaseholder of the mansion (excluding its

A eastern annex) and the second defendant, Mr. Herskovic, is the leaseholder of the eastern annex.

In 1976 Mr. Herskovic and his brother bought the mansion, and subsequently the freehold was transferred to Venrich Ltd., a £100 company owned by Mr. Herskovic and his brother. In about 1989 Barclays Bank Plc. advanced money on the security of the mansion. In 1993, when the bank was considering enforcing its charge on the property, Mr. Herskovic B and his brother revealed to the bank the existence of two leases of the property. Each of the leases was dated 15 December 1987, and each was granted by Venrich: one was to Tokenhold, and comprised the mansion other than the eastern annex; the other was to Mr. Herskovic and comprised the eastern annex. In each case the tenants were granted leases until 14 December 2004 at a rent of £5,000 per annum, with the tenants C covenanting "to keep and maintain the property in good and tenant-like repair throughout the term" and "to permit the landlord and its agents at all times reasonable access to examine the condition of the premises." When the bank's solicitors made inquiries about the leases from Turners, who had acted for Venrich on the bank's loan, they told the bank's solicitors that they, Turners, had been unaware of the existence of the leases.

D In June 1991 Venrich was struck off the Companies Register for failure to comply with filing requirements, and at some time in 1995 the bank applied to have it restored in order to present a winding up petition and appoint a liquidator. In 1996 the liquidator sold the property to Senator Properties Ltd. for £150,000, which on 5 November 1996 then transferred it to Rainbow for £230,000.

E Subsequently, in the course of correspondence and in these proceedings Tokenhold and Mr. Herskovic maintained that no rent was due under the leases, and that there was no repairing obligation on the tenants, because the leases were subject to two agreements dated 17 November 1987 under which the repairs were to be the responsibility of the landlord, Venrich, and under which the cost of work undertaken by the tenants could be deducted from the rent.

F In my judgment, I decided (on the assumption that the agreements and the leases were genuine documents): (a) that there was a conflict between the agreements and the leases; (b) that, in general, where there is a conflict between a lease and a prior agreement, the rights of the parties are governed by the lease; (c) that there was no credible evidence that the agreements and the leases were part of one transaction. The consequence G was that the defendants were responsible for repairs and were in arrears with the rent. I noted that a prior agreement may be relied on to seek rectification of the later agreement on the basis that the later agreement did not properly give effect to the real agreement between the parties: *Henderson v. Arthur* [1907] 1 K.B. 10, 13; but I also noted that in the present case there was no suggestion of mistake.

H *The rectification claim*

The defendants now seek to amend their defence by adding a plea that the leases were intended to embody the agreements, but failed to do so by failing to provide that the tenants' duties and responsibilities were limited

to cleaning, handyman work and repairs, gutter cleaning, grass and hedge cutting, refuse and rubbish clearance, electricity supply, hot water supply, and central heating maintenance; and that the leases were drawn up and signed under a mutual mistake of fact that keeping and maintaining the property in tenant-like repair meant not allowing the property to fall into disrepair rather than putting it into repair; and a draft amendment to the prayer seeks rectification of the leases so as to embody the agreement actually made or their true intentions.

In my earlier judgment I recorded the unsatisfactory nature of the evidence on behalf of the defendants about the execution of the agreements and the leases. The evidence on the present application does not even begin to address the question of mistake or the origin or execution of the documents. All that Mr. Herskovic says is that his brother gave copies of the agreements and the leases to the bank in 1989, and he produces a copy letter dated 8 June 1989 from his brother and sister-in-law to the bank referring to the leases. Both he and Miss Maxwell (the defendants' solicitor) rely on the price (£150,000) on the sale by the liquidator to Senator as indicating knowledge that the freeholder was responsible for repairs, but the price does not tend to indicate knowledge, and has nothing at all to do with mutual mistake.

I refuse the application because (a) the defendants seek leave to defend in circumstances where I have already heard an application under Order 14 in which evidence of mistake should have been adduced; in the course of that application the defendants did not seek leave to defend on any such basis as is now put forward; (b) the evidence in support of the application to amend and/or for leave to defend does not present any factual basis whatever for the exercise of the discretion to rectify; there is no evidence about the inception and execution of the documents; and there is no evidence that the parties intended the leases to carry out the terms of the agreements and not to vary them; and (c) in any event the remedy is not available if it would prejudice a bona fide purchaser for value without notice, and there is nothing in the assertion that the price paid for the property by Senator indicates that Senator (and still less Rainbow) knew that the repairing obligation fell upon the landlord.

Specific performance of landlord's repairing covenant

Until relatively recently it was generally accepted that repairing covenants could not be specifically enforced, whether they were landlord's covenants or tenant's covenants. The decision on which that view rested was the decision of Lord Eldon L.C. in *Hill v. Barclay* (1810) 16 Ves. 402. In refusing a tenant relief against forfeiture for breach of a repairing covenant, Lord Eldon L.C. said, at p. 405, that the landlord

> "may bring an ejectment upon non-payment of rent: but he may also compel the tenant to pay rent. He cannot have that specific relief with regard to repairs. He may bring an action for damages: but there is a wide distinction between damages and the actual expenditure upon repairs, specifically done. Even after damages recovered the landlord cannot compel the tenant to repair: but may bring another action. The tenant therefore ... may keep the premises until the last year of the term; and ... the most beneficial course for the landlord would

A be, that the tenant, refraining from doing the repairs until the last year of the term, should then be compelled to do them."

But, said Lord Eldon L.C.: "The difficulty upon this doctrine of a court of equity is, that there is no mutuality in it. The tenant cannot be compelled to repair."

The view that the landlord's covenant could not be specifically enforced B came to be based on the theory that there was no mutuality because the tenant's covenant could not be specifically enforced, or because the works could not be adequately defined, or because effective compliance could not be obtained without the constant supervision of the court: cf. *Fry on Specific Performance*, 6th ed. (1921), pp. 42–50, 222–223.

But today there is little or no life in these reasons. First, as regards the requirement of mutuality, it is now clear that it does not follow from the C fact that specific performance is not available to one party that it is not available to the other: want of mutuality is a discretionary, and not an absolute, bar to specific performance. The court will grant specific performance if it can be done without injustice or unfairness to the defendant: *Price v. Strange* [1978] Ch. 337, 357, *per* Goff L.J. Second, as regards the need for precision in the terms of the order, it is

D "a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong ... it is, taken alone, merely a discretionary matter to be taken into account ... It is, however, a very important one:" *per* Lord Hoffmann in *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] A.C. 1, 14. E

So also, the objection to an order for specific performance based on the need for the court's constant supervision is designed to avoid repeated applications for committal which are likely to be expensive in terms of cost to the parties and the resources of the judicial system, but as regards orders to achieve a result, Lord Hoffmann said, at p. 13:

F "Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order ... This distinction between orders to carry on activities and orders to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants ..." G

and he cited *Wolverhampton Corporation v. Emmons* [1901] 1 K.B. 515 (building contract) and *Jeune v. Queens Cross Properties Ltd.* [1974] Ch. 97 (repairing covenant).

In particular, it became settled that the court will order specific performance of an agreement to build if (a) the building work is sufficiently defined; (b) damages would not compensate the plaintiff for the defendant's H failure to build; and (it seems) (c) the defendant is in possession of the land so that the plaintiff cannot employ another person to build without committing a trespass: *Snell's Equity*, 29th ed. (1990), p. 595. The analogy with agreements to build was relied on by Sir John Pennycuick V.-C. in

Jeune v. Queens Cross Properties Ltd. in deciding that the court could specifically enforce a lessor's repairing covenant. In that case tenants complained of a failure by the landlord to reinstate properly a stone balcony at the front of a house in Westbourne Terrace, London, W.2, comprising four flats. The tenants sought an order that the landlord should reinstate the balcony in the form in which it existed prior to its partial collapse. Sir John Pennycuick V.-C. acknowledged that common sense and justice required the grant of the relief. But he acknowledged the view in some textbooks that "specific performance will never be ordered of repairing covenants in a lease," and said, at p. 99:

> "So far as the general law is concerned, apart from a repairing covenant in a lease, it appears perfectly clear that in an appropriate case the court will decree specific performance of an agreement to build if certain conditions are satisfied."

The conditions were that the work was sufficiently defined by the contract; damages would not be an adequate remedy; and the defendant was in possession, and so the plaintiff could not have the work done without committing a trespass. These conditions were fulfilled, and after referring to the statement of Lord Upjohn in *Morris v. Redland Bricks Ltd.* [1970] A.C. 652, 666 that the court must be careful to ensure that the defendant knows exactly what he has to do so that in carrying out an order he can give contractors the proper instructions, Sir John Pennycuick V.-C. said there was no difficulty about that, but a difficulty arose from the decision of Lord Eldon L.C. in *Hill v. Barclay*, 16 Ves. 402. In holding that there was no reason in principle why an order should not be made against a landlord to do some specific work, he said [1974] Ch. 97, 100 (obiter) of *Hill v. Barclay*: "Now that decision is, I think, an authority laying down the principle that a landlord cannot obtain against his tenant an order for specific performance of a covenant to repair." In concluding that the landlord's covenant could be the subject of an order for specific performance, he said, at p. 101:

> "Obviously, it is a jurisdiction which should be carefully exercised. But in a case ... where there has been a plain breach of a covenant to repair and there is no doubt at all what is required to be done to remedy the breach, I cannot see why an order for specific performance should not be made."

More recently orders have been made against a landlord to enforce a covenant to employ a resident porter; what had to be done was capable of definition, and enforcing compliance would not involve superintendence by the court to an unacceptable degree: *Posner v. Scott-Lewis* [1987] Ch. 25, 33–37; and against a landlord requiring removal of dry rot, on the basis that, notwithstanding the difficulty of working out the appropriate order, damages would not be an adequate remedy; in particular, the condition of the premises was continually deteriorating: *Gordon and Teixeira v. Selico Ltd. and Select Management Ltd.* (1986) 18 H.L.R. 219. See also *Peninsular Maritime Ltd. v. Padseal Ltd.* [1981] 2 E.G.L.R. 43 (interlocutory mandatory injunction to use best endeavours to put lift into working order) and *Tustian v. Johnston* [1993] 2 All E.R. 673, 681.

A These decisions show that there is no longer any life in the proposition that the court will not grant specific performance against a landlord of a covenant to repair either because of lack of mutuality or because of the supposed need for constant supervision; and in the case of dwellings, there is now a statutory jurisdiction to order specific performance of a landlord's repairing covenant. Section 17 of the Landlord and Tenant Act 1985 (replacing the Housing Act 1974, section 125) provides:

B

> "(1) In proceedings in which a tenant of a dwelling alleges a breach on the part of his landlord of a repairing covenant relating to any part of the premises in which the dwelling is comprised, the court may order specific performance of the covenant whether or not the breach relates to a part of the premises let to the tenant and notwithstanding any equitable rule restricting the scope of the remedy, C whether on the basis of a lack of mutuality or otherwise."

Specific performance of tenant's repairing covenant

Is there any reason in principle why an order for specific performance should not be made against a tenant in appropriate circumstances? It would not be profitable to consider whether the statements in the older authorities that tenant's repairing covenants were not specifically enforceable D were ratio or dicta: in *Rayner v. Stone* (1762) 2 Ed. 128 the basis of the decision was that the work could not be sufficiently defined; in *Hill v. Barclay*, 16 Ves. 402 the actual decision was that the tenant could not obtain relief against forfeiture for breach of the repairing covenant, and one reason (of several, alternative) was lack of mutuality, in the sense that, if there were relief from forfeiture, the landlord would have to bring E successive actions for damages since "the landlord cannot compel the tenant to repair ... there is no mutuality in it. The tenant cannot be compelled to repair" and otherwise the tenant would "have the option, against the will of the landlord, of keeping the lease upon those terms; from time to time breaking the covenant, which he cannot be compelled to perform:" *per* Lord Eldon L.C., at p. 405. See also *City of London v. Nash* (1747) 3 Atk. 511 and *Mosely v. Virgin* (1796) 3 Ves. 184 (dicta F suggesting tenant's repairing covenants could not be specifically enforced).

The statement in *Jeune v. Queens Cross Properties Ltd.* [1974] Ch. 97, 100 that "a landlord cannot obtain against his tenant an order for specific performance of a covenant to repair" was obiter, as was the remark by Oliver J. in *Regional Properties Ltd. v. City of London Real Property Co. Ltd.* [1981] 1 E.G.L.R. 33, 34 that there was "grave doubt whether ... a G tenant's covenant is capable of specific performance," although he went on to acknowledge that *Hill v. Barclay*, 16 Ves. 402 "may logically be much weakened as an authority, if indeed it ever was more than a mere dictum" by the decision of Sir John Pennycuick V.-C. in *Jeune v. Queens Cross Properties Ltd.* [1974] Ch. 97.

According to *Halsbury's Laws of England*, 4th ed. reissue, vol. 27(1) (1994), p. 346, para. 368 "specific performance of a tenant's repairing H covenant will not ordinarily be granted," citing *Hill v. Barclay*, 16 Ves. 402, but the editors go on, at footnote 4:

> "This has long been stated by textbook writers to be the law but the jurisdiction to grant specific performance of contracts to do

> building works has developed and there seems no reason in principle why such an order should not be made if the works are sufficiently defined ... and the order is not being sought as a means of circumventing the statutory restrictions on the recovery of damages ... It may be that the remedy will often be inappropriate because damages will be a sufficient remedy; but this may not be so where the landlord has no right of entry and the property is deteriorating rapidly ..."

Dowding and Reynolds, Dilapidations: The Modern Law and Practice (1995), pp. 555–559 suggests that there is no reason in principle why specific performance should not be granted: first, there is no logical reason for distinguishing between covenants to repair and other contractual obligations; second, if specific performance can be granted of a landlord's covenant there is no reason for a different rule for a tenant's covenant; third, there is no reason to distinguish between building obligations (for which specific performance can be granted) and repairing obligations; fourth, even if the older cases do decide that specific performance of a tenant's obligation can never be granted, the law relating to specific performance has developed significantly. See also *Woodfall, Landlord and Tenant*, looseleaf ed., para. 13.099; *Jones & Goodhart, Specific Performance*, 2nd ed. (1996), p. 189 and *Spry, Equitable Remedies*, 4th ed. (1990), p. 116.

Like the editors of *Halsbury's Laws* and of *Woodfall, Landlord and Tenant*, *Dowding and Reynolds* suggests, at p. 561, that the court will not allow the remedy of specific performance to circumvent the protection which the Leasehold Property (Repairs) Act 1938 was intended to confer on tenants: although the Act of 1938 does not apply to a claim for specific performance, the editors suggest that the court would be reluctant to make an order where an action for damages or forfeiture would be subject to the restrictions imposed by the Act and where the circumstances are such that leave would not be granted. The effect of the Act of 1938 is that, in the case of a tenancy of not less than seven years with three years or more unexpired, forfeiture or claims for damages for breach of repairing covenants are not available until certain conditions have been fulfilled. The court will only grant leave if the landlord can prove that one of the conditions specified in section 1(5) of the Act of 1938 have been fulfilled, and if the court is satisfied in the exercise of its discretion that leave ought to be granted. The conditions are (in summary): (a) that the immediate remedying of the breach is required for preventing substantial diminution in the value; (b) that the immediate remedying of the breach is required to give effect to any enactment, or court order; (c) where the lessee is not in occupation, that the immediate remedying of the breach is required in the interests of the occupier; (d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or (e) that there are special circumstances which in the opinion of the court, render it just and equitable that leave should be given.

In my judgment, a modern law of remedies requires specific performance of a tenant's repairing covenant to be available in appropriate circumstances,

A and there are no constraints of principle or binding authority against the availability of the remedy. First, even if want of mutuality were any longer a decisive factor (which it is not) the availability of the remedy against the tenant would restore mutuality as against the landlord. Second, the problems of defining the work and the need for supervision can be overcome by ensuring that there is sufficient definition of what has to be done in order to comply with the order of the court. Third, the court B should not be constrained by the supposed rule that the court will not enforce the defendant's obligation in part; this is a problem raised by the Law Commission Report, Landlord and Tenant: Responsibility for State and Condition of Property, paras. 9.10 and 9.13, but it is not raised elsewhere as an objection; it is by no means clear that there is such a principle, and in any event if there is such a principle, it applies where the C contract is in part unenforceable (*Jones & Goodhart, Specific Performance*, pp. 57–61); it does not mean that the court cannot in an appropriate case enforce compliance with a particular obligation such as a repairing covenant.

Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the D appropriate remedy. This will be particularly important if there is substantial difficulty in the way of the landlord effecting repairs: the landlord may not have a right of access to the property to effect necessary repairs, since (in the absence of contrary agreement) a landlord has no right to enter the premises, and the condition of the premises may be deteriorating.

E In all cases the court must be astute to prevent oppression, even if tenants are no longer (as they were said to be in *Rayner v. Stone*, 2 Ed. 128, 130) for the most part of "mean and low circumstances." The leading texts suggest that the remedy should not be available to circumvent the restrictions on the recovery of damages or forfeiture under the Act of 1938. The Act of 1938, however, does not apply to decrees of specific performance, and it would not be right to treat the legislation as covering F the remedy when it does not in terms apply. That would be an impermissible extension of a statute to cover a case where it is not applicable. What the court should do is to prevent specific performance from being used to effectuate or encourage the mischief which the Act of 1938 was intended to remedy. The object of the Act of 1938 was to remedy the mischief of speculators or unscrupulous landlords buying the reversion G of a lease which had little value, and then harassing the tenant with schedules of dilapidations, not with a view to ensuring that the property was kept in proper repair for the protection of the reversion, but to put pressure on the tenant: see authorities cited in *Jervis v. Harris* [1996] Ch. 195, 204–205. Although the court should not use the provisions of section 1(5) of the Act of 1938 as if they were applicable, it should be astute to ensure that the landlord is not seeking the decree simply in order H to harass the tenant; in so doing, the court may take into account considerations similar to those it must take into account under the Act of 1938.

It follows that not only is there a need for great caution in granting

the remedy against a tenant, but also that it will be a rare case in which the remedy of specific performance will be the appropriate one: in the case of commercial leases, the landlord will normally have the right to forfeit or to enter and do the repairs at the expense of the tenant; in residential leases, the landlord will normally have the right to forfeit in appropriate cases.

The present case

The present case has the following unusual features. First, as regards the appropriateness of the remedy of specific performance, there is no adequate alternative remedy. The leases, unusually, contain no forfeiture clause or proviso for re-entry; consequently breach of a repairing covenant will not entitle the landlord to forfeit the leases. Nor do the leases contain a term allowing the landlord access to the premises other than for the purpose of examining their condition: consequently the landlord cannot enter the premises, carry out the works and recover the cost from the tenants. The first defendant is a £100 company and the second defendant's means are unknown. There is no evidence as to the value of the repairs involved, but I was told by counsel for Rainbow that it was in the order of £300,000 and counsel for the defendants did not object to that figure, which does not seem at all unrealistic in the light of the photographs of the mansion in the evidence.

There is evidence of serious disrepair and deterioration of the property. The statement of claim had annexed a substantial schedule of dilapidations. The counterclaim relied on the same schedule for the purposes of the defendants' claim that Rainbow was responsible, under the terms of the November 1987 agreements, for repairs. The affidavit by Rainbow's solicitor in support of its Order 14 application exhibited the surveyor's report and schedule of dilapidations and deposed that "the property has become seriously dilapidated" and that the extent of the disrepair was apparent from the report. The report noted that there was "very considerable disrepair," and that the schedule concentrated on those defects which affected the value of the reversion, those which if not properly repaired would lead to more extreme damage, and those which would be the subject of local authority enforcement notices. There is nothing in the evidence served on behalf of the defendants in the Order 14 application which suggests that the contents of the schedule are denied; indeed, on the contrary, the affidavit of Miss Maxwell (the defendants' solicitor) expressly relied on the defendants' counterclaim, and suggested that it was a matter for evidence "as to who is liable for such repairs." Only on 28 January 1998 did Mr. Herskovic depose that repairs were in hand, and that if an order is made the defendants will have no opportunity to challenge the schedule by introducing their own surveyor's evidence or querying the costings. This falls a long way short of raising triable issues as regards the breach of the repairing obligations, especially in the light of the fact that until then the defendants had been relying on precisely the same schedule of dilapidations.

Evidence has been filed by Rainbow that the Epping Forest District Council has served notices pursuant to the Housing Act 1985 and the Environmental Protection Act 1990. The effect of non-compliance with the

notices under the Housing Act 1985 is that if neither the landlord nor the tenant does the work, the council may do so, and its costs are, until recovered, a charge on the premises to which the notice relates: Schedule 10, paragraph 7(1) to the Act of 1985. The same result applies if an abatement notice under the Environmental Protection Act 1990 is not complied with: section 81A(4) of the Act of 1990, as inserted by section 10(2) of the Noise and Statutory Nuisance Act 1993. Rainbow provided a schedule showing that there is a considerable overlap between the dilapidations schedule produced by its surveyors and the works required by the Epping Forest District Council under the Acts of 1985 and 1990.

The schedule of works required is sufficiently certain to be capable of enforcement, particularly in the light of the unusual feature that the defendants themselves relied on Rainbow's schedule of dilapidations in making their own counterclaim in reliance on what they claimed were the landlord's obligations under the agreements. As I have said, the defendants' evidence on the Order 14 application did not challenge Rainbow's evidence verifying the statement of claim and exhibiting the schedule of dilapidations.

Consequently, the lack of any serious alternative remedy, the absence of any real dispute about the repairs required, the scope of the repairs and the deterioration of the state of the property, and the notices served by the Epping Forest District Council together strongly point to specific performance being the appropriate remedy.

Nor is there any force in the grounds on which the defendants rely to resist an order for specific performance. First it is said that, because damages could not be awarded if the requirements of the Leasehold Property (Repairs) Act 1938 are not met, then specific performance could not be ordered. There is no logical or legal basis in this argument. In any event, even if the requirements of section 1(5) of the Act of 1938 should be applied by analogy, or as discretionary grounds to prevent oppression, it is plain that several of the grounds could be made out, especially ground (a) (to prevent substantial diminution in value), ground (b) (to give effect to enactments etc.) and ground (d) (increased expense due to postponement of work).

I do not accept the argument (based on *Tito v. Waddell (No. 2)* [1977] Ch. 106, 326) that the order would be made in vain in support of a merely transient interest: first, there is no longer any absolute rule that specific performance will not be granted to protect transient interests: *Verrall v. Great Yarmouth Borough Council* [1981] Q.B. 202; secondly, the fact that Rainbow hopes, or intends, to sell the property at a profit does not mean that the order would be in vain. Nor can it be said (relying on *Grist v. Bailey* [1967] Ch. 532) that the order should be refused because there was a common mistake by the parties to the action as to the terms of the tenancy (i.e. it can be inferred from the price paid that Rainbow knew that the repairing obligation fell on the landlord). The evidence put forward by the defendants is that the liquidator of Venrich Ltd. (the original freeholder owned by Mr. Herskovic and his brother) sold the property to Senator for £150,000, and that shortly afterwards Senator sold the freehold to Rainbow for £230,000; and that in January 1997 Rainbow was advertising the freehold for sale at £575,000. The inference drawn is that the liquidator of

Venrich Ltd. sold the property, and Senator bought the property, on the basis that the freeholder was responsible for repairs. But there is no reason for that inference to be made, and if it be the case that Rainbow obtained a bargain, that is no impediment to the making of the order if its object is legitimate; in any event, the fact that Rainbow has put the property on the market for a much higher price than it paid does not prove anything if (as I was told by counsel for Rainbow) there has been no purchaser interested in such a price.

Finally, it is suggested that because the leases contain options for the lessees to purchase the freehold (although there is no provision for a price or the fixing of a price and the options are not registered) it would be unjust to grant specific performance of the repairing covenants. But the question of the validity or enforceability of the options is not one for decision at this stage. There is no suggestion that the options have been exercised. The defendants counterclaim for declarations that they have options to purchase the freehold, which Rainbow denies. This unresolved claim does not make it unjust to grant specific performance of the repairing covenants; although in general the court will not compel a defendant to perform his obligations specifically if it cannot ensure that any unperformed obligations of the plaintiff will be specifically performed (*Price v. Strange* [1978] Ch. 337, 367), here there is no evidence of unperformed obligations of Rainbow and, even if the options are valid, the repairing obligations are capable of independent enforcement.

In my judgment, therefore, in the unusual circumstances of this case an order for specific performance is appropriate, subject (as in *Gordon and Teixeira v. Selico Ltd. and Select Management Ltd.*, 18 H.L.R. 219, 241–242) to liberty to apply to a master, who is to have discretion to make directions for the working out of the order.

Interest on overdue rent

The court has a discretion to award interest on a debt as from the date the cause of action accrued: section 35A(1) of the Supreme Court Act 1981, as inserted by section 15(1) of and Schedule 1, Part I to the Administration of Justice Act 1982, and *Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd. (formerly Edward Erdman (an unlimited company)) (No. 2)* [1997] 1 W.L.R. 1627. The cause of action accrued when the rent became due, and an assignee of the reversion is entitled to the rent: section 141 of the Law of Property Act 1925. Accordingly, interest may be, and will be, awarded as from the dates the rents were due.

Orders accordingly.

Solicitors: Philippsohn Crawfords Berwald; Turners, Bournemouth.

[Reported by CLAIRE ESPINER, Barrister]

All England Official Transcripts (1997-2008)

Rainbow Estates Limited v Tokenhold Limited and others

Practice - Costs - Security for costs - Dismissal of appeal for failure to comply with order for security of costs - Application to reinstate appeal - Whether defendants showing cause why application should proceed

[2001] EWCA Civ 975, (Transcript: Smith Bernal)

COURT OF APPEAL (CIVIL DIVISION)

CHADWICK LJ

7 JUNE 2001

7 JUNE 2001

The Applicant did not appear and was not represented

The Respondent did not appear and was not represented

CHADWICK LJ

[1] On 4 March 1998 Mr Lawrence Collins QC, as he then was, sitting as a Deputy Judge of the High Court in the Chancery Division, in proceedings brought by Rainbow Estates Ltd, as Plaintiff, against Tokenhold Ltd and Mr Herman Herskovic, as Defendants, gave summary judgment against each of the defendants for arrears of rent and interest payable (as he held) under two leases, each dated 15 December 1987, of separate parts of property known as Gaynes Park Mansion, Epping. The judge gave permission to appeal against his order. Notice was served within a few weeks thereafter.

[2] On receipt of the notice of appeal Rainbow Estates, as the Respondents to the appeal, sought security for the costs of the appeal. That application came before me as a single judge of the Court of Appeal on 26 August 1998. After hearing argument on both sides I ordered that the application be granted, although in a lesser sum than the amount sought. I ordered that the Appellants - that is to say Tokenhold and Mr Herskovic - do, on or before 23 September 1998, furnish security for the Respondent's costs of appeal in the sum of £12,000; and that the appeal be stayed pending provision of such security.

[3] I further ordered that upon the occurrence of either of the following events - namely (1) the solicitor for the Plaintiff notifying the Registrar of Civil Appeals in writing that he had not received from the Respondents on or before 23 September 1998 notice in accordance with the Rules of the Supreme Court Ord 22, r 8 (1) (as amended) that the sum had been paid into court in compliance with the order, or (2) any cheque or other bill or exchange lodged with the Supreme Court Fund Office in purported compliance with the order being dishonoured - the appeal should stand dismissed with costs without further order. No payment of the sum ordered to be provided as a security was made within the 28-day period limited by that order or at all. The Plaintiff's solicitor informed the court that no notice had been received under Ord 22 r 8 (1), as required by the order. Accordingly, the appeal was dismissed on 5 October 1998 without further order; as I had directed it should be. Mr Herskovic was given notice of that by letter dated 6 October 1998.

[4] On 28 February 2000 Mr Herskovic wrote to the Court Service in these terms:

> "Kindly note that I was unable to continue with the appeal as I was not able to raise £12,000 to deposit into court. I have now been accepted for legal aid. I understand that it will no longer be necessary to deposit the £12,000 into court any more. I will be obliged if you will arrange a new date to continue with the appeal."

[5] The Civil Appeals Office wrote back. It told Mr Herskovic that before the appeal could continue, it would be necessary for him to make an application to reinstate. He was sent the appropriate forms for that purpose.

[6] Little further progress was made in the following months. In particular, there is no indication on the court file that Mr Herskovic ever became an assisted person. On 9 November 2000 Mr Herskovic wrote again to the Civil Appeals Office indicating that he wished to apply for the appeal to be reinstated. He was informed by the Civil Appeals Office that there were formidable difficulties to overcome in seeking to reinstate an appeal, which by that date had been dismissed for failure to provide security for costs in accordance with an order made over two years previously. Nevertheless, with the assistance of the Royal Courts of Justice Advice Bureau a bundle was prepared and the matter came before me for consideration on paper. In the circumstances that I have set out it seemed to me undesirable to have a hearing at which the respondents were required to attend - with the costs that would inevitably be incurred, and the possibility that those costs might have to be paid by Mr Herskovic - unless and until I was satisfied that there was some prospect that the application might succeed. The papers disclosed little prospect of success - in that there was no material which indicated why Mr Herskovic had not provided the sum which he was ordered to provide as security in August 1998. In particular, there was no material in the bundle which gave any indication whether his failure to comply was due to an inability to do so or whether he had failed to comply because, although able to do so at the time, he chose not to do so. I note from the judgment which I gave on 26 August 1998 that it was not then suggested that Mr Herskovic would have any difficulty in meeting the order to provide security provided that he was able to have recourse to assets which were then the subject of a Mareva injunction. The order which I made on 26 August 1998 provided for that opportunity to be given to him.

[7] The matter comes before me today, therefore, on a direction that Mr Herskovic should show cause why the application should be allowed to proceed and should not be dismissed in limine.

[8] At the sitting of the court this morning, I was handed a clip of correspondence received by the court office on 7 June 2001 - that is, today - from solicitors Brook Martin & Co purporting to act on behalf of Mr Herskovic and a large number of other defendants who have been joined to the present proceedings. The clip contains what appears on its face to be a consent order made in the action on 25 May 2001. There is no explanation as to why the matter was not drawn to the attention of the Court of Appeal in time to avoid today's hearing. There is no explanation why a copy of an order which was made on 25 May 2001 should not have been provided to this court before the morning of the hearing. The order purports to contain terms of settlement of the action which, on their face, will bind Mr Herskovic. In those circumstances (as the solicitors say) the Appellants are not proceeding with the application this morning. Accordingly, nobody appears. There is nothing on the file that I have seen which indicates whether or not the solicitors are on the record in this matter for Mr Herskovic.

[9] Accordingly, although treating the letter as providing some explanation for the absence of Mr Herskovic or any representative at today's hearing, I propose, formally, to dismiss the application on the basis that no cause has been shown why an appeal which was dismissed more than two-and-a-half years ago for failure to comply with an order to provide security should now be revived and allowed to proceed.

[10] The order which I make is that the application of 6 December 2000 is dismissed.

Application dismissed.