ZIMCO PROPERTIES LTD v HICKEY STUDIOS LTD AND MARRYAT AND SCOTT (Z) LTD. (1988 - 1989) Z.R. 181 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND CHAILA, JJ.S.
12TH OCTOBER, 1989 AND 19TH FEBRUARY, 1990.
(S.C.Z. JUDGMENT NO. 17 OF 1989)

Flynote

Landlord and tenant - Control of common parts retained by landlord - Duty to maintain and repair.
Landlord and tenant - Covenants - Landlord's obligation of.
Landlord and tenant - Covenant for repairs - Extent of obligation.
Landlord and tenant - Covenant for quiet enjoyment - Breach of.

Headnote

The appellant leased to the first respondent the twenty-second floor in a highrise block of offices in multi-occupation. Access to the various floors by the tenants, their customers and invitees were by means of stair-cases and three passenger lifts which were not themselves leased to any individual tenant. As a result of frequent breakdowns of the lift services, the first respondent lost business and finally gave it all up. The High Court awarded damages in favour of the first respondent for breaches of the covenant for quiet enjoyment and repairs.

The appellant appealed against the decision.

Held:

(1) The fact that a tenancy concerns a highrise block of offices or any similar tall building demands that there be some contractual obligation on the landlord to maintain the facilities retained under his control in a state of repair so that the easement impliedly granted to the tenants over these means of access would permit their use and enjoyment.

Liverpool City Council v Irwin and anor (1) followed.

(ii) Liability to a tenant must relate to the landlord's obligation, not to the public but to the tenant himself.

(iii) A landlord's obligation is not to guarantee constant availability of the facilities but to take reasonable care and to carry out necessary repairs and maintenance.

(iv) Landlords are not liable in damages to the tenant under the covenant of quiet enjoyment when they had in no way actively participated in causing the breakdowns which in the main were caused by the various tenants and their invitees. *Malzy v Eichhlolz* (4) followed.

Cases referred to:

(1) Liverpool City Council v Irwin and anor [1976] 2 All E.R. 39
(2) Haseldine v C.A Daw & Sons and anor [1941] 3 All E.R. 156
(3) Green v Fibre Glass Ltd [1958] 2 Q.B. 245
(4) Malzy v Eichholz [1916] K.B. 308

For the appellant : M.M. Muyenga, Director of Legal Services Corporation and Miss L. Walubita.
For the respondent: A.O.R. Mitchley, and A. Adams, Solly Patel, Hanir and Lawrence.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the Court.

For convenience, we will refer to the appellant as the landlords and the first respondent as the tenant. This is an appeal by the landlords against the decision of a High Court judge on the question of liability and the amount awarded as damages in favour of the tenant for alleged breaches of the covenants for quiet enjoyment and for repairs. The tenant has cross-appealed on the question of damages. The landlords own an imposing highrise block of offices known as Findeco House which is multi-occupied by various tenants. It is the lifts in that building which gave rise to this litigation. The landlords leased the twenty-second floor to the tenant for the purpose of running a restaurant called Studio 22 which also served as a discotheque. Access to the various floors by the tenants, their customers and invitees is by means of stair cases and three passenger lifts. There is also a service lift and an executive lift not available for use by the general public. The lifts broke down continually before as well as after the tenant took occupation, which was in August,1979. One or two lifts, and at times all the lifts, would break down and there would be no lift service at all on certain days. It was common ground that the lift service was, to put it mildly, erratic. Quite understandably, the tenant's customers were reluctant to walk up and down twenty-two floors for their meals and dances. The tenant lost business and finally gave it all up in June 1983 when he vacated the premises. For the purpose of maintaining the lifts, the landlords employed a firm of specialists under contract, the second respondent - who were on call twenty-four hours a day to attend to, among other things, the frequent breakdowns. There was evidence that 85% of abuse causing the breakdowns occurred due to gross overloading, and the rest shared between vandalism, fluctuations in the electricity current supplied, wear and tear, and so on. The difficulty of obtaining foreign exchange for spare parts added to the general deterioration in the lift service and prevented expeditious or thorough repair work. There was opinion evidence from the specialists that the number of lifts were inadequate for the population of occupants and visitors who frequently overloaded the lifts resulting in breakdowns. Both the landlords and the tenant attempted to address this problem by providing lift attendants to control the number of persons getting into the lifts.

The tenant sued the landlords who sought indemnity from the second respondent. The tenant alleged that the landlords were in breach of covenants to be implied in the tenancy for the maintenance of the lifts in a constant state of repair and in breach of the covenant for quiet enjoyment by reason of the failure to constantly provide an adequate lift service. The landlords denied being under any obligation to keep the lifts in constant repair or to have been in breach of either covenant. They also joined the specialists to the action as third parties to indemnify them should the Court find for the tenant.

The landlords also sought to show that most of the breakdowns were occasioned by this tenant's teenage patrons who overloaded the lifts and damaged various things in them. The learned trial judge found that the landlords were under obligations to maintain the staircase and the lifts which were the common parts of the building still under their care and

control. She also found that the landlords' evidence had not established that the tenant's customers caused most of the breakdowns although all the breakdowns occurred during the weekends - and there were many which occurred when only the tenant's employees and customers were using the lifts. The argument was that the landlords had not succeeded in pinpointing the actual causes of such breakdowns although this reasoning is difficult to follow when the specialists' evidence was that overloading was the cause and examples were given when drunken teenagers who had crammed the lift had to be rescued from there. However, the learned trial judge found that the lifts were overworked by all the tenants and their invitees; that the building was in any case underlifted:, and that the opening of Studio 22 increased the volume of traffic for the lifts rendering them more vulnerable than was the case before. In finding for the tenant, the learned trial judge had this to say:

> " The evidence of PW1 shows that he was aware of the erratic situation of the lifts at the time that he entered into the tenancy agreement and as such the question of inducement did not arise. He cannot therefore, claim that he was induced to enter into this agreement by the defendant. On breach of the covenant for quiet enjoyment of the demised premises, I find that the defendant company knew that the plaintiff's business of a restaurant would attract a lot of people who would increase traffic for the lifts service, and that such an increased traffic would worsen the situation and the services of the lifts which were already erratic. The defendant company was therefore taking on an extra load for which they required to prepare themselves. The defendant company was obliged to see to it that the third party obtained the necessary spare parts at all times so that the repairs could be carried out constantly. There is no evidence that the third party were informed of the plaintiff's intention to open the restaurant on the 22 floor or that the third party were asked to double their efforts to make certain that the lifts were always in working order. To the extent that the defendant company failed to do something extra or to make an extra effort in running the lift service for the use of the plaintiff, their clients and agents, the defendant company was in breach of the covenants to afford the plaintiff quiet enjoyment of the premises, and access thereto."

The learned trial Judge considered that, although the staircase was always available, it would be unrealistic and unreasonable to expect diners to climb twenty-two floors and that the tenant's known interest could only be served by use of the lifts. With this observation, we are in general agreement. But the learned trial Judge went on to hold that, in those circumstances the landlords were obliged to maintain the lift service in a state of constant repair and that this they failed to do. Damages were awarded in the sum of K200,000. The landlord's own claim against the specialist maintenance firm was dismissed because the learned trial judge found that they were not negligent; they were skilled and promptly attended to all breakdowns and that they repaired the lifts whenever spare parts were available. All the foregoing findings were in issued in this appeal and we shall be alluding to them.

This case is of general importance to landlords and tenants of skyscrapers in multi-occupation where the common parts, such as stairs and lifts, have not themselves been leased to any individual tenant. The first question is whether an obligation on the part of the landlord to maintain the

stairs and lifts can be implied in the absence of specific provisions to that effect in the tenancy agreement. In the instant case, there was not even any written lease operative at the time. For the detailed reasons discussed by the law lords (and by Lord Denning in the court of appeal) in *Liverpool City Council v Irwin* and another (1), it is both reasonable and necessary for the court to imply such an obligation. The relationship of landlord and tenant between the parties entailed that the tenants must of necessity enjoy, among other easements, the right of access to their floors using the stairs or lifts. These are not just conveniences provided at discretion but essentials of the tenancy without which no occupation could be possible. The fact that a tenancy concerns a highrise office block or any similar very tall building demands that there be some contractual obligation on the landlord to maintain the lifts and stairs retained under his control in a state of repair so that the easement impliedly granted to the tenants over these means of access would permit their use and enjoyment of the various floors. The ground of appeal which criticised the finding that there was to be implied such an obligation cannot be entertained.

The major ground of appeal concerned the nature and extent of such obligation. Mr Muyenga relied on the Liverpool case in which it was held that the obligation to repair the lifts in a highrise block of dwellings was not an absolute one and did not exceed what was necessary or reasonable. Having regard to the particular circumstances; that it was subject to the tenants own responsibilities and was related to what reasonable tenants should do for themselves. Accordingly, the obligation to be implied was one to take reasonable care to maintain the common parts (which were in that case the stairs, the lifts and the lighting on the stairs) in a state of reasonable repair and efficiency. In other words, the decision there was that the landlord owed the tenants no more than the common duty of care and the corporation was found not by hooligans against whom the corporation, despite their very determined effort, fought a losing battle. The learned trial judge's attention was drawn to the Liverpool case but despite citing it, she found that the obligation was one to keep the lifts in constant repair and for the reasons stated in the passage from her judgment which we have quoted, she found for the tenant. It is plain that in effect, the learned trial judge considered that the obligation was an absolute one. Certainly no account seems to have been taken of the arrangement to employ specialists; nor of the latter's brave efforts on behalf of the landlords; nor of the commonest cause of the frequent breakdowns, namely gross abuse of the lifts by overloading on the part of all or some of the tenants, and their invitees. Mr Muyenga argued to the effect that, as the landlords had employed specialists who were always on call and who always responded to the breakdowns, including the many caused by overloading, the landlords were not in breach of the common duty of care to take such reasonable steps as were necessary to maintain the lifts. Mr Mitchley argued that the Liverpool case was distinguishable and that, in any case, the particular tenant was in a special category because the restaurant business was different from the others which were mere offices and the workers could afford to walk up and down the stairs or to wait for lengthy periods for a lift to arrive. Diners, on the other hand, could not be expected to walk up twenty-two floors or to wait for so long for a

lift, if one was available. In the circumstances, it was his submission that the landlords were obliged to make sure that the restaurant business worked; which meant that the lifts had to be operational all the time. He suggested that, since overloading was the main problem, the landlord could have placed men at the lifts to control such overloading and argued that the fact that the tenant

gratuitously endeavoured such an exercise -without much success - did not shift liability for taking all these necessary steps to the tenant. Mr Mitchley argued very vigorously for the finding that there was here not just a breach of covenant for repair and maintenance but an obligation for quiet enjoyment which raised absolute liability. The submission was that as the provision of lifts was essential to the running of a restaurant, failure so to provide for whatever reason was a breach of the covenant for quiet enjoyment.

We have given anxious consideration to all these arguments and submissions. We can find no authority for the proposition, in effect, that the obligation of a landlord and his liability should differ according to whether the business carried on depends on patronage by members of the public or mere attendance by staff. Liability to a tenant must, in our considered opinion, relate to the landlord's obligation, not to the public but to the tenant himself. We also do not agree that the Liverpool case is distinguishable; the principles discussed in that case, especially Lord Denning's views in the Court of Appeal and their Lordships' opinion in the House of Lords, are, we consider, of general application and apply here, since we find, respectfully, that we are in agreement with those views. There is nothing in the discussion of the basic principles to confine that case to lifts in residential blocks of flats only. The landlord, even of a tall office block, has not an absolute obligation, let alone an absolute liability, in regard to repair and maintenance of lifts. There can be no question of a landlord's absolute liability without some fault nor can there be implied any absolute warranty that the lifts will always work or will be kept working constantly, as suggested by the learned trial judge. On such a suggestion, it would seem that every landlord of a tall building whose tenants depend on the public's patronage for their business would be turned into an insurer in respect of the vagaries of lifts. The nature and extent of the landlord's obligation appears to have been given a novel and unwarranted dimension extending far beyond the common duty of care and without reference to other causes of the breakdown, nor any credit for the fact that the landlords did actually try very hard through a specialist firm, to perform their obligation. In order for the tenant to succeed, it had to be shown that the landlords failed to take reasonable care. In this regard, the fact that all the tenants had their own responsibility not to abuse the lifts cannot be ignored. The employment of specialists on call twenty-four hours a day could not be ignored either, in deciding whether these landlords had failed to take reasonable care. A notion of absolute liability or warranty would produce absurd results. Thus, if, for instance, the tenant's own teenage patrons caused a breakdown by overcrowding the lifts in disregard of instructions as to the number of passengers and the lifts were out of order for a prolonged period because of lack of spare parts, the landlord would be liable for the actions of those for whom they are not responsible. If other tenants

overloaded the lifts - 'like a minibus' was how one witness put it - the landlords would pay damages to them if they lost the custom of the members of the public. A claim of absolute liability or absolute warranty in such a case and without regard to the facts and circumstances or fault does not accord with any known notions of justice or fairness. Another example of the strange results may be given. Although Ormord LJ in the Liverpool case in the Court of Appeal was opposed to implying the obligation to repair, he did illustrate the possible absurdities when he said, at page 676:

> "An implied covenant to keep a stairway reasonably safe is one thing, an implied covenant to keep it in good repair is quite another. Under the former, the landlord would be liable in

> damages for personal injuries; under the latter, he would be liable to be sued in contract for damages for inconvenience, discomfort and so on under such cases as Jackson v Horizon Holidays Limited. Moreover, every time somebody removed or broke the lights on the staircase he would be in breach of covenant. Counsel for the defendants next moves on to the lifts, arguing that if there is an implied obligation to keep the stairway in good repair there must be a similar covenant in respect of the lifts, so that every time somebody put the lifts out of order by breaking the control panel or in some other way, the landlord would be in breach of covenant and liable to be sued by every tenant in the block for damages for inconvenience, no matter how hard he tried to keep the lifts in working order. Then the rubbish chutes - every time a tenant puts a mattress or some other large object down the chute, the landlord would be in breach of his covenant to maintain the chutes in working order, with similar, though perhaps less costly, consequences."

Whilst we do not agree that the illustrations support a case for declining to imply an obligation, we consider them to be good to support the case against absolute liability without fault and in favour of the necessity to investigate the facts and circumstances to see if the landlord did in fact fail in his common duty to take reasonable care.

As can be seen from the passage which we have quoted from the judgement below, the learned trial judge was at pains to justify the findings of liability by stretching the nature and extent of the obligations to be implied by requiring the landlord to 'take any extra measures' to cope with the increased volume of traffic and 'to see to it that the third party obtained the necessary spare parts at all times'; in addition, to ask the third party 'to double their effort' to ensure that the lifts were always working. It was the alleged failure to do these extra things which the learned trial judge found justified a judgment in favour of the tenant. For our part, we do not agree that the common duty of care can be stretched so far or that the court is entitled to frame an implied obligation in such sweeping terms, let alone to fail to evaluate the duty of care in relation to the actual facts and circumstances on both sides of the case, including the causes of the breakdowns complained of.

It is apparent that we are satisfied that the landlords' obligation was not to guarantee constant availability of the lifts but to take reasonable care and to carry out necessary repairs and maintenance. Such obligation related to the maintenance of the existing lifts and could not extend to requiring the landlords to install new or additional lifts to cope with the increase in traffic nor, as Mr. Mitchley proposed, to the provision of

constant supervision by the landlords of the tenants and their invitees. A reasonable set of tenants and invitees must play their part too. Can a landlord still be in breach of his common duty of care as an occupier of the common parts, such as lifts, when he has employed a firm of skilled and competent specialists who are on call at any hour, day or night? We think not. In many of the precedents that we have come across, landlords who have employed competent contractors have been held not liable for injuries to plaintiffs coming upon those parts of their premises maintained on their behalf by such specialists. In most cases, rather, it is the specialists, if negligent, who are liable to the injured parties: see, for example, *Haseldine v C-A Daw & Sons and another* (2): *Green v Fibre Glass Limited* (3), and similar cases. There can be no doubt in the case at hand that

the landlords acted reasonably in entrusting the task of maintaining the lifts to a specialist firm. They did not fail to discharge their common duty of care. We are mindful that Mr. Mitchley argued very forcefully that the landlords were in breach of the implied covenant for quiet possession as opposed to one for repair or maintenance so as to justify strict liability. He even cited some cases where there was deliberate or active interference, disturbance or invasion to the tenant's quiet use and enjoyment or some deliberate omission. None of these cases could possibly apply here and the obligation under discussion could not relate to quiet enjoyment. In the Liverpool case, Denning in the Court of Appeal said at page 663:

> "COVENANT FOR QUIET ENJOYMENT
> Counsel for the tenants conceded that there was no breach by the corporation of the implied covenant for quiet enjoyment. He was quite right to make that concession. This covenant extends, I think, so as to protect the tenant in his possession and enjoyment of the demised premises from any invasion or those claiming through him: Browne v Flower, Kenny v Preen. But here there was nothing done by the landlord which amounted to an invasion, interruption or disturbance of the tenant. Failure to repair the demised premises, or the common parts, cannot be said to be a breach of the covenant for quiet enjoyment."

We respectfully agree with Lord Denning. In any event, even had interruptions to the lift service due to breakdown been a breach of the covenant for quiet enjoyment, we would have applied the reasoning in *Malzy v Eichholz* (4) and found that the landlords are not liable in damages to the tenant under the covenant of quiet enjoyment when they had in no way actively participated in causing the breakdowns which in the main were caused by the various tenants and their invitees.

We are not without some sympathy for the tenant but the decision below, on the issue of liability, cannot be allowed to stand. The cross-appeal and the discussion on damages are now irrelevant. The appeal is allowed; The judgment below is reversed and judgment entered for the landlords with costs both here and below to be taxed in default of agreement.

Appeal allowed.
