APPROACHES TO THE CONSTRUCTION OF A COVENANT

MASTERTON LICENSING TRUST v. FINCO [1957] N.Z.L.R. 1137, C.A.

This recent Court of Appeal decision is of interest to the layman insofar as it concerns a lessor's liability to his tenant for rainwater damage, and to the lawyer insofar as it demonstrates differences in approach to questions of construction. It was an appeal from a decision of McGregor J. in Finco v. Masterton Licensing Trust [1956] N.Z.L.R. 896.

The appellant was at all material times the owner of a three-storey hotel, the whole of which he occupied apart from two small shops on the ground floor. The respondent was the tenant and occupier of one of these shops, having leased it from the appellant under a written agreement to lease. One of the terms of this agreement was as follows:

> 3. And the Owner hereby undertakes with the Tenant as follows:-
>
> (a) Subject to the provisions of Clause (2) subclause (3) that the Owner will keep and maintain in good and tenantable weatherproof wear and condition the roof and outer walls of the said shop premises on the said premises (not caused by the act or default of the tenant)
>
> PROVIDED THAT the Owner shall not be liable for any damage caused by any failure to so keep and maintain in good and tenantable repair until after the expiry of one (1) month from the date or respective dates on which the Tenant shall have given notice to the Owner of any such want of repair to the Owner.

During the respondent's occupation of the shop under her lease from the appellant there was a heavy storm, the

respondent's shop was flooded and damage was caused to stock therein in the following circumstances. The roof was constructed gently sloping to one side, thus providing a water table against a parapet, and this was drained by a hole put through the parapet leading to a box or "rainhead" surmounting a downpipe. At the junction of the rainhead and downpipe there was inserted a rose to prevent material from being carried into the downpipe and blocking it at the bottom. The rainhead, instead of being open at the top, was partly covered with a metal lid. As a result excess water backed up and was trapped in the north-eastern corner of the roof. It would appear that the water found a means of escape over the flashing in the roof guttering and then flowed down the inside of the northern wall, down the wall of the second and first floors to the respondent's premises.

In the Supreme Court the plaintiff had based her claim on three submissions: (a) that there had been a breach of an express covenant in the lease; (b) that there had been negligence on the part of the defendant; and (c) that the defendant was liable to the plaintiff in nuisance. In giving judgment for the plaintiff the Court held that the defendant was not negligent and was not liable to the plaintiff in nuisance, but that there was a breach of the covenant. It was held that the covenant was not coterminous with its proviso, and that the damage complained of fell outside the proviso, but within the covenant.

The Court of Appeal (Hutchison, Turner and Henry JJ.) allowed the appeal and disallowed the respondent's claim to be entitled to judgment in nuisance.

This note on the decision will be confined to the Court's approach to the covenant and its proviso.

The reasoning of the two judges who gave full judgments, Turner J. and Henry J., is significantly different and, in fact, partly irreconcilable - which makes it very difficult, it is respectfully submitted, to support the concurrence of Hutchison J. who agreed with both.

An important factor in the reasoning of Turner J. was that he accepted the view of the trial judge that the damage was brought about by three factors, each of which may be said to have been a cause of that damage. These three factors were (a) the presence of the rose on the top of the downpipe, (b) the accumulation therein of pigeon droppings and (c) the presence of the metal cover on top of the rainhead.

On the assumption that there were these three causes of the flood which damaged the respondent's stock, the questions before the Court were (a) whether these causes singly or jointly attracted liability to the appellant on his obligations under the covenant, and (b) whether the proviso to the covenant protected the appellant in the event of liability thereby arising.

In order to determine these questions Turner J. was of the opinion, contrary to that of McGregor J. in the Supreme Court, that both the covenant and the proviso should be considered together. As authority for this method of construction the House of Lords cases of Jennings v. Kelly [1940] A.C. 206, and West Derby Union v. Metropolitan Life Assurance Society [1897] A.C. 647, were cited by His Honour. It is submitted that the statement set out below by Lord Russell in the first of these two cases accurately represents the opinion of the House of Lords on the question of construing a statutory section containing a proviso, even though there was some doubt as to whether the House was actually considering a true proviso. Lord Russell said (at 220):

> I do not agree with the contention of the appellants . . . that "it is not a right method of construction to use a proviso to control or alter the operative effect of the words preceding it". That is frequently the very function of a proviso, namely, to include within the scope of the preceding words something which prima facie would not fall within it, or to exclude something which prima facie would so fall.

> Although a proviso may well be incapable of putting upon preceding words a construction which they cannot possibly bear, it may without doubt operate to explain which of two or more possible meanings is the right one to attribute to them.

Furthermore, it is respectfully submitted that Turner J. was correct when he stated that there was no valid reason why in this instance the rules of the above-mentioned cases should not be of equal validity in construing a section containing a proviso in a written agreement to lease. Consequently the covenant and the proviso should be read as a whole, one part throwing light on the other.

Given that it is necessary to interpret the covenant in the light of the whole section, we revert to the main question, namely, whether the covenant "that the owner will keep and maintain in good and tenantable weatherproof wear and condition" is to be interpreted as involving the owner in liability in the event of rainwater entering through any cause whatever, or only in the event of its entering through some particular causes. Turner J. placed on the covenant the latter interpretation for the following principal reasons: (1) The principle of construction expressed in the maxim noscitur a sociis required a restriction of the meaning of the word "condition" in the phrase "wear and condition". (2) Reading the covenant in the light of the proviso, the covenant did not disclose an absolute obligation. This was so because (a) the only way in which an absolute obligation could be spelled out of the covenant would be to give a full and independent meaning to the word "condition"; (b) this would mean that the proviso did not cover the whole of the obligation of the lessor under the covenant, for the Court could not interpret the word "repair" in the proviso as including in its meaning a full independent interpretation of the word "condition"; and (c) an interpretation of the proviso as not covering the whole of the obligation in the covenant would be unreasonable.

The reasoning of Henry J. concerning the meaning of the covenant and the extent of the proviso is somewhat different.

Assuming that the rose and the construction of the rainhead were the causes of the flood, the learned judge thought that damage arising therefrom placed no liability on the covenantor, even if the proviso was not co-extensive with the covenant. That is to say, he concurs in the result with Turner J.'s restricted construction. It is significant that Henry J. gives no reasons for this interpretation of the scope of the covenant, and this suggests that he placed more reliance on the alternative argument that, no matter what the obligations under the covenant were, the proviso covered them. His approach to the construction of the proviso is difficult to reconcile with that of Turner J. His view is that, even if the covenant be given a wider interpretation, the proviso covers the full extent of any obligation that may be ascribed to it. He says (at 1150):

> . . . However, even assuming that the defect in the rainhead is a breach of the covenant to keep and maintain the premises in weatherproof condition, I still think the proviso would exclude liability in the absence of prior notice. . . .

The difficulty in reconciling this line of reasoning with that of Turner J. becomes apparent when it is remembered that one of Turner J.'s main grounds for restricting the meaning of the covenant was the fact that the proviso was of more restricted scope than the covenant if the latter were construed without reference to the proviso. On the reasoning of Henry J. the proviso can cover an independent interpretation of the word "condition" in the covenant. If this is so, one can no longer use as a reason for restricting the meaning of the covenant the argument that the proviso has a restricted meaning and therefore the covenant must also have a restricted meaning because any other interpretation would be unreasonable.

The dichotomy of reasoning is thus due to their Honours' differences of approach to the interpretation of the proviso. Turner J. looks at the whole clause and comes to the conclusion that the proviso has the effect of not covering an obligation to replace the rose and modify the rainhead, and

that this is strong support for interpreting the covenant in a similarly restricted fashion.

Henry J.'s reasoning notably differs from that of Turner J. He says (at 1151):

> . . . But whereas the subject of the covenant is "weatherproof wear and condition", the proviso refers to "repair". Is there then any difference between the subject-matter of these two expressions? I am of opinion there is not.

As he has already stated that even if damage from defective construction fell within the covenant the proviso would still protect the covenantor, an implicit conclusion is that the word "repair" can in the circumstances, albeit special ones, have a subject-matter which includes defects of construction. This is directly contrary to the opinion of Turner J., who states (at 1145):

> . . . "repair" cannot include the substitution of a fixture of different design for one undamaged by wear or the ravages of time and unaffected by any lack of maintenance, which, simply by reason of its design or construction, is inefficient. . . .

This discrepancy is due to entirely different approaches. For Turner J. the fixing of the meaning of the word "repair" is an essential step in the narrower construction of the covenant. His approach can be symbolised thus:- the meaning of the proviso is **x** (for reason p) and therefore the meaning of the covenant is also **x** (for reason q) where p is the strong line of authority for the proposition that the word "repair" does not include matters of construction or design, and q is the statement (at 1144) that

> it would be unreasonable and unreal to suppose that the parties could have meant that while the lessor was bound to maintain the roof in good condition, thereby assuming an obligation transcending mere-repair, nevertheless, it was only in

> respect of his obligation to repair that it would be protected by the requirement as to notice.

The construction of the word "repair" is one of the main instruments by which he limits the scope of the covenant.

Henry J., however, considers that construing the proviso on the basis of decided cases, by considering what the word "repair" entails, is too narrow. His approach can be symbolised thus:- given that the construction of the covenant extends to obligations x or y or z, the meaning of the proviso must also extend to obligations x or y or z for reason p. This reason is that the lessor has covenanted to keep the roof in weatherproof wear and condition, and the words "failure to so keep and maintain the premises" refer back to the covenant, which really defines the condition in which the lessor covenanted to keep the roof. That is to say, the failure to so keep the premises (as mentioned in the proviso) means the failure to do whatever is necessary to keep and maintain that condition or state.

What is of particular interest is that two Judges of the same Court, contemplating the same covenant, should take such different approaches. Their approach to the problem is so different, yet they both reach the same conclusion. While this might denote admirable flexibility to some, to others it must surely register as yet another example of the unpredictability of certain decisions on construction, for, although the end results in this case were identical, such a divergence of approach may effect different results on other facts.

This much is clear, that the Courts show steady and perhaps increasing reluctance to be bound by the judicial interpretation given to a word in a covenant on a prior occasion. Certain words, such as "repair" in a lease, have been the subject of much litigation in the past and have thereby acquired certain associations. However, even in these circumstances, the word in question must be read in the light of the particular facts of the individual case, as Masterton Licensing Trust v. Finco so well demonstrates. In

the Court of Appeal Henry J. was prepared to ascribe to the word "repair" a meaning which included an obligation to rectify constructional defects, a view diametrically opposed to that of Turner J.

There is no doubt that it would be a retrograde step to attempt to attribute a fixed meaning to every word, and the law has never gone so far as to do this. But in the interest of certainty and predictability some medium between these counter-balancing interests must be sought. Masterton Licensing Trust v. Finco suggests that any more weight on the scales of flexibility might overbalance the whole machine.

Some evaluation of the two approaches in the case will now be attempted, but to do so will entail a more detailed analysis of other parts of their Honours' reasoning. Henry J.'s attempt to make the proviso coterminous with the covenant can now be examined more closely.

In the first place he considered that the word "repair" when used in the context of the clause he was considering has reference to a condition rather than an act. This however is no support for reaching the conclusion that the proviso is coterminous with the covenant. Granting that the word "repair" refers to a condition, the words "any failure to so keep and maintain in good and tenantable repair" in the proviso could be read "any failure to so keep and maintain in good and tenantable condition." The fact that the word "repair" may refer to a condition or state is no support for Henry J.'s conclusion, as it really just takes the question one stage further back - the words "good and tenantable condition" may have a meaning far different from the words "good and tenantable weatherproof wear and condition". His main argument would appear to be contained in two sentences at 1151, 1152:

> The condition in which the appellant has undertaken to keep the premises is "weatherproof wear and condition", and the failure to so keep the premises mentioned in the proviso means the failure to do whatever is necessary to keep and

> maintain that condition or state. It denotes a failure to make good the condition earlier referred to and does not require or permit in its context a more restricted meaning. . . .

This argument places the utmost importance on the word "so" in the proviso. After stating that the word "repair" refers to a condition the learned Judge goes on to say in effect that the proviso refers to the whole of the obligation under the covenant because the word "so" makes it nonsensical to read it otherwise.

It is submitted that this word in its context has not the far-reaching effect which the Judge ascribes to it, and this for two reasons. The first may be given by the use of a hypothetical example. If the covenant contains an obligation transcending an obligation merely to repair, the word "so" does not necessarily mean that the proviso must be construed as covering the whole of the obligation of the covenant simply because the obligations covered by the proviso are included in the obligations contained in the covenant. It is not nonsensical to covenant "to paint the premises every five years and to maintain in good repair provided that the lessee will not be liable for failure so to repair unless fourteen days notice has been given to the lessee of want of repair". The covenant to repair is different from the covenant to paint though related to it. The word "so" in the proviso does not have its meaning removed by construing the covenant as containing obligations transcending the obligations covered by the proviso.

The second reason is that the word "repair" is one which has been judicially considered on innumerable occasions. It is submitted that it is not in the interests of predictability to sacrifice the more common connotations which this word has to the far different associations of the words in the previous phrase, merely through attaching so much importance to the word "so", which, for the reasons given above, had not the axiomatic effect which Henry J. seemed to think it had.

We are now in a position to examine in more detail the reasoning of Turner J., whereby he restricts the obligations

of the covenant to such an extent that they exclude the obligation to rectify matters of defective design and construction. As we have just considered, it is legitimate to consider that the proviso covers a restricted number of obligations reading the clause as a whole. However, this in itself is no reason for restricting the actual extent of the obligations of the covenant. What then are the reasons? The learned Judge considers (at 1144)

> that it would be unreasonable and unreal to suppose that the parties could have meant that while the lessor was bound to maintain the roof in good condition, thereby assuming an obligation transcending mere repair, nevertheless, it was only in respect of his obligation to repair that it would be protected by the requirement as to notice.

What he goes on to say really means that it is unreasonable because (a) the parties could have been specific and provided so in clearer terms; (b) the words "so" and "such" suggest that the area of the first part of the obligation is coterminous with the more restricted area of the proviso; (c) the word "repair" is not in the first part of the clause, and (d) a literal interpretation of the whole clause is impossible as the words "not caused by the act or default of the tenant", cannot stand without some addition or amendment. Taken singly these reasons are not of sufficient strength to support the conclusion that the learned Judge comes to, but considered collectively they constitute, it is submitted, good reason for (1) constructing the covenant in a non-absolute way, and (2) restricting the obligations of the covenant to those covered by the proviso. It may not be entirely clear why they are good reasons for submission (2) - granted that there is good reason for interpreting the covenant non-absolutely, and granted that, as regards the rainhead and rose, the defect was one of construction and design, must it necessarily follow that these two latter causes fall outside the non-absolute obligation of the covenant? Admittedly such a conclusion does not necessarily follow, but it is submitted that reasons (a) and (b) supra give good reason for it to follow. This, however, rests on the assumption that "repair" cannot include an obligation to substitute a fixture

of different design for one undamaged by wear or the ravages of time and unaffected by any lack of maintenance which, simply by reason of its design or construction, is inefficient. On this point Turner J. was in agreement with the trial Judge and the ruling is, it is respectfully submitted, a sound one, based on a strong line of authorities.

It remains to consider the application of the principle of construction expressed in the maxim noscitur a sociis. It assumes one of the most important tenets on which the learned Judge based his judgment. He firstly distinguishes other cases in which the word condition was used in a covenant in a lease and interpreted as placing obligations higher than those ascribed to the covenantor in Masterton Licensing Trust v. Finco by holding that in these other cases the covenant expressed two ideas and not one, whereas in the case before the Court only one idea was expressed. Now this may well be the case with regard to the authorities cited, and the question is whether the same result should be forthcoming from a consideration of the covenant in the present case.

The Court denied that it should, and at first sight the decision is rather startling. It would appear, for instance, that if, instead of writing the more or less convenient - and less cumbersome - "good and tenantable weatherproof wear and condition", the words "good and tenantable weatherproof wear and good and tenantable weatherproof condition" had been substituted, the ground for distinguishing the cited authorities from the present case would not exist. The attempt to distinguish Lurcott v. Wakely and Wheeler [1911] 1 K.B. 905, on the grounds that in that case the covenant contained the word "repair" as used in association with the phrase "clean and proper order and condition", whereas in this case the word "wear" used with the word "condition" is suspect, for the reason that the Court later has to ascribe a meaning to the word "wear" akin to that of the word "repair" in order to allow the maxim noscitur a sociis to limit the obligations under the covenant.

It is submitted that the principle noscitur a sociis is no reason per se for the conclusion that good and tenantable weatherproof wear and condition entails an obligation only to

keep and maintain in good and tenantable weatherproof repair. Far from "requiring" such a construction, it is doubtful whether it allows it. At the most the principle, if it be such, may allow but certainly not compel. Furthermore, there is difficulty in reconciling its application with the passage (cited with approval by Turner J. at 1142) from Lurcott v. Wakely and Wheeler (supra at 915 per Fletcher Moulton L.J.):

> . . . I think it is our duty to give the full meaning to each word of the covenant. . . . The sole duty of the Court is to give proper and full effect to each word used, and the question whether this leads to more or less overlapping is of no legal importance. . . .

It is submitted that neither judgment is free from objections and that probably no judgment on the facts could be. However, this is not to abdicate from the task of evaluation, and it is suggested that the approach of Turner J. is preferable, as the end result is attained without disturbing the connotations of the word "repair". It is further suggested that this comment might have application on a more general plane and that, where two or more methods of constructional approach are offered, the path that reaches the desired results without trammelling the long established legal meaning of common terms should be taken. Flexibility is desirable, but so too is certainty.