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Regis Property v. Dudley

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REGIS PROPERTY V. DUDLEY — LANDLORD AND TENANT — REPAIRS — EXCEPTION OF FAIR WEAR AND TEAR — EFFECT OF EXCEPTION — The recent House of Lords decision in *Regis Property Co. Ltd. v. Dudley*[1] seems to have resulted in a new interpretation of the fair wear and tear exception clause found in the tenant's repairing covenant of most leases. A sample of a covenant to repair may be found in the *Short Form of Leases Act*.[2] The previous law as stated in *Taylor v. Webb*[3] appears to have been overruled.

Before discussing what the fair wear and tear exception is, and how it may now be redefined, it is necessary to review the law prior to the *Taylor v. Webb* case, as an aid in seeing how the court in *Regis Property* arrived at its present position.

In *Gutteridge v. Munyard*,[4] Tindal C.J. stated the effect of a repairing covenant containing an exception of reasonable wear and tear in these words:

> What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord. But

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25 *Supra*, footnote 7, at p. 141.

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1 [1958] 3 All E.R. 491 (H.L.).

2 R.S.O. 1950, c. 361. "And also will, during the said term, well and sufficiently repair, maintain, amend and keep the said demised premises with the appurtenances in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made by the lessor, when, where, and so often as need shall be, reasonable wear and tear and damage by fire, lightning and tempest only excepted."

3 [1937] 1 All E.R. 590.

4 173 E.R. 57, (1834), 7 Car. & P. 129, 174 E.R. 114, (1834), 1 M. & Rob. 334.

> the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised.[5]

It should be noted that the exception clause protects the tenant here, and that he is responsible only for damage other than that governed by the fair wear and tear exception. He is responsible also for damage from abnormal operation of the elements.

In *Lister v. Lane and Neshan,*[6] Lord Esher M.R., in affirming the *Gutteridge* decision, said:

> . . . The effects of natural causes upon such a house in the course of time—are results from time and nature which fall upon the landlord, and they are not a breach of the covenant to repair.[7]

This definition of the exception clause was applied in *Terrell v. Murray*[8] and in *Buttimer v. Betty.*[9]

In 1928, Talbot J. expanded the meaning of the fair wear and tear exception in the case of *Haskell v. Marlow.*[10] Here a husband had left a dwelling house and garden to his wife for life, the wife "keeping the same in good repair and condition, (reasonable wear and tear excepted)". The wife did nothing actively to injure the house and premises, but did little to counteract the natural process of decay. The plaintiff trustees of the husband's will claimed the wife had breached the will's terms by neglecting to keep the premises in good repair and condition, (reasonable wear and tear excepted). Talbot J. in a now famous judgment (re-echoed in *Regis Property*) said:

> . . . The tenant (for life or years) is bound to keep the house in good repair and condition, but is not liable for what is due to reasonable wear and tear. . . . If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception . . . reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is *directly* due to wear and tear, reasonable conduct on the part of the tenant being assumed. . . . He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.[11] (Italics mine.)

It appeared that the tenants were responsible for *consequential damage* resulting from fair wear and tear.

However, in 1937, the Court of Appeal in *Taylor v. Webb*[12] disapproved of the reasoning of Talbot J. in *Haskell v. Marlow* and held that the clause relieved the tenant not only from the immediate

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[5] 174 E.R. 114 at 115, also quoted in *Woodfall on Landlord and Tenant,* 25th edition, 1954, at p. 765.
[6] [1893] 2 Q.B. 212 (C.A.).
[7] *Ibid.* at p. 217.
[8] (1901), 17 Times L.R. 570.
[9] (1914), 26 W.L.R. 705, 6 W.W.R. 22 (B.C.).
[10] [1928] 2 K.B. 45.
[11] *Ibid.* at pp. 58, 59.
[12] *Supra,* footnote 3.

effects of wear and tear, but also from the obligation to take any steps to avert any consequential damage. The facts of that case are unusual, and are stated in the headnote as follows:

> A landlord covenanted in an underlease to keep the outside walls and roofs in tenantable repair, as he was required by the headlease to do. The covenant in the headlease contained an exception of damage by fire, and fair wear and tear. Owing solely, as it was found, to the effect of wind and rain, certain roofs and skylights became defective, and as they were not repaired certain rooms in due course became uninhabitable. The tenant claimed damages for breach of the landlord's covenant to repair.

Lord Justice Scott speaking for the court, reversed Du Parcq J. in the court below, and held that the landlord was not responsible for the effects of wear and tear, or for any consequential damage flowing from the wear and tear. However, Scott L.J., emphasized the unusualness of the situation, commenting that:

> . . . Our task is not quite the ordinary one, as we have to construe the words removed from their normal context of a tenant's covenant, and transported into the text of a landlord's covenant. The result of this incorporation is to produce a topsy-turvey covenant by a landlord, seeking to measure his obligation as landlord in an underlease by the scope of his commitment as tenant in the head-lease.[13]

The Lord Justice went on to explain that the phrase "fair wear and tear" covers two classes of disrepair, (a) that caused by the normal operation of natural causes, wind and weather, and (b) that caused by the tenant in the course of the fair (or reasonable) use of the premises.[14]

The meaning of the repairing covenant, as given in *Haskell v. Marlow* was commented upon by Lord Justice Scott. He states that the covenant as interpreted in the *Haskell* case, throws upon the covenantor a positive duty of stepping in and spending money, in order to stop the wear and tear due to natural elements and tenant's ordinary uses of the premises. An obligation, which he did not agree to perform is thus placed on the shoulders of the covenantor. The learned judge asks:

> At what stage in the process of natural decay does the duty arise to effect repairs and prevent the further ingress of the elements? On the first leak? If so, the exception is made meaningless. Upon nature's enlargement of the leak? Where is the line to be drawn? There is no such limitation of degree in the exception. In my view, the mere operation of normal wind and weather does not at any stage, confer on the covenantee the right to call on the covenantor to come in and effect repairs, in order to prevent further effects of wind and weather.[15]

Three years ago, the English Court of Appeal gave clear indication of dissatisfaction with the *Taylor* case. In *Brown v. Davies,*[16] Romer L.J., agreeing with Evershed M.R., stated the court's view, that *Taylor v. Webb* was a highly exceptional case, and that the covenant there was in a most unusual form. He added that:

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[13] *Ibid.* at p. 596.
[14] *Ibid.* at p. 597.
[15] *Ibid.* at p. 600.
[16] [1957] 3 W.L.R. 818, [1957] 3 All E.R. 401 (C.A.).

> It seems to me that the law as laid down by Tindal C.J. in *Gutteridge v. Munyard* is still the general law, and was not intended to be overruled by this court in *Taylor v. Webb*. Nor, indeed, was the statement of the law by Tindall C.J. brought to the attention of the court in that case.[17]

Although this comparison of *Taylor v. Webb* with the *Gutteridge* case by Romer L.J. was *obiter,* it illustrated the court's attitude towards the *Webb* decision, and its reluctance to be bound by it.

In *Regis Property Co. Ltd. v. Dudley*[18] the Law Lords, in affirming the Court of Appeal in the instant case, and the *obiter* in the *Brown* case, specifically agreed with Talbot J. in the *Haskell* case and overruled *Taylor v. Webb*. Here a rent-controlled flat was let to a tenant on a monthly tenancy under an agreement in writing. Under the tenancy agreement, the tenant undertook to keep "the interior of the flat together with all the fixtures and fittings . . . in good and substantial repair, and clean sanitary condition (fair wear and tear and damage by accidental fire excepted)." The tenant contracted to keep the baths, sinks, etc., clean and open, and in proper repair and order, and be responsible for damages by his failure to do so. The landlord had the burden of all exterior repairs, of all interior repairs caused by fair wear and tear, and of certain plumbing.

It was held that the exception clause in the tenant's repairing covenant, meant that the tenant was responsible for consequential damage resulting from the fair wear and tear defect. Viscount Simonds, in expressing the court's ruling, quotes and upholds the judgment of Talbot J., and states that *Haskell v. Marlow* should be reinstated by the House of Lords, replacing *Taylor v. Webb*.

It is not entirely clear whether prior to the *Regis Property* case, the law in Canada was that expressed in *Taylor v. Webb* or *Haskell v. Marlow*. Canadian cases interpreting the exception clause (especially its scope), are rare. Ostensibly, *Taylor v. Webb* was followed in British Columbia in *Bartram v. Rempel,*[19] where O'Halloran J.A. expressly considered that *Taylor v. Webb* overruled *Haskell v. Marlow*.

In the Ontario case of *Hall v. Campbellford Cloth Co. Ltd.,*[20] the fair wear and tear exception clause in the tenant's repairing covenant was present. However, this clause was not in issue, consequently it was not defined in the judgment. Here, the roof of a curling rink, held under a lease, collapsed, owing to the accumulation of an "abnormal amount" of snow. The landlord's action for damages against the tenant was successful, since the court felt that the "abnormal amount" of snow was outside the exception in the tenant's repairing covenant.

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[17] *Ibid.* at p. 408.

[18] *Supra,* footnote 1.

[19] [1950] 4 D.L.R. 442 (B.C. C.A.).

[20] [1944] O.W.N. 202, [1944] 2 D.L.R. 247.

Although *Taylor v. Webb* was English law at the time, it is submitted that the court could have arrived at their decision by interpreting the covenant according to *Haskell v. Marlow.* The tenant would be responsible for the consequential damage resulting from the accumulation of snow. This view would incorporate *Haskell v. Marlow* as Ontario law at that time. However, the court held the tenant liable, because the "abnormal amount" of snow was outside the exception in the tenant's repairing covenant; perhaps it may be implied that the court adopted *Taylor v. Webb* as part of the law of Ontario, since *Haskell v. Marlow* was not followed.

What is the resultant effect of the *Regis Property* case on Canadian law? Although no Canadian cases have yet been decided on the fair wear and tear exception since the *Regis* case, it is probable that *Regis Property,* being a House of Lords decision, will be adopted in most Canadian jurisdictions. Then a tenant with a fair wear and tear exception in his lease has the responsibility of avoiding consequential damage stemming originally from a fair wear and tear defect, even though a landlord does not repair the fair wear and tear defect. It is submitted that the only remedy a tenant may have, where he has informed the landlord in such a situation, is an estoppel against the landlord from proceeding against him. The *Regis Property* case still leaves unanswered the question of drawing the line between direct and consequential damage, as Scott L.J. so aptly noted.[21] These issues still have to be contended with in our jurisdiction today.

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