ROYAL TRUST COMPANY.....SUPPLIANT; 1924 April 26.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Landlord and tenant—Lease—Covenant to repair—"Wear and tear"—Interpretation.

Held, that where a lease contains a covenant "to repair, reasonable wear and tear, and damage by fire, lightning and tempest only excepted . . . and that the lessee shall leave the premises in good repair, reasonable wear and tear, etc., only excepted," such a covenant must be construed with moderation and not with severity, so that nothing will be exacted at the expiration of the lease in the nature of repairs, except such as are necessary to make the premises reasonably fit for occupation by tenants of the class likely to occupy it. Repair and not perfection is the test, and the tenant will be deemed to have discharged his liability to repair if he has kept the building in repair according to its age, nature and the condition in which it was when he took possession.

2. That "wear and tear" must be considered in the light of the purpose for which the building was leased and the nature of the use to which it might be put.

3. That the suppliant's claim for damages for breach of the covenant to repair was not extinguished by a sale by him of the demised premises, before the institution of the action. This right is in the nature of a chose in action existing separately from the property itself.

PETITION OF RIGHT seeking to recover $10,000 damages for breach of covenant to repair under a lease of premises from suppliant to respondent.

April the 2nd, 3rd, 4th and 5th, 1924.

Case now heard before the Honourable Mr. Justice Audette, at Toronto.

R. T. Harding, K.C. and *C. B. Clark* for suppliant;

H. H. Dewart, K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 26th April, 1924, delivered judgment.

The suppliant, by its Petition of Right, seeks to recover the sum of $10,000 damages arising out of an alleged breach of a covenant in a lease or agreement entered into between the parties, in that at the expiration of the least the property has been yielded up to the suppliant

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greatly injured, wasted, damaged and destroyed, and that the defendant failed to keep the premises in repair during the term of the lease.

On the 23rd February, 1921, the parties hereto entered into a lease whereby the suppliant rented to the respondent on College Street, in the city of Toronto, a large property which hitherto had been used as a dwelling or residential property and for a time as the residence of the Lieutenant Governor of Ontario. The lease specially sets out that the property is taken or leased

to provide facilities for the care and training, in the city of Toronto, of sub-normal ex-members of the Military and Naval Forces who are eligible for such care and training under the regulations of the Department of Soldiers' Civil Re-establishment with a view to the re-establishment of such persons in civil life . . . .

the lessor specifically agreeing

to lease unto the lessee for such purposes.

The house was rented and used to open and operate "vetcraft" workshops, providing manual employment,—such as the making of toys, baskets and brass-work, etc., involving technical, mechanical and artisan training with machinery and equipment, for sub-normal handicapped men who required consideration, as alleged in paragraph 2 of the statement in defence. The building

which is a good old house

was used, as stated by one of the witnesses, for copper work, wooden work, wicker work and light carpentering.

The claim is made against the respondent for breach of covenants for repair contained in the lease, reading as follows:

And to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted . . . . And that the lessee shall leave the premises in good repair, reasonable wear and tear, etc., only excepted.

Both of these clauses to be read within the amplified meaning defined in R.S.O. (1914) c. 116, Schedule B., pp. 1239 (4) and 1240 (9), as per annexed copy to the lease filed as exhibit No. 1.

The particulars of the claim are as follows, viz:—

1. Repairs to roofing..	$ 250 00
2. Necessary plastering..	100 00
3. Repairs and replacements of plumbing and steamfitting	400 00
4. Repairs to lighting, wiring and lighting fixtures..	1,500 00
5. Necessary carpenter work, about..	250 00
6. Repairs to and installation of floors and floor coverings, about..	1,400 00

7. Repairs to tile work in bathrooms and lavatories, and marble work in main lavatory, as well as replacement of fireplace linings, about..	350 00
8. Painting and decorating interior work, about..	1,800 00
9. Replacing broken glass and painting conservatory inside..	250 00
10. Exterior painting, two coats of paint on the outside of the house—estimate..	1,100 00
11. Repairs to stables, greenhouses and outbuildings, for cleaning up and painting, estimate..	200 00
	$7,600 00

It must primarily be observed that notwithstanding the allegation of paragraph 8 of the petition of right that this sum of $7,600 " was required " to put the demised premises in a final state of repair, that the allegation would have been clearer and unambiguous had it said " would be required," as no amount was expended and that this sum of $7,600 is merely an estimate of the cost of the contemplated repairs. *Klees* v. *Dominion Coat and Apron Co.* (1).

The standard of repairs under the circumstances of the case is the difficult question left for determination.

That question, it seems, cannot be properly decided without taking all the circumstances of the case into consideration. The evidence discloses that the demised premises were old; the property was built in 1858 or 1859 and when bought in 1904 by Mr. Beardmore it was remodelled and repaired at great expense.

It is further established under the evidence that these premises in the process of trade and commercial change and development in Toronto, had gone out of the dwelling and residential class and district into another class and district. That it was now to be used either as a public library or an institution, etc.

Does not the fact that the owners leased to the respondent for the avowed purposes mentioned in the lease, show that they realized that the residential character of the property had departed. Does not this fact, coupled with the evidence that the property had gone out of the residential district, lead to the conclusion that the state of repair in which the property was to be left at the conclu-

(1) [1905] 6 Ont. W.R. 200.

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sion of the tenancy was to be such as would make it reasonably fit for the occupation of a tenant of the class likely to take it. That it seems to me is the true construction to be placed upon the covenants to repair. *Proudfoot* v. *Hart* (1); *Calthorpe* v. *McOscar* (2).

Now it is one thing to lay down the rule that the covenants of the lease must be fairly construed, but quite another thing to establish the proper application of the rule to a particular case.

The claim made is an estimate and it must be borne in mind that the evidence adduced in support of the same has been by so-called experts or men in the trade, master-plumbers, etc., who were sent upon the premises for the very purpose of finding fault. Indeed, at all times and under all conditions, if an expert in plumbing, heating, or any other trade, is let into a house for the very purpose of fault finding, he will always find manifold defects that will be magnified and increased to suit the purposes of the case. Therefore in an earnest endeavour to do justice between parties one must guard against exaggerations one way or the other.

A lessee cannot commit waste in the nature of a breach of a covenant of his contract, even technically, if he is doing that which he is entitled to do by such contract,—that is he cannot commit waste in the nature of a breach, if the lessor has entered into a special contract with him that enables him to do what he has done. *Meux* v. *Cobley* (3).

When an old building is demised and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed state at the end of the term, or that it should be of greater value than it was at the beginning of the term. *Gutteridge* v. *Munyard* (4). Some of the witnesses were testifying to expenditures in repairs upon the basis of turning out some portion of the house as good as new, in first-class condition, when it is clearly established that the house was only in fair condition at the time possession was taken.

(1) [1890] 25 Q.B.D. 42.
(2) [1923] 2 K.B. 573 at p. 579.
(3) [1892] L.R. 2 Ch. D. 253 at p. 263.
(4) [1834] 1 Moody & Rob. 334, at p. 336.

Far from being maltreated or badly abused, the house—having regard to the use for which it had been leased—(Woodfall's Law of Landlord and Tenant 20th ed. 818) has been relinquished in a better condition than might have reasonably been expected,—saving always, *inter alia,* the injury which obviously must have resulted from the user of the large benches for the purposes of the copper workshop in the dining room—but all of this is due to the careful supervision of those in charge at the time of the taking possession, occupation and at the end of lease.

The covenant to repair, as set out in the lease, is to

well and sufficiently repair, etc.,

words that have been very ably commented and passed upon in the leading case of *Calthorpe* (ubi supra) and wherein it is said that they must be construed with moderation and not with severity. Repair and not perfection is the test. The covenant must not be strained, but reasonably construed, so as to keep the premises in substantial repair as opposed to trivial matters. 18 Hals. 508.

The learned judge in the *Calthorpe* case, sums up his judgment and concludes in the following manner, viz:—

In concluding this judgment I desire to point out that *Proudfoot* v. *Hart* (ubi supra) supplies, I think, a useful working rule for the normal covenants to repair, however variously they may be worded. Some standard must be taken. What is it to be? The notion of the actual owner may be generous or severe. The notion of the actual tenant may be narrow or indulgent. It is well to adopt a practical and general working standard and thus to meet the difficulty arising when landlords and tenants have opposite views with respect to houses which vary greatly in age, description, locality and purpose. Such a standard is provided by *Proudfoot* v. *Hart.* After all, a building is made for occupation. It is for use as a business or residential structure and not as a museum of reparational achievement. If the actual landlord with varying notions is excluded, and the actual tenant with varying notions is also excluded, then a hypothetical person can be taken as supplying the test. That person is well indicated in *Proudfoot* v. *Hart.* He is known as the reasonable person. He is assumed to be the intended occupant. He is reasonably minded. He must not ask too much or accept too little. The notional existence of this person guards equally the interests of landlord and tenant. Exclude him and confusion exists; adopt him and a working rule is provided.

The tenant discharges his liability when he keeps the building in repair according to its age, nature and the condition in which it was when he took possession. He is not expected to return a new house, but a house in a substantial state of repairs, with due allowance for wear and tear.

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The covenant to repair does not imply the necessity to rebuild when not contemplated by the lease. *Lister* v. *Lane* (1).

I have had the advantage, accompanied by counsel for both parties, of viewing during the trial, the premises in question,—a visit which has enabled me greatly to properly appreciate the testimony of the witnesses and to understand the manifold details of the claim.

The house has been empty from the 1st February, 1923. It was heated from that day to the spring of 1923, but not to the same degree of temperature as before.

Possession of the property was taken on 1st February, 1920, and it was vacated on 31st January, 1923.

Now the property when entered upon by the tenant was not, as put by witness Northgrave, in first-class repair, and the defects in wiring, plumbing and heating were not, however, such as would interfere with the use it was intended to be made of the premises. Great precautions were taken at the outset by the tenant to protect the house, repairs were made from time to time and even at the expiration of the lease, when carpenters were sent to make such repairs as would appear to be required. Witness Northgrave went over the property, at the time possession was taken and exhibit G prepared by him shows the state and condition of the premises when possession was taken on about 1st February, 1920.

Taking the several items of the particulars above recited the full estimate will be allowed in respect of the floor in the dining room and a reasonable amount to retouch and fix the other floors on the ground and first floors which might have been affected by the washing with water, or otherwise. There was no damage to the third floor as stated by one of the witnesses heard on behalf of the suppliant. A reasonable allowance will also be made with respect to the tile work, together with the decorations in the interior; that is to clean, touch with paint, but not repaint the two flats. If all the painting and decorating asked were allowed,

(1) [1911] 31 Can. L.T. 927; [1893] 2 Q.B.D. 212.

the house could be placed in a very much better condition than when the tenant took possession. *Scales* v. *Lawrence* (1); *Crawford* v. *Newton* (2).

Nothing should be allowed in respect of the conservatory the evidence establishing clearly that it was "not in good shape" on the 1st February, 1920. There were panes of glass broken, it leaked and could not be used at the time. The paint was gone and the ribs of the dome showed dry rot. *Lister* v. *Lane* (3). The 10th item respecting painting of the outside of the house has been abandoned at trial and very little could be allowed, if any, in respect of the stables, which were especially well protected by a wooden floor plank laid with joints over the cement when used by the tenant.

A small amount will be allowed in respect of all items, excepting items 1, 9, 10 and 11. The plumbing and heating except "some small details" have been maintained in fair state of repairs and the claim in that respect was grossly exaggerated by some of the witnesses, such as the sum claimed in respect of the laundry tubs (which were not used by the tenant), the copper sink, the smoke stacks of the furnaces, etc. A moderate and small amount is allowed with respect to the item of wiring, lighting and bells, a claim marked with the most arrant extravagance, as shewn by the evidence.

The system of telephones between the different apartments of the house was not in perfect condition, not in working condition, when possession was taken. It was not used. However, it is true there was some slight damage at a couple of places and an allowance is made for such damage. All wirings in the building are obsolete and under the rules and regulations of underwriters could not be installed to-day. Brass sockets were removed from cellar and replaced by porcelain.

Going over these particulars, I may say that in making an estimate of what should be allowed it is impossible to arrive at a compensation with mathematical accuracy, and I have come to the conclusion that the sum of $1,016 will

(1) [1860] 2 F.F. 289. (2) [1886] 36 W.R. 54.
(3) [1893] 2 Q.B.D. 212.

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meet the merits of the case, so far as it can be ascertained, to cover all real and actual damages.

Besides the item of the particulars amounting to $7,600, as more fully amplified in exhibit 7, there is also a claim of $2,500 set out in paragraph 9 of the information for the use of the premises, by the landlord, to make the repairs in question, thereby depriving him of rent in the meantime.

The repairs alleged in the petition of right were not made and there is no evidence on the record going to show the lessor has lost any tenant on that account. Moreover, the property was relinquished on the 31st January, 1923. The bursar and secretary of the University of Toronto testified that the property has been bought by them, under deed bearing date the 17th May, 1923. That negotiations for such sale had been submitted in writing by the lessor on the 5th March, 1923, and furthermore that "some verbal negotiations had started before that date" and he said he should judge "a month or so before,"—which would take us back to the 5th of February, 1923, five days after the expiration of the lease.

The claim for this sum of $2,500 has not been proven and is disallowed.

There remains the further question raised by the amendment of the statement in defence to the effect that the claim made by the petition which is dated the 22nd June, 1923, at a time when the suppliant had sold the property and had thus parted with and disposed of all its interest whatsoever in the demised premises, as more fully stated in the pleadings, and that therefore the suppliant's right of action was at that time extinguished and that he has no claim for any damages against the respondent.

The right of action for damages arose on the 31st January, 1923, and remained extant and in existence as long as unsatisfied. It is a right in the nature of a chose in action existing separately from the property itself and which did not depend upon what the lessor was doing with his property at the expiration of the lease,—either selling or demolishing. This right of action must not be confused with an alleged right of action for damages arising after the property has been sold by the lessor.

Where, indeed, premises have been pulled down by the lessor at the expiration of a lease, his rights under the covenant to repair are not thereby diminished or altered. *Inderwick* v. *Leech* (1); *Joyner* v. *Weeks* (2) 18 Hals. 513; *Rawlings* v. *Morgan* (3); *Calthorpe* v. *McOscar* (4).

I should not close without saying I have not overlooked the question stressed in the course of the trial with respect to exhibit No. 3, required when submitting premises for rental to the Crown and the letter, exhibit No. 4, written by witness Northgrave. The writer of that letter had no authority to bind the Crown and even had he such authority the signing of the lease after that date is a clear and distinct waiver of the several conditions mentioned in exhibit No. 3 which is entirely superseded by the lease itself which has become the law between the parties thereto.

Therefore, there will be judgment adjudging that the suppliant is entitled to recover and be paid by the respondent the said sum of $1,016 and with costs.

Judgment accordingly.