Specific performance and tenant disrepair

Mark Pawlowski examines the principles determining the grant of specific relief to a landlord against a tenant in breach of a covenant to repair

The view that the landlord must rest content with a claim in damages for breach of a tenant's covenant to repair dates back to the decision of Lord Eldon LC in the celebrated case of *Hill v Barclay* (1810) 16 Ves 402; 33 ER 1037. Subsequent case law also appeared to favoured this view. In *Regional Properties Ltd v City of London Real Property Co Ltd* (1980) 257 EG 64, at 66, for example, Oliver J expressed "grave doubt" whether a repairing covenant was capable of specific performance against a tenant, although his Lordship also ventured to suggest that the decision in *Hill* "may logically be much weakened as an authority, if indeed it ever was more than a mere dictum". In *Jeune v Queens Cross Properties* Ltd [1974] Ch 97, at 100, Pennycuick V-C also stated (obiter) that "a landlord cannot obtain against his tenant an order for specific performance of a covenant to repair". The judgment, however, left open the thorny issue of mutuality of remedy and highlighted the inherit imbalance as to the availability of specific performance as between landlord and tenant.

The view taken in *Hill*, however, was overturned by Mr Lawrence Collins QC (sitting as a deputy judge of the High Court) in *Rainbow Estates Ltd v Toke*nhold *Ltd* [1999] Ch 64, who held that a modern law of remedies required specific performance of a tenant's repairing covenant to be available in appropriate circumstances when damages would not be an appropriate remedy with no constraints of principle or binding authority against the availability of the remedy.

OBJECTIONS TO SPECIFIC PERFORMANCE

Interestingly, the deputy judge in *Rainbow* examined each of the various objections traditionally raised against the award of specific performance of a covenant to repair in favour of a landlord.

(a) want of mutuality

In *Hill*, Lord Eldon LC refused the tenant relief against forfeiture for breach of a repairing covenant on the ground that a landlord "cannot have specific relief with regard to repairs": at 405. The basis for the decision was the absence of mutuality between the parties. The tenant could not obtain relief against forfeiture for failing to repair because the landlord (in turn) could not obtain specific relief against the tenant. This reasoning, of course, has little (if any) significance today because the tenant now has the benefit of a statutory jurisdiction to be relieved against forfeiture under s.146(2) of the Law of Property Act 1925 and is able to

obtain specific performance of the terms of the lease (including the obligation to repair) both under s.17(1) of the Landlord and Tenant Act 1985 and the court's inherent equitable jurisdiction: see, *Jeune*, above. Not surprisingly, therefore, the deputy judge had little difficulty in dismissing mutuality as an obstacle to specific relief.

(b) requirement of supervision and definition of works

Another justification for not granting specific relief in this context has been the court's reluctance to grant orders involving the supervision of continuing acts involving work and labour. Also, relief has been denied on the ground that the remedial works necessary to comply with the repairing covenant cannot be adequately defined to form the basis of an effective court order.

As regards the need for the court's supervision, the deputy judge adopted the observations of Lord Hoffmann in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, that this objection to relief (which was designed to avoid repeated applications for committal which were likely to be expensive in terms of cost to the parties and the resources of the judicial system) had less force in relation to orders to achieve a stated result because the court had only to examine the finished work and state whether it complied with the order.

With regard to the need for precision in terms of the court order, here again, the deputy judge was able to rely on *Argyll Stores* to the effect that lack of precision was no more than a discretionary matter to be taken into account in determining whether or not to make the award. The problem associated with defining the remedial work (and the need for supervision) could both be overcome by ensuring that there was sufficient definition of what had to be done in order to comply with the court order.

(c) other obstacles

A more cogent obstacle to specific relief, canvassed in the past, has been 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, in terms, apply to claims for specific performance, the suggestion is 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 were such that leave under the Act would not be granted. Not surprisingly, this proposition was recognised by the deputy judge to the extent that the court should prevent specific performance from being used to effectuate or encourage the mischief which the 1938 Act was intended to remedy. Thus, the court had to be astute to ensure that the landlord was not seeking the decree simply in order to harass the tenant and, in so doing, it may take into account considerations similar to those it must take into account under s.1(5) of the 1938 Act.

Another issue (not specifically addressed in earlier authority) relates to the principle that equity's jurisdiction is limited to specific performance of contracts and not of particular

stipulations in a contract. In *Rainbow*, however, the deputy judge dismissed this as a problem concluding that the court should not be constrained by the (supposed) rule that the court will not enforce the defendant's obligation in part. In his view, the principle (if it existed) applied only where the contract was part unenforceable - it did not mean that the court could not, in an appropriate case, enforce compliance with a particular obligation such as a covenant to repair in a lease.

UNUSUAL FACTS IN RAINBOW

It was apparent that the case had a number of unusual features which favoured the grant of specific performance against the tenants. First, the leases in question contained no forfeiture clause so that a breach of the tenant's repairing covenant did not entitle the landlord to forfeit the leases. Nor did the leases contain a clause entitling the landlord access to the demised premises to carry out the repairs with a view claiming the cost from the tenants as a debt or rent in arrears. This all pointed to the fact that there was no adequate remedy other than specific performance against the tenants. Moreover, there was evidence of serious disrepair and deterioration to the property with the value of the repairs being estimated at £300,000. Various notices, pursuant to the Housing Act 1985 and the Environmental Protection Act 1990, had been served in respect of the premises. In addition, the schedule of works required were sufficiently certain to be capable of enforcement by the court. All these facts pointed strongly to specific performance being the appropriate remedy in this case and the deputy judge so ordered, subject only to liberty to apply for directions for the working out of the order.

RELEVANT TESTS

The deputy judge in *Rainbow* stressed the need for "great caution" in granting the remedy of specific performance of a repairing covenant against a tenant. Only in a "rare case" will it be justified because, in the context of a commercial lease, the landlord will normally have the right to forfeit the lease or to enter and do the repairs at the expense of the tenant. In residential leases also, the landlord will normally have the right to forfeit. Moreover, the courts will be astute to avoid injustice or oppression to the tenant and the remedy will be confined to cases where damages are not an adequate remedy. In *Blue Manchester Ltd v North West Ground Rents Ltd* [2019] EWHC 242 (TCC), HH Judge Stephen Davies (sitting as a judge of the High Court) put the matter this way, at [53]:

> "It is well-established that specific performance is a discretionary remedy which will only be granted where it appears to the court in all the circumstances to be just and equitable. The court must always proceed with caution since it is a draconian remedy in the sense that failure to comply with an order for specific performance is a contempt of court."

In *Airport Industrial GP Ltd v Heathrow Airport Ltd* [2015] EWHC 3753 (Ch), Morgan J, referring to the *Rainbow* decision, derived the following propositions relating to a claim to specific performance, at [115]:

> "(1) the remedy should be made available where it is the appropriate remedy and, in particular, where damages are not an adequate remedy; (2) it will be relevant that the person with the benefit of the contract cannot enter upon the relevant land and carry out, or procure the carrying out of, the work; (3) in the case of an obligation to build contained in a lease, it will be relevant to consider whether the landlord with a right to forfeit the lease should be left to pursue that remedy, to recover possession of the premises and then to have the ability to carry out the building works; (4) the court's order should contain sufficient definition of what is to be done."

Similarly, in *Zinc Cobham 1 Ltd (In Administration) v Adda Hotels* [2018] EWHC 1025 (Ch), Mr Andrew Hochhauser QC (sitting a deputy judge of the High Court), alluded to the guidance given in *Rainbow* in the following terms, at [35]:

> ". . . there was no constraint preventing the court from ordering specific performance of a tenant's repairing covenants where damages were not an adequate remedy, in appropriate circumstances, where the required work was sufficiently clearly defined and the order was not being sought by the landlord simply to harass the tenants."

Again, in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, Lord Neuberger stated, at [30]:

> "More generally, the attitude of the courts, reflecting that of the Court of Chancery, is that specific performance of contractual obligations should ordinarily be refused where damages would be an adequate remedy. This is because the minimum condition for an order of specific performance is that the innocent party should have a legitimate interest extending beyond pecuniary compensation for the breach."

CONCLUSION

Back in 1996, the Law Commission in its report on *Responsibility for State and Condition of Property*, Law Com No 238, (1996), stressed the potential importance of specific performance as a remedy to rectify the state and condition of demised property and recommended that it should be made generally available as a discretionary remedy to enforce repairing obligations in all leases to landlords and tenants alike: see, paras. 9.32-9.34. Indeed, the Law Commission viewed specific performance as playing a key role in securing its overriding objective of encouraging repair and promoting "the public interest in seeing that there is an adequate stock of usable rented property, properly repaired and maintained": para. 1.27. To date, however, the Commission's recommendations have not been implemented.

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