Neutral Citation Number: [2023] EWCA Civ 1178

Case No: CA-2023-000285

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
MR JUSTICE RICHARDS
[2023] EWHC 403 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE DINGEMANS

- -

Between :

HARMOHINDER SINGH GILL **(as Trustee of the Gillcrest UK Pension Scheme)**	**Appellant**
- and -	
LEES NEWS LIMITED	**Respondent**

- -
- -

Nicholas Grundy KC (instructed by **Lawcomm Solicitors**) for the **Appellant**
Joanne Wicks KC and Ben Walker Nolan (instructed by **David Cooper & Co**) for the **Respondent**

Hearing dates : 05/10/2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 12/10/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. This appeal concerns a landlord's opposition to the grant of a new tenancy pursuant to Part II of the Landlord and Tenant Act 1954 ("the Act"). The procedure is initiated either by the landlord serving notice under section 25 of the Act terminating the current tenancy; or by the tenant making a request for a new tenancy under section 26. If the landlord serves notice under section 25, and wishes to oppose the grant of a new tenancy, the notice must state the grounds of opposition. If the tenant initiates the process by requesting a new tenancy, the landlord may serve a counter-notice opposing the grant of a new tenancy, stating the grounds on which it will be opposed. In either case, there is no power to amend the grounds of opposition. The grounds on which a landlord may oppose the grant are contained in section 30 (1) of the Act. The grounds with which we are concerned are:

> "(a) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;
>
> (b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;
>
> (c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding…"

2. The particular questions that arise are:

   i) By reference to what date or dates must the grounds be established?

   ii) What is the scope of the value judgment that is implicit in the phrase "the tenant ought not to be granted a new tenancy"?

The relevant facts

3. Lees News Ltd ("the tenant") was the tenant under two business leases of premises in London W10 (the "premises"). The principal minds behind the tenant are Mr and Mrs Nathan who are husband and wife. The landlord is Mr Gill in his capacity as trustee of the Gilchrest UK Pension Scheme (the "landlord"). Part II of the Act applied to both leases.

4. Clause 2 (8) (a) of the leases contained a covenant to repair and keep the premises in good and substantial repair to the satisfaction of the landlord or the landlord's surveyor. Clause 2 (8) (b) contained a covenant in the following terms:

> "If at any time during the term whether by reason of age or state of dilapidation or any requirement of any competent authority or otherwise it shall become necessary for the purposes of putting or keeping any building or structure from time to time comprising the demised premises or any part thereof in a first class condition and state of repair to rebuild such building or structure or any part thereof then the Tenant shall at their own cost and with all practical speed and under the direction and to the reasonable satisfaction of the Landlords' Surveyors and in accordance with plans and specifications to be previously approved by them in writing carry out such rebuilding"

5. On 31 August 2018 the tenant made a request for new tenancies under section 26 of the Act. The landlord served counter-notices opposing the grant, relying on grounds (a), (b) and (c) (set out above) and, in addition, ground (f) (demolition or reconstruction). The last ground failed, and there is no appeal against that.

6. Following a two day trial, HHJ Monty QC ("the judge") found that at the date when the counter-notices were served:

   i) The premises were in substantial disrepair as a result of the tenant's breach of its repairing covenant.

   ii) The tenant had persistently delayed in paying rent.

7. But he went on to decide that the substantial disrepair had been remedied by the date of the hearing; and that the delay in payment of rent was minor and would not recur. There were other breaches of covenant, but they, too, were minor. Accordingly, he decided that the landlord had not established that the tenant "ought not" to be granted a new tenancy, and ordered new tenancies to be granted. The landlord's appeal was dismissed by Richards J. The landlord now brings this second appeal. Since this is a second appeal, our focus must be on the decision of the trial judge.

8. The trial judge's findings about the state of repair of the premises were as follows. The tenant served requests under section 26 of the Act seeking new leases of the premises on 31 August 2018. The landlord instructed Mr Dickinson of Daniells Harrison Chartered Surveyors to inspect the premises. Mr Dickinson produced a report dated 26 October 2018 (the "2018 DH Report") setting out various items of repair and maintenance said to be required, particularly to the roof. On 31 October 2018, the landlord served counter-notices on the tenant opposing the grant of leases on grounds that included the disrepair ground. Lease renewal proceedings were commenced in the county court on 21 October 2019.

9. By the time pleadings closed in the county court proceedings, following answers to the landlord's Part 18 requests on 10 November 2020, the tenant's position was that the premises were not in substantial disrepair that arose by breach of its repairing obligation. Its position as regards the roof was that any defects had been remedied by works carried out by Mack Builders in 2017, before Mr Dickinson had inspected. That position was maintained in Mr Nathan's witness statement of 15 January 2021 in

which he indicated a willingness to undertake "cosmetic changes" that were necessary.

10. In fact, contrary to the Nathans' stated position, on 6 October 2020 the tenant had entered into a contract with a building company called Let's Construction Ltd run by Mr Jason Hirrell, to carry out the work set out in the 2018 DH Report. The contract provided for the works to begin in April or May 2021 and to be completed by 26 July 2021 for a contract price of £30,000.

11. Moreover, the tenant disclosed no documents relating to its engagement of Let's Construction in its disclosure or answers to Part 18 requests. Even an updated disclosure list, prepared at a time when Mr Hirrell would have been actively carrying on the works, did not disclose the existence of the contract.

12. Let's Construction's engagement only came to light at an interlocutory hearing in early July 2021. There were case management directions in place that permitted both parties to serve expert evidence. The landlord was relying on expert evidence of Mr Colbourne and the tenant purported to rely on an undated report of Mr Hirrell of Let's Construction which contained no expert declaration and so did not comply with CPR Part 35. One of the items on the agenda for the 12 July 2021 hearing was whether the tenant should be relieved from sanctions and so be entitled to rely on Mr Hirrell's report. It emerged that Mr Hirrell's company was engaged by the tenant to perform works at the premises and so he was insufficiently independent to act as the expert. Faced with evidence that undisclosed works were going on at the premises, the judge ordered further disclosure of matters relating to works being conducted whether by Mr Hirrell or otherwise.

13. Following that hearing, the tenant realised that the works needed to be carried out quickly. Mrs Nathan, in particular, emailed Mr Hirrell saying that the works needed to be completed "ASAP". The tenant also engaged the services of an independent chartered surveyor to advise, who said that 95 per cent of the works had been completed at a cost of about £50,000.

14. During the trial the landlord clearly expressed concern at the tenant's conduct. Both Mr and Mrs Nathan were cross-examined and asked to explain what looked like a suppression of relevant evidence. At [36] and [37], the judge summarised the explanations that Mr and Mrs Nathan put forward, and concluded at [38] and [40]:

> "[38] It is unsatisfactory that the [tenant's] stated position, maintained throughout until recently, was that no major work was required, whilst at the same time carrying out works under a contract which apparently dated back to October 2020. The position in relation to disclosure is equally clearly unsatisfactory, as is the fact that there was no mention of works or Mr Hirrell or the contract until July 2021.
>
> …
>
> [40] Nonetheless, having heard Mr Nathan and Mrs Nathan give evidence, I am satisfied that there has been a genuine attempt to carry out the works in the Schedule, which

> commenced in accordance with the contract entered into with Mr Hirrell in October 2020. In my view, Mr Lane [counsel for the landlord] is right when he says that the delay in starting work was because Mr and Mrs Nathan hoped that Mr Nathan would be getting redundancy money from the Post Office when he gave up his sub-postmastership and that this would fund the work, but in any event I accept that the work was funded by Mr and Mrs Nathan personally by extending the borrowing on their residential mortgage."

15. In relation to the state of repair of the premises, the judge said:

> "[57] When one looks carefully at the matters which are said to be disrepair, I accept that these have in fact all been addressed, satisfactorily, by the works done by Mr Hirrell and his company…
>
> [58] I am however satisfied that the breaches identified by Mr Colbourne which relate directly to the repairing obligations meant that the landlord has established that the tenant was in breach of covenant at the date of the notice, in that there was a substantial neglect on the part of the tenant to comply with the repairing obligations."

16. The judge dealt with the question whether the tenant "ought not" to be granted a new tenancy as follows:

> "[59] In my judgment, the evidence from Mr Nathan and Mrs Nathan, that the business they operate from the premises is their livelihood and serves the local community is to be accepted as genuine. It strikes me that Mr and Mrs Nathan have had a rather rude awakening over the need to comply with the terms of the lease, as a result of these proceedings and in particular the July 2021 hearing, and the need to get works done.
>
> [60] In answering the question as to whether it is fair to the landlord having regard to the tenant's past behaviour to compel him to re-enter into legal relations with the tenant, I take into account the fact that Mr Gill is on the evidence I have seen and heard what might be described as a hands-off, commercial landlord. He does not appear to have engaged with the tenant at any time, ignoring emails and text messages, leaving things in the hands of his solicitors. Whilst this attitude was the subject of bitter complaint by Mr and Mrs Nathan, not only can I see nothing wrong with a landlord who takes that view, it also seems to go in the tenant's favour when considering the question I have identified. I am, on the evidence I have heard, satisfied that the tenant would not allow itself (or more accurately that Mr and Mrs Nathan would not allow the

> Claimant company) to fall into breach of the repairing covenant again. This has been a very costly exercise for them.
>
> [61] I have therefore concluded that were ground (a) the only ground of opposition, I would find for the tenant. I will revisit the position overall, as I am required to do, once I have looked at grounds (b) and (c)."

17. So far as persistent delay in paying rent was concerned, the judge found that there was persistent delay, although the delay was of only a few days. But he also said that he was satisfied that "this will not re-occur".

18. He then went on to consider ground (c). He found in relation to that ground that some "other breaches of covenant" had been established, but that they were not substantial. He also took into account criticisms of the tenant's conduct in the proceedings themselves. He said:

> "[80] …Mr Lane invited me to consider the [tenant's] conduct during this litigation including its attitude to the repairs, disclosure and carrying out work in a race to complete the repairs all the while denying the breaches were substantial. Mr Lane also refers to the fact that at no stage during these proceedings, and even now, has the [tenant] conceded there were substantial disrepairs.
>
> [81] In my judgment, there are clearly criticisms to be made of the [tenant's] conduct, as Mr Lane has identified and as I have set out in the earlier part of this judgment. It seems to me that the [tenant's] formal stance in these proceedings in relation to the repairs was unfortunate, and wrong, it is clear that once the [tenant] appreciated the need for the works, these were effected. The position in relation to disclosure was unsatisfactory. I take these matters into account. In my view, they do not outweigh the other matters in relation to which I have made findings in relation to ground (c) above.
>
> [82] Overall, I am not satisfied that the breaches proven in respect of ground (c) are substantial."

19. Having dealt with each ground separately, he went on to consider them collectively. But he concluded that, even considered collectively, they were not enough to deny the tenant a new tenancy. He said at [86]:

> "I accept Mr Nathan's evidence, which was not challenged, that he inherited the premises in a poor condition. He has now spent a lot of money on doing the works. He now knows the importance of paying rent on time rather than a few days late. He now knows that the landlord expects complete compliance with the terms of the lease regarding notices. I accept the submission made on behalf of [the tenant] that it is likely that the terms of any new leases would be adhered to."

The material time

20. The first question that I propose to address is the material time at which the court must assess the state of repair of the holding. This is an issue raised by the Respondent's Notice, but logically it comes first. Ms Wicks KC for the tenant, adopts Richards J's characterisation of the ground of opposition as involving a factual precondition ("the state of repair of the holding… resulting from the tenant's failure to comply" with repairing obligations) and a value judgment. She poses the question: when must the factual precondition be established? Her answer is: at the date of the hearing. Section 30 (1) (a) refers to "the" state of repair, being "a" state resulting from the tenant's failure to comply with his obligations. That clearly indicates that that the state of repair of the premises must be assessed at a single point in time. The choice, therefore, is assessment as at the date of the landlord's notice or counter-notice on the one hand, and the date of the hearing on the other. Mr Grundy KC, for the landlord, says that the court is not tied to a single snapshot, but may look at the state of repair of the holding over the current tenant's period as tenant.

21. The words of ground (a) do not specifically refer to any particular point in time; and I do not consider that the reference to "the state of repair of the holding" necessarily implies a single date. Ms Wicks relied on observations in the case law that suggest that notification of the landlord's grounds of opposition amounts to no more than the pleading of what case the landlord will advance at trial. The tenant receiving notification of grounds of opposition needs certainty about what is required of him. If, having put the property into a proper state of repair by the trial date, the tenant is dependent on the judge's discretion or value judgment about whether he "ought not" to be granted a new tenancy, then that certainty is fatally compromised.

22. Ms Wicks dangled the prospect of a tenant having an application opposed because of breaches of covenant by a predecessor in title of his under the current tenancy. But I do not consider that argument to be well founded. That is clear from *Lyons v Central Commercial Properties London Ltd* [1958] 1 WLR 869 in which the trial judge had wrongly taken into account the fact that the tenant had contracted to sell the lease to Littlewoods, a large company. Ormerod LJ said:

> "The contract with Littlewoods had, in my view, no bearing on the case. The question was one to be tried between the landlords and the existing tenant, and it was his breaches and his conduct which were material."

23. She also submitted that the landlord's concern (or at least primary concern) is that the holding should be in a proper state of repair at the start of the new tenancy; and that to focus on the state of repair of the holding at the date of the hearing would achieve that. There is some force in that point, but it is limited. In the first place, the tenant's repairing obligations are continuing obligations; and the landlord has a legitimate interest in securing compliance throughout the term. Second, once court proceedings have been initiated, section 64 of the Act prolongs the current tenancy until three months after the final disposal of the application for a new tenancy. That prolongation will continue during the pendency of any appeal (and any period within which an appeal or further appeal could be brought). Third, in practice grounds of opposition are almost invariably dealt with as preliminary issues. If, therefore, after the resolution of the preliminary issues there is a dispute about the terms of the new

tenancy, or the rent to be paid under it, the tenancy will be prolonged until three months after those matters have been resolved. There may, in consequence, be a very significant time lag between the initial determination of the grounds of opposition and the actual start date of the new tenancy.

24. Ms Wicks correctly pointed out that ground (a) is limited to the state of repair of "the holding". That excludes any part of the demised property which is occupied neither by the tenant nor by an employee of his employed for the purposes of the relevant business: Landlord and Tenant Act 1954 section 23 (3). So, for example, if the demised property consists of a shop and upper part, and the upper part is sublet, disrepair in the upper part does not fall within ground (a). But Ms Wicks accepted that such disrepair did fall within ground (c), which is not tied to any particular date. She also accepted that breaches of the repairing obligations which had taken place before trial (even if they had been remedied) could also fall within ground (c), either as "other substantial breaches," or as part of the tenant's use or management of the holding. These submissions, in my judgment, undermine her reliance on the need for certainty to the tenant, as the well-advised landlord will always include ground (c) as a sweep-up. I do not, therefore, consider that her arguments in so far as based on the policy of section 30 (1) carry the day.

25. It is also the case that ground (a) (unlike ground (c)) does not in terms require any breach of the tenant's repairing and maintenance obligations to be substantial. It merely refers to the state of repair of the holding resulting from the tenant's failure to comply with those obligations. It would be a rarity for a determined landlord to be unable to establish some breach of repairing obligations as at the date of trial. If, therefore, there is a precondition to be established at the trial date it is likely to be established in all but a handful of cases, in which event the tenant is still dependent on the trial judge's decision on the "ought not" question. Of course, if the breaches are not substantial, that will have a very significant impact on the question whether the tenant "ought not" to be granted a new tenancy. That is why, in considering the "ought not" question, Ormerod LJ said in *Lyons* that "the neglect to repair to which the section refers should be substantial".

26. The question of the material date under ground (a) is not the subject of any binding authority, but it has been discussed *obiter* in a number of cases. The most important of these is *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd*, both in this court ([1957] Ch 67) and in the House of Lords ([1959] AC 20). I note in passing that in the House of Lords there were three days of argument, and the Law Lords gave their speeches less than a month later. The ground of opposition relied on in that case was the redevelopment ground in section 30 (1) (f) of the Act. Both this court and the House of Lords held (in each case by a majority) that the material time for establishing an intention to demolish or reconstruct was the date of the hearing, rather than the date of the landlord's section 25 notice. But in the course of reaching their conclusions both courts discussed the other grounds. In this court Birkett and Romer LJJ were in the majority. At 82 Birkett LJ said:

> "Under section 30 (1) (a) let it be supposed that at the date of the hearing of the application the state of repair was excellent and that the landlord could not possibly establish to the satisfaction of the court that any fault could be found with the state of repair then existing. Is the court then to decide the

> question: what was the state of repair when the landlord served the notice? If the tenant were to say: "It is true that the landlord had cause to complain when he served the notice, and I am very sorry about it, but it was due to a series of misfortunes which left me without the necessary labour to perform my covenants, as I would have wished; but happily that trouble is over and the property is in perfect condition and will be kept so," is the court to say: "It is too late; all the court can consider is what was the state of repair at the date of the notice"? That would be, in my view, to interpret section 30 (1) (a) as though the words were "... in view of the state of repair of the holding at the date of the landlord's notice," and the Act refrains from using any such language. The notice is in fact saying: "This ground is the ground on which I shall oppose your application to the court when the matter comes to be determined"."

27. Having considered grounds (b) and (c) he said at 83:

> "The words "ought not" imply that the court must see whether the landlord has established the ground on which he relies to the satisfaction of the court, and this must, in my judgment, permit the court to look at all relevant matters down to the actual hearing. In cases where grounds (a) or (b) or (c) are relied on, the court must exercise its discretion on the evidence given before the court at the hearing."

28. Romer LJ also considered grounds (a) to (c) and said at 96:

> "It is, of course, very unlikely that a landlord would rely on any of these grounds of opposition unless they in fact existed when he served his counter-notice, but I should have thought it reasonably plain that subsequent events would be relevant and admissible in relation to the tenant's repairing obligations, payments of rent and so on."

29. These grounds were the subject of further discussion on the ultimate appeal to the House of Lords. Viscount Simonds began his discussion of this ground at 35, where he said:

> "I see no reason why different grounds of opposition should not relate to different periods of time."

30. He continued:

> "It is not to be supposed that a landlord will base his opposition under ground (a), that is, the state of repair of the holding resulting from the tenant's failure to comply with his obligations, if in fact the state of repair at that date gives him nothing to complain of. He will state that he will rely on ground (a) if and only if at the date of notice it gives him solid support. At the hearing the judge, whose power to grant a new tenancy

> is discretionary where this ground of opposition is pleaded, will necessarily take into consideration the state of repair or disrepair, not only at the date of notice, but also at the date of hearing."

31. Lord Morton said at 42:

> "I cannot imagine a landlord relying on this ground unless the premises were in disrepair at the date of the notice, and I think that at the hearing, in deciding whether the tenant ought or ought not to be granted a new tenancy, the court would have regard both to the state of repair at the date of the notice and to the state of repair at the date of the hearing. A similar situation arises in cases under paragraphs (b) and (c) of section 30 (1). The court would consider, at the hearing, whether there has been persistent delay in paying rent, or other substantial breaches of obligation by the tenant, at the date of the notice, and would also consider the state of affairs at the date of the hearing. Again, in a case under paragraph (d), the court would consider the state of affairs at each of the dates already mentioned. Thus in each of these four paragraphs I find words which are clearly referable to the date of the notice of opposition."

32. Lord Somervell began his speech by saying that he agreed with Viscount Simonds. Although he did not specifically consider ground (a) he said at 48:

> "In all the cases under section 30 the court must, in my opinion, consider the points raised as at the conclusion of the cases on each side. Although, for example, a notice based on paragraph 30 (1) (b) would not be given unless there had been past delay in paying rent, events between the notice and the hearing would be relevant to the decision whether the court ought to grant the tenancy. The tenant may after the notice has been given have improved or aggravated his position as a payer. The court would have to consider as at the time of the hearing whether he had "persistently delayed in paying his rent"."

33. Lord Denning agreed that the appeal should be dismissed (but for different reasons) and Lord Keith dissented.

34. The main issue in *Lyons* was the approach to the question whether the tenant "ought not" to be granted a new tenancy. I will return to that case when dealing with that issue. But Harman J, sitting in this court, did touch on the question of the material date. He said at 880:

> "In my judgment, paragraphs (a), (b) and (c) of section 30 (1) must mean that where the tenant is proved during the currency of the former lease to have been a bad tenant, no new lease ought to be granted unless some exculpating circumstances are enough to excuse the tenant's misdoings. The court must look

> at the position at the time when the application comes before it — see *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd*, per Birkett LJ — and if the landlord then satisfies the court that there have been substantial breaches either of repairing covenants or in payment of rent, or any other obligations under the tenancy, the court ought to refuse any lease under section 31 whatever promises may be made in the future."

35. In *Hazel v Akhtar* [2001] EWCA Civ 1883, [2002] 2 P & CR 17 the tenant had been in breach of his repairing obligations; but the landlords' own surveyor had accepted that the tenant had carried out a lot of repairs over the previous 12 months, and that at the date of the hearing the property overall was in average condition. Reversing the trial judge's refusal of a new tenancy, Sir Anthony Evans said that the judge ought to have taken into account the amount of work that the tenant had done to remedy earlier breaches of the repairing covenants. He did not, however, suggest that the history of disrepair was irrelevant. On the contrary, the decision in that case was not based on a finding that the factual precondition was not satisfied, but upon the question whether the tenant "ought not" to be granted a new tenancy.

36. None of these observations confine the court to a consideration of the state of repair of the holding at the date of the hearing. On the contrary, both Viscount Simonds and Lord Morton specifically said that the court must consider the position both at the date of the notice and at the date of the hearing. Since Lord Somervell said that he agreed with Viscount Simonds, that view seems to me to have commanded a majority of the House of Lords. In this court, neither Birkett nor Romer LJJ confined themselves to saying that matters arising after the date of the notice were the only relevant considerations. On the contrary, Birkett LJ said that the court must consider all relevant matters down to the date of the hearing. In *Lyons* at 878 Ormrod LJ described the underlying policy of the fault-based grounds of opposition as follows:

> "The object of paragraphs (a), (b) and (c) of section 30 , as I see it, is to enable the judge to refuse to grant a new lease to a tenant who has shown himself to be unsatisfactory in the performance of his obligations under the contract of tenancy."

37. That, too, does not suggest that the court is limited to consideration of the state of repair of the holding at the trial date.

38. I do not consider that there is anything in either the case law, or the words of the section, that confines the court to considering only the state of repair of the premises at the date of the hearing, without regard to the tenant's past behaviour. It is, in addition, more consistent with the underlying policy of those grounds of opposition for the court not to be so hemmed in. Grounds (b) and (c) lend some support to that view. If the court is invited to consider whether there "has been persistent delay in payment of rent", it is plainly entitled to survey the whole course of the current tenancy in order to decide whether any delay has been "persistent". Likewise, if the court is invited to consider whether there have been substantial breaches of covenant, or the tenant's use or management of the holding, the court will look back at the tenant's overall performance.

39. What has happened between the date of the notice (or counter-notice) and the date of the hearing is plainly relevant; and doubtless in many cases it will be given considerable (or even decisive) weight. To that extent, I agree with Ms Wicks that the tenant has a clear incentive to remedy any breaches of the repairing obligations by the date of the hearing. But it would be too prescriptive to say that breaches of the repairing covenant at the date of the notice must be ignored if they have been remedied by the date of the hearing. If the tenant has a lamentable record of performance and only puts things right at the last minute that is, in my judgment, something that the court can legitimately take into account. What is entailed in Ms Wicks' submission is that the ground is confined to the tenant's continuing failure to comply with its repairing obligations. There is, in my judgment, no need to read ground (a) in that way.

"Ought not"

40. The second issue that arises is the approach that the court should adopt to the question whether the tenant "ought not" to be granted a new tenancy. Mr Grundy KC submits that the question should be approached solely from the perspective of the landlord; and that any hardship to the tenant must be ignored. The overall question is whether it is fair to the landlord to require him to enter into a new legal relationship with the tenant, bearing in mind that Part II of the Act is an interference with freedom of contract. It is true that Part II of the Act is an interference with freedom of contract, but that argument cannot be pushed too far. The purpose of Part II of the Act is to protect the business interests of the tenant so far as they are affected by the approaching termination of the current lease, in particular as regards his security of tenure: *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726, 740-741 (per Lord Hailsham LC), 747 (per Lord Wilberforce). Thus in discussing the "ought not" question in *Lyons*, which he regarded as the exercise of a discretion, Morris LJ said:

> "It is to be noted that the discretion is one whereby a tenant may be deprived of that which under the Act he was in a position to receive. The discretion does not operate to give something, but to take away something."

41. There is some additional help to be gained in this regard from the court's approach to the interpretation of enfranchisement legislation, which interferes more drastically with freedom of contract. In *Cadogan v McGirk* (1997) 73 P & CR 483 Millett LJ said at 486:

> "It would, in my opinion, be wrong to disregard the fact that, while the Act may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy."

42. In considering the question whether the tenant "ought not" to be granted a new tenancy, Mr Grundy submitted the court should confine itself to matters relating to the particular ground of opposition relied on. Thus, in considering ground (a) the ambit of the relevant factors are those relating to the tenant's performance (or failure to

perform) its repairing obligations. In considering that question the court should have regard to the tenant's conduct of the litigation leading up to its decision in so far as it related to the repairing obligations. In this case the judge found that the tenant had concealed matters from the landlord and the court; had wrongly asserted that the premises were not in disrepair; had tried (unsuccessfully) to rely on the evidence of his own builder as expert evidence; and had misled both the landlord and the court about the reasons for the delay in remedying the disrepair. That was conduct so egregious that it effectively undermined the relationship of landlord and tenant, with the consequence that the judge was wrong not to hold that the tenant "ought not" to be granted a new tenancy. It would not be fair to the landlord to compel him to enter into a new legal relationship with the tenant where that relationship had broken down.

43. On the face of it, this is a surprising submission for the landlord to make, because the trial judge said in terms that had ground (a) been the only ground of opposition, he would have found for the tenant. One might have thought that it was in the interest of the landlord for the court to take a broader view of all the tenant's breaches of obligation rather than to pick them off one by one. The judge did in fact consider the tenant's litigation conduct, although he considered it in connection with ground (c) rather than ground (a). But since he approached the question of "ought not" cumulatively, it would have made no difference to the result if he had dealt with that conduct under ground (a).

44. The question of the court's approach to the question whether the tenant "ought not" to be granted a new tenancy has been addressed in a number of cases. In *Betty's Cafés* Birkett LJ said at 83:

> "The words "ought not" imply that the court must see whether the landlord has established the ground on which he relies to the satisfaction of the court, and this must, in my judgment, permit the court to look at all relevant matters down to the actual hearing. In cases where grounds (a) or (b) or (c) are relied on, the court must exercise its discretion on the evidence given before the court at the hearing."

45. It is important to note that in *Lyons* the only ground of opposition was ground (a) (disrepair). Morris LJ said at 877:

> "But where Parliament has not precisely defined, I would hesitate to adopt any particular formula as being all embracing or which might be thought to be restrictive or definitive. I do not think that it is desirable to say more than that once a court has found the facts as regards the tenant's past performances and behaviour and any special circumstances which exist, then, while remembering that it is the future that is being considered, in that the issue is whether the tenant should be refused a new tenancy for the future, the court has to ask itself whether it would be unfair to the landlord, having regard to the tenant's past performances and behaviour, if the tenant were to enjoy the advantage which the Act gives to him."

46. Ormerod LJ said at 887:

> "But the word "ought" in the section in my judgment implies that the discretion of the judge is not confined to the consideration of the state of repair. Without attempting to define the precise limits of that discretion, the judge, as I see it, may have regard to the conduct of the tenant in relation to his obligations, and the reasons for any breach of the covenant to repair which has arisen."

47. Harman J took a rather more uncompromising line. He said:

> "In my judgment, paragraphs (a), (b) and (c) of section 30 (1) must mean that where the tenant is proved during the currency of the former lease to have been a bad tenant, no new lease ought to be granted unless some exculpating circumstances are enough to excuse the tenant's misdoings. The court must look at the position at the time when the application comes before it, and if the landlord then satisfies the court that there have been substantial breaches either of repairing covenants or in payment of rent, or any other obligations under the tenancy, the court ought to refuse any lease under section 31 whatever promises may be made in the future."

48. He added:

> "In my judgment, the discretion vested in the court under section 30 (1) (a), (b) and (c) is a narrow one; it is limited to the question whether, having regard only to the grounds set out, a new tenancy "ought not" to be granted. This must mean, I think, whether, having regard to the tenant's past conduct as a tenant, it would be equitable to exclude the landlord from his property for a further term or to foist the tenant on him contrary to the contract."

49. In view of the policy of Part II of the Act, I think that the use of the word "foist" was unfortunate. Moreover, I consider that Harman J was wrong to say that the court must ignore "promises for the future". In some cases the offer of security for performance of future obligations or the introduction of an obligation to pay interest on late payments of rent would be relevant considerations.

50. In *Eichner v Midland Bank Executor and Trustee Co Ltd* [1970] 1 WLR 1120 the landlord opposed the grant of a new tenancy on grounds (a) and (c) (confusingly labelled (a) and (b) in the section 25 notice). The trial judge found that ground (a) had not been established. In considering ground (c) he found one breach of the use covenant had been established; but he also took into account the tenant's history of paying rent and his ability to pay the rent in the future; both of which would more naturally have fallen within ground (b). This court upheld his decision.

51. Lord Denning MR preferred the view of Ormerod LJ in *Lyons* to that of Harman J. He went on to say:

> "It was, I think, open to [the trial judge] to look at all the circumstances in connection with that breach: also, I may add, to look at the conduct of the tenant as a whole in regard to his obligations under the tenancy."

52. Thus, the trial judge had been entitled to take into account the tenant's history of paying rent and his ability to pay in the future when considering the "ought not" question under ground (c).

53. In *Hazel*, to which I have already referred, Sir Anthony Evans said at [43]:

> "In exercising the discretion afresh, it seems to me that the judge's decision was wrong and the application for a new tenancy should be granted. It required the court proceedings to make the appellant realise that the previous lax practice was no longer acceptable, as regards either the payment of rent or keeping the property in good repair. But, faced with the loss of his business and possibly his livelihood also, he was apparently sincere in his declarations of intent for the future. That would not have availed him, if the past record of breaches was as long and serious as the judge supposed, but he failed to take account of the attitude of the previous landlords and of the fact that the defendants never gave clear express notice that the previous practice was not acceptable to them. Once those matters are taken into account, together with the amount of work that the appellant had done to remedy earlier breaches (under the same previous landlords) of the repairing covenants, in my judgment the decision not to grant a new tenancy was indeed "harsh" and, I would hold, "unduly harsh" in the circumstances of this case."

54. That in my view, was a case in which the court took into account the consequences to the tenant of a refusal of a new tenancy, as well his intentions for future compliance.

55. In *Hutchinson v Lamberth* [1984] 1 EGLR 75 the landlord opposed the grant of a new tenancy on the ground of persistent delay in payment of rent. But the trial judge also heard evidence of nuisance (which had not been alleged in the landlord's section 25 notice). The trial judge had wrongly permitted the landlord to amend the section 25 notice. Although it was accepted that she was wrong to do so, this court held that she was nevertheless entitled to have regard to the evidence of nuisance. O'Connor LJ said:

> "Mr Cohen, who has said everything possible for the tenants, has submitted that the mere fact that the learned judge thought that it was a further ground of opposition which she could take into account may have influenced her in the exercise of her discretion and that therefore at the very least we should order a new trial. In my judgment that submission is not well founded, for this reason: if the case had been before the court solely on the ground of persistent delay in paying rent, it would have been open to the landlord to lead evidence of all collateral matters affecting the occupancy of the premises by the tenants,

> and they would have been permitted to give evidence in order to help the learned judge exercise her discretion as to what had been going on. Therefore it cannot be said that the evidence about nuisance was wrongly before her."

56. Thus, O'Connor LJ said in terms that even if opposition had been limited to ground (b), the evidence of nuisance would still have been relevant to the "ought not" question.

57. *Horne & Meredith Properties v Cox* [2014] EWCA Civ 423, [2014] 2 P & CR 18 was a case in which a new tenancy was opposed on ground (c) ("any other reason connected with the tenant's use and management of the holding"). The tenants in that case had subjected the landlords to a remorseless campaign of unmeritorious litigation over 16 years, making spurious or exaggerated claims, accompanied by baseless allegations of fraud. The landlords had incurred costs of over £300,000 in defending themselves. The trial judge refused the grant of a new tenancy, and this court upheld his decision. I said at [27]:

> "The second part of the question has been described as a discretion, although I would myself prefer to describe it as a value judgment. The phrase "ought not" does to my mind suggest that there would usually be some fault or culpability on the part of the tenant. The overall question under this head is whether it would be fair to the landlord, having regard to the tenant's past behaviour, for him to be compelled to re-enter into legal relations with the tenant; see *Lyons v Central Commercial Properties Ltd*…. If the landlord has been the aggressor in the litigation or if the tenant's litigation has been responsibly and proportionately conducted the answer to that question may well be no. That is the value judgment for the trial judge to make. In the present case the judge concluded that the tenants' conduct had grotesquely exceeded any reasonable balance, that he had made baseless allegations of wrong-doing and fraud and that he was a legal menace. That was a value judgment to which the judge was entitled to come."

58. One possible outlier is the decision of this court in *Youssefi v Musselwhite* [2014] EWCA Civ 885, [2014] 2 P & CR 14. In that case the landlord opposed the grant of a new tenancy on grounds (a), (b) and (c). Gloster LJ was referred to, and quoted from, *Lyons* and *Eichner*. She said at [29]:

> "Thus under s.30(1)(a), the court has to ask itself whether "in view of the state of repair of the holding", brought about by the tenant's breach of its obligation to repair and maintain the holding, the tenant "ought not to be granted" a new tenancy. This involves the court, for the purposes of this subsection, *focusing exclusively on the state of repair* and asking itself whether, looking forward to the hypothetical new term, "the proper interests of the landlord would be prejudiced", by continuing in a landlord/tenant relationship with this particular tenant.. ; or, put another way, whether it "would be unfair to the

> landlord"…, having regard to the tenant's past performances and behaviour in relation to its obligation to repair and maintain the holding, if the tenant were to be "foisted on the landlord for a new term" ... *The discretion is not circumscribed in any way other than by the requirement that, in asking itself the question whether the tenant "ought not to be granted" a new tenancy, the court has to focus on the state of repair of the holding.* A similar approach applies in relation to the court's consideration of the question whether the tenant "ought not to be granted" a new tenancy under s.30(1)(b). In that case the focus is on the persistent delay in paying rent which has become due and nothing else. Under s.30(1)(c), however, the approach is broader. The court, when considering the "ought not to be granted" issue, is entitled to focus not merely on "other substantial breaches" but also, or alternatively, on "any other reason connected with the tenant's use or management of the holding."" (Emphasis added)

59. I find it difficult to see how this compartmentalised approach to the individual grounds of opposition is justified by the authorities to which Gloster LJ referred. In *Lyons* both Morris and Ormerod LJJ adopted a broader approach the question whether the tenant "ought not" to be granted a new tenancy; and in relation to ground (a) Ormerod LJ said in terms that the court "is not confined to the consideration of the state of repair". It was his approach that this court approved in *Eichner*. In addition, the court in *Youssefi* was not referred to the contrary decision in *Hutchinson v Lamberth*.

60. The tension between *Youssefi* and other cases was considered by Snowden J in *Kent v Guest* [2021] EWHC 51 (Ch), [2022] 1 P & CR 9, although it was not necessary for him to decide the point. Since I agree entirely with his analysis, I will simply set it out:

> "[39] As a matter of principle, the relationship of landlord and tenant is a unitary contractual relationship, and the compartmentalised approach to Sections 30(1)(a), (b) and (c) advocated by Mr Moore could have unjust results. The most obvious is that a tenant could breach covenants falling under each of Sections 30(1)(a), (b) and (c) which, if viewed separately, might not mean that he should be denied a new tenancy. But if taken collectively – as would reflect the situation of the parties in practice – the totality of the breaches by the tenant could be of such significance as to make it obviously unfair to compel the landlord to re-enter into legal relations with the tenant.
>
> [40] There would also seem to be no obvious policy reason why, under Section 30(1)(c), the court could take into account reasons relating to the use and management of the holding that did not amount to a breach of covenant, but would be prohibited from taking into account conduct that actually amounted to a breach of the most significant obligations that a

> tenant has – namely to keep the property in good repair and to pay rent.
>
> [41] Nor do I think that the wording and structure of Section 30(1) or the reference to "other" breaches or reasons in Section 30(1)(c) obviously mandates a separate approach to each subsection. The separate delineation of breaches in subsections (a) and (b) might be seen as simply setting out explicitly the most important covenants likely to breached by a tenant."

61. The quoted part of the judgment in *Youssefi* does not appear to me to have been necessary to the court's overall decision; and I do not, therefore, regard it as binding. Moreover, in so far as there is a conflict between *Youssefi* and *Hutchinson*, we are free to choose between them: *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, 725-6.

62. For the reasons given by Snowden J, I consider that *Hutchinson* should be preferred. In my judgment, the compartmentalised approach should no longer be followed, and to do the trial judge justice, in this case he considered the grounds of opposition both singly and cumulatively. That was an entirely correct approach.

63. The landlord's original skeleton argument also asserted that the tenant's conduct in carrying out the repairs was "surreptitious" and amounted to a breach of clause 2 (8) (b) because the works had not been carried out to the satisfaction of the landlord's surveyor in accordance with plans and specifications previously approved by them. But as Richards J pointed out at [55] this was not an issue raised before the trial judge. Applying the principles in *Singh v Dass* [2019] EWCA Civ 360 he refused permission for it to be introduced on appeal. On the face of it, this is one of the grounds of appeal for which Newey LJ has given permission to appeal. But the fact that permission to appeal has been given does not preclude the tenant from objecting to its being raised: *Mullarkey v Broad* [2009] EWCA Civ 2 at [29]; *Brent LBC v Johnson* [2022] EWCA Civ 28 at [37]. The skeleton argument did not seek to show that Richards J misapplied the principles in *Singh v Dass* or that he was wrong in refusing to permit the point to be argued on the first appeal. If permission to argue the point on the first appeal was properly refused, it is difficult to imagine circumstances in which it would be right to permit it to be argued for the first time on a second appeal. After some discouraging interventions from the bench, Mr Grundy did not pursue this point.

64. It is clear that the judge appreciated that the overall question was whether it was fair to the landlord to require him to re-enter into a legal relationship with the tenant. At [49] he quoted from paragraph [27] of *Horne* (quoted above); and repeated at [60] that the question was whether it was fair to the landlord having regard to the tenant's past behaviour to compel him to re-enter legal relations with the tenant. In posing the question in that way he was not confining himself to considering only breaches of the tenant's repairing obligations. He was correctly treating it as an overall question. Mr Grundy accepted that the judge had posed the right question in those parts of his judgment, but argued that he had in fact adopted a broader approach, more akin to considering what was fair in all the circumstances, rather than what was fair to the landlord.

65. He criticised the judge's finding at [59] that Mr and Mrs Nathan had had a "rather rude awakening" as a result of the July 2021 hearing. He submitted that that hearing was no more than a case management hearing. But the trial judge's finding was amply justified in view of the fact that, following that hearing, Mrs Nathan instructed the contractors that the work needed to be done "ASAP"; and Mr and Mrs Nathan also engaged the services of an independent chartered surveyor to advise.

66. Mr Grundy took us to two further passages in the judgement. In one, dealing with ground (c), the judge said that the conduct of the tenant in the litigation did not "outweigh" his findings on breaches of covenant; and in the other he said that "the balance" was plainly in favour of the tenant. Mr Grundy suggested that that showed that the judge was answering the "ought not" question from the perspective of the tenant as well as that of the landlord and therefore applied the wrong test. I disagree. Having set out the correct test twice, it is highly unlikely that the judge applied a different test, and it is not a legitimate criticism that he did not set it out again under each ground. Mr Grundy's submission depended on a minute textual examination of the judge's phraseology, which is not appropriate on an appeal of this kind. As Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372 a judgment can always be better expressed and an appellate court should not subject a judgment to a minute textual analysis in order to show that the trial judge misdirected himself.

67. In answering the "ought not" question, the judge was entitled to take into account matters relating to *this* landlord and *this* tenant, as *Lyons* makes clear. He was not considering the question by reference to some hypothetical landlord and hypothetical tenant. Thus, in answering the "ought not" question in *Hazel* this court took into account both the attitude of the landlord towards strict performance of the tenant's obligations; and also the tenant's potential loss of livelihood if a new tenancy were refused.

68. The trial judge was, therefore, entitled to take into account his assessment of Mr Gill as a "hands-off" commercial landlord. He was equally entitled to take into account the fact that the tenant's business was Mr and Mrs Nathan's livelihood, not least because that was relevant to the question whether there would be future compliance with the tenant's obligations. Given that the judge adopted the correct approach to his value judgment on whether the tenant "ought not" to be granted a new tenancy, what are the grounds for disturbing it?

69. In essence, the matters relied on are the tenant's attitude to, and evidence about, the repairs during the currency of the proceedings for the new tenancy. Mr Grundy submitted that this was case in which the relationship of landlord and tenant had broken down; and that in view of the tenant's deceptive behaviour (even though inadvertent rather than dishonest) the landlord could no longer trust the tenant. Ironically, what this amounts to is that the tenant was in fact a better tenant than the landlord had supposed.

70. But in any event, this submission fails on the facts. Not only did the judge make no finding to this effect, Mr Gill's own evidence did not even allege that the relationship of landlord and tenant had broken down; or that he could no longer trust the tenant.

71. Moreover, a further difficulty with this submission is that the judge did consider the tenant's conduct in relation to the repairs and the proceedings in paragraphs [80] and

[81] of his judgment and took them into account in his consideration of ground (c). He took the view that they were not serious enough to deny the tenant a new tenancy. Since he also considered the grounds of opposition in the round, he must also have taken into account the tenant's conduct in the litigation in reaching his overall conclusion.

72. The tenant's conduct in litigation can, in an extreme case like *Horne*, be a reason for refusing a new tenancy. But in that case the tenant had waged a remorseless campaign against the landlord at considerable expense; and it was relied on as a free-standing ground of opposition. It would be a very rare case in which the conduct of the very proceedings for the grant of a new tenancy would amount to a reason to deny the tenant a new tenancy. It is, however, possible to conceive of a case in which it might be relevant. Suppose, for example, that the tenant contests a ground of opposition tooth and nail, makes extravagant allegations against the landlord and is found to have repeatedly lied in the witness box. Realising that the judge is likely to find against him, he promises that things will improve in the future. In answering the "ought not" question the judge would, in those circumstances, be entitled to say that he disbelieved the tenant's promises, and that his conduct in the litigation was directly relevant to the ground of opposition. But that is not this case.

Result

73. In my judgment the judge's decision was one to which he was entitled to come; and is one with which an appeal court cannot or should not interfere. I would dismiss the appeal.

Lord Justice Popplewell:

74. I agree.

Lord Justice Dingemans:

75. I also agree.