VADAC PROPERTIES [PRIVATE] LIMITED
versus
CURE CHEM OVERSEAS [PRIVATE] LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 22 September 2015; 13 November 2015 & 3 February 2016

Civil trial

T. Mpofu, for the plaintiff
A. Bangidza, for the defendant

MAFUSIRE J: The plaintiff was the ex-landlord. The defendant was the ex-tenant. For close to ten years the defendant, an agro-industrial chemical wholesaler and distributor, had leased from the plaintiff certain industrial premises. The lease agreement said the defendant would use the premises for the storage and distribution of chemicals and allied products. It also provided that at termination, the defendant would return the premises, together with, *inter alia*, all the keys and other property of the plaintiff in the same good order "… ***fair wear and tear … excepted.***"

The lease also provided that the defendant would, during the period of the lease, *inter alia*, maintain the premises in a clean and sanitary condition; repair all interior plumbing; re-decorate the internal walls when necessary; and replace, if destroyed, lost or damaged, all fittings and fixtures, window panes, door locks and the keys thereto. Finally, it was also the defendant's obligation to replace all the fluorescent light fittings, starters and ballasts, etc.

The trial before me was the plaintiff's claim for damages. The plaintiff averred that during its occupation, the defendant had caused considerable damage to the premises in that certain fixtures and fittings had been destroyed. The floors of the premises had been damaged. The defendant was said to have moved out without having made good that damage. The major damage complained of was said to have been caused by the spillage of chemicals. The damage was said to have been concentrated on the floors of the various rooms making up the warehouse. The section said to have suffered the most was described as the "***red***" or "***pink***" room. This was followed by the "***purple***" room.

The other damage sued for comprised:

- electrical damage to the power trunking, lights, switches and sockets;
- damage to the plumbing system in the toilets;
- broken window panes;
- damage to the locks and keys which had to be replaced;
- a pungent smell as a result of the spillage of industrial chemicals.

The plaintiff said until the repairs had been done and completed, the premises had remained unletteable. The pungent smell had had to be cleaned up.

Apart from interest at the prescribed rate, and costs of suit on a legal practitioner and client scale, the plaintiff's claim was for US$27 150-78. The amount was broken down as follows:

- US$5 198-05, being the consultation fees for the engineers engaged to assess the damage;
- US$19 145-73, being the actual cost of repairs;
- US$1 043-00 for electrical repairs;
- US$1 248-00 for plumbing;
- US$296-00 for glass repairs, and
- US$ 220-00 for locks and keys

The plaintiff said since it could not re-let the premises immediately after the defendant had vacated, it had lost rental income for five months. At US$5 000 per month, the total claim under this head was US$25 000-00. So the total claim was US$52 150-78.

The defendant denied the claim *in toto*. It said the claim was malicious and one calculated to harass it for having moved out of the premises. It was said moving out was something that had displeased the plaintiff which had wanted the lease to continue. The mainstay of the defence was that the alleged damage neatly fitted into the "***... fair wear and tear ...***" exception. The defendant also alleged that it had offered, to quote directly from its plea: "***to attend to a certain 'pink' / 'red'***... ... ***in the spirit of avoiding further quarrel with***

Plaintiff and not out of any legal obligation [o]n its part." The defendant said in the end, it had not attended to the "***pink***" [or "***red***"] because the plaintiff had frustrated the gesture.

To tell its story, the plaintiff lined up three witnesses. The first was Mr Andrew Lockhart-Scott. He was the plaintiff's managing director. The nub of his evidence was that the plaintiff's premises were for commercial hire. The defendant had left them in a deplorable state. There had been structural damage on the floors due to chemical seepage. There had been rust on the windows, the doors and the frames. The damage to the electrical trunking had been caused by forklifts moving up and down. He also confirmed the rest of the damage as specified in the declaration.

Mr Scott said the premises were unletteable before repairs. He had commissioned two sets of engineers to assess the damage and to recommend the nature and extent of the remedial work required. The first was a firm of consulting engineers called Brian Colquhoun Hugh Donnell & Partners. They had carried out a visual inspection of the damage. They had also carried out an intrusive investigation. This had entailed, among other things, the drilling and carving out of samples from the affected spots for analysis. At the end of their investigations they had compiled a detailed report. The report was produced. Throughout the trial it was referred to as "***the BCHOD report***".

In summary, the BCHOD report concluded that the chemical penetration in portions of the floor of the "***red***" room ranged in depth from 25mm to 50mm. This translated to 19% to 32% of the total floor depth. The warehouse was made of concrete floors. The finish in most rooms was screed or power float. The concrete surface of the "***red room***" in particular was granular. It could easily disintegrate.

According to the BCHOD report, the next section with some notable chemical penetration was the "***Sulphonic Acid***" room. Here the depth of chemical penetration was 5mm. The penetration in the rest of the sections was said to be negligible.

In substance, the remedial action recommended in the BCHOD report included the cutting up, through grinding, of the concrete slab in the "***red***" room, down to the good concrete. The remaining exposed surface could be treated in either of two ways, namely, doing a finished smooth as a final working platform, or installing a separate bonded topping of not less than 25mm in place of the exposed slab surface.

In the "***Sulphonic Acid***" room, the BCHOD report recommended the removal of a 5mm surface through grinding, and the improvement of the flatness across the slab.

For the "***purple***" room, the same treatment as that of the ***Sulphonic Acid*** room was recommended, except that no remedial work for the structural integrity of the concrete slab was required.

The rest of the sections were given virtually a "clean bill", just requiring minute remedial action to sort out some dampness in the main warehouse, and to achieve a smoother concrete finish.

The BCHOD report stressed that it had focused on the structural integrity of the affected areas and that its comments had been confined to the surface degradation. It recommended a separate investigation from a chemical expert that would focus on the health risks caused by the chemicals which allegedly had caused the damage to the building.

Mr Scott said there had been need for a thorough investigation on all aspects of the damage to the building and on the potential health risks due to the chemical exposure or from the odour. To this extent, he had approached the ministry of health for assistance. He had been referred to the Radiation Protection Authority of Zimbabwe ["***RPAZ***"].

RPAZ had compiled a report. It was also produced. Its major findings were that there had been no radioactive chemicals. It said the defendant had stored heavy mineral acids, alkalines and industrial chemicals. These might have caused the corrosion of the floors and of the walls; the rusting of the steel structures; the strong odours and the sticky floors.

RPAZ had concluded that at the time of its inspection, in February 2014, the premises had not been fit for use. It had recommended cleaning up with different solvents and neutralizers.

The invoices making up the plaintiff's claim as set out in the summons were produced through Mr Scott.

The plaintiff's next witness was Mr Antony Robert Root. Robert Root Property Consultants ["***Robert Root***"] had been the managing agents of the premises throughout the lease period. Mr Root was the managing director. He had upwards of forty five years' experience in property management.

The gist of Mr Root's evidence was to confirm the defendant's tenancy; the periodic inspections carried out by his firm; the alleged damage to the premises; the remedial action taken to restore them back to their letteable status, and the uncooperative attitude of the defendant when engaged to make good, or meet the cost of, the damage.

Mr Root also spoke about the endeavours to get a replacement tenant. One such had submitted a serious offer but the proposed rent had been marginally lower than the market

rate. At that time the repairs were still to be completed. Among other things, the cleaning process to get rid of the odours had yet to be done. Eventually this offer had fallen through. A replacement tenant had only been secured from 1 May 2015. Even then, the rent was marginally less than what the defendant had been paying. However, this difference was not part of the plaintiff's claim.

The plaintiff's third and last witness was Mr Cyprian Kunaka. He had thirty years post qualification experience in civil and structural engineering. It was his firm, Dickie & Kunaka Consulting Engineers, which the plaintiff ultimately engaged to carry out the repair work. It had subcontracted the other jobs.

Mr Kunaka said he had first carried out an investigation of his own on the nature and extent of the damage. Much of that investigation had been through visual inspections. He had compiled a report giving the plaintiff several options. The cheapest option would cost US$17 312-32. The highest would cost US$ US$19 902-90. Mr Kunaka said he had recommended the highest option as a guaranteed for safety and sustainability.

Mr Kunaka's diagnosis and report had been independent of the BCHOD report. The major highlights of his findings and recommendations were that the chemical damage to the floors, particularly in the "***red/pink***" and the "***purple***" rooms had been severe; that the remedial work that would be necessary would not only restore the floors to their original state, but would also guarantee safety. The repairs would entail the scraping off of the concrete finishes in the affected rooms, replacing them with new screeds in some of them, and power float finishes in others, to the recommended depths of between 30mm to 40mm.

The remedial works to the floors, electrics, glassware, doors, locks, and the like, were carried out through Dickie & Kunaka. The contract had been 'supply and fix'. Supporting invoices and receipts for the payments made were produced. They largely matched the plaintiff's claim.

The defendant called two witnesses. The first was Mr Anub Chand. He was the defendant's managing director. He had a Master's degree in civil engineering. He had been seventeen years with the defendant.

Defendant's second and last witness was Mr Paul Francis Robinson. He was an industrial chemist with 35 years' experience. He said he had been consulted by the defendant over its dispute with the plaintiff. He had carried out an inspection of the premises and had compiled a report on the nature and extent of the alleged chemical damage and the nature and

extent of the remedial works required to be done. However, his inspection had been carried out at a time when the premises had already been cleaned up of chemical residue.

The substance of the defendant's case, as told by Mr Chand and Mr Robinson, was that the so-called remedial work had been overdone; that it had amounted to extensive renovations beyond any damage as may have been attributed to its occupation; that the defendant could not be expected to bear the cost of such repairs when it had been excluded from the assessment of the damage and of the remedial work; and that, in any event, the defendant had once offered, soon after it had vacated the premises, to repair such of the damage as could be attributed to its occupation, but that the plaintiff had unreasonably spurned the offer. The defendant maintained that but for the elaborate repairs which were excessive and unnecessary, the period when the premises could have remained vacant for the purposes of repairs could have been no more than a couple of days. It said if it had been allowed to do the repairs itself, as it had offered to do, the cost would have been no more than US$3 000.

In a nutshell, the defendant's case was that the damage complained of was no more than normal fair wear and tear.

Other highlights of the defendant's evidence were that in all the periodic inspections of the premises by Robert Root, nothing adverse had been reported. All its employees would undergo periodic health inspections as a standard requirement in the chemical industry, and that in all such inspections they had been given a clean bill. By their nature, the chemicals that they traded in released some smells. However, there was nothing harmful about them.

The defendant was prepared to accept the BCHOD report and its recommendations. Mr Chand regarded Mr Kunaka's diagnostic method as having been superficial and unreliable. He said this had led to him recommending remedial action which was way over the top. To the defendant, Mr Kunaka's works had been to rebuild the floors anew for the benefit of new tenants, something that should, or could, not be charged to it.

Through Mr Robinson in particular, the defendant tried to show that the alleged chemical damage had been superficial. Much of it was said to be mere discolouration that could easily be gotten rid of by a coat of paint.

That was the case before me.

Except, perhaps, for Mr Scott whose professional qualifications none of the parties ventured to highlight beyond asserting his ownership of the premises through the plaintiff, virtually all the witnesses from both sides were not only qualified personnel in their fields of

endeavour, but also they each had vast years of post-qualification experience behind them. Counsel had the unenviable task of discrediting them in cross-examination. In my view, and with due respect, both counsel did a splendid job. They did manage to bring out, and to build up their respective clients' cases. I commend them.

However, I consider that all the witnesses from both sides spoke well. They stood their ground in cross-examination. They highlighted as best as they could their respective cases. In my view, the credibility of witnesses is a relatively minor aspect in determining this case. The matter turns on the story in, or behind, the relevant documents. Much of what those documents reveal was common cause. That is where the defendant fell short.

That there was some damage to the plaintiff's premises after the defendant had vacated was common cause. On the one hand, the plaintiff said that the damage was extensive and could not be excused for mere fair wear and tear. On the other hand, the defendant said the damage was minimal or superficial, and that it was normal wear and tear, given the years of occupation, and the nature of the product stored, something which the lease had expressly acknowledged.

What is fair wear and tear in cases of this nature?

YOUNG J, in *Cash Wholesalers [Pvt] Ltd v Marcuse*[1], said ***fair wear and tear*** is dilapidation or depreciation which is due to normal use, the ravages of time, exposure and natural elements. For such damage, the tenant is relieved of the obligation to repair.

In my view, it is a question of fact whether or not particular damage is fair wear and tear. If it is, then it is depreciation or degradation caused by exposure to the elements or due to normal use. The tenant is not liable. If it is not normal fair wear and tear, then the damage may be due to neglect. It may even be wilful. In that case the tenant is liable.

In this case, where the defendant was saying the damage was normal fair wear and tear, and the plaintiff saying it was more than that, someone else had to come forward and say which was which. Several experts did. BCHOD was the first. It had been commissioned by the plaintiff. It concluded that the damage went beyond fair wear and tear. At first, the defendant's stance was to reject the BCHOD report wholesale. However, it subsequently made a U-turn and was prepared to accept it. Therefore, on this alone, it is safe to conclude that it became common cause that the damage to the premises had gone beyond fair wear and tear. *Prima facie* then, the defendant would be liable.

[1] 1961 [2] SA 347 [SR], at p 354

Why the defendant, accepting the BCHOD report, would not then agree to pay the plaintiff's loss was threefold. As I understood it, the defendant was saying, firstly, that it had not been consulted when BCHOD had been engaged; secondly, that, at any rate, it was not BCHOD that had eventually carried out the remedial works, but someone else who had completely gone overboard; and thirdly, that the defendant could have easily carried out those remedial works itself, even on the basis of that BCHOD report, but at a fraction of the cost now being claimed.

Inevitably, the spotlight fell on Mr Kunaka, the next expert commissioned by the plaintiff. The defendant condemned his diagnostic methods and his recommendations. He was the one who had eventually carried out, or caused to be carried out, all the remedial work.

But I find the defendant's stance flawed. BCHOD did not cost the remedial works required to be done. It merely spelt out what was wrong; what needed to be done; and how it could be done. It did not say how much it would cost.

Furthermore, and at any rate, BCHOD had also stressed the need for further investigations, especially on the potential health risks due to possible chemical exposure. Therefore, the defendant, if it accepted the BCHOD report, must necessarily also have accepted that the plaintiff had been justified in engaging other experts for further investigations.

It is common cause that the premises were still engulfed by odours months after the defendant had left. The defendant said it was just an unpleasant smell that was normal, allegedly given the type and quantity of the chemicals it had been using, and the length of the storage. The plaintiff said it was more than that. The odours were putrid. They made the premises uninhabitable. The health hazards were unknown. Therefore, the plaintiff had engaged RPAZ on the recommendations of the ministry of health. That was the third expert commissioned by the plaintiff.

RPAZ confirmed the strong odours but allayed any fears about health risks. There seems to have been no direct cost attributed to the procurement of the RPAZ report. But even if there had been, I would easily pass it as having been necessary. Until the investigation had been done, the plaintiff could never have known what dangers lurked in those pungent smells. Thus, I consider that the plaintiff's move to engage RPAZ had been reasonable and justified.

The defendant's complaint on the RPAZ report was that RPAZ had no "jurisdiction" over potential chemical damage, and that the investigator from RPAZ who had recommended

the cleaning up of the premises with different solvents and neutralisers, had been unqualified to make such recommendations. But in my view, this was neither here nor there. The defendant's own chemical expert, Mr Robinson, who notwithstanding arriving at the scene after the premises had already been cleaned up, seemed to have been satisfied with the level of cleaning up that had been carried out. Apparently, it was because of the premises' state of cleanliness that Mr Robinson had been able to rule out the possibility of any further corrosion of the premises by chemicals. He seemed to endorse the level of cleaning up that had been carried out. His own further remedial action was just a coat of paint.

Therefore, I consider that the cost of cleaning up the premises was a necessary expense incurred by the plaintiff in restoring the premises back to their original letteable status.

Then came Mr Kunaka. It was through him that the bulk of the restoration costs had been incurred. The defendant argued that Mr Kunaka had gone over the top. It argued that what he did had not been what BCHOD had recommended.

The first difficulty that I have with the defendant's argument on the Kunaka issue is that I was not told by how much Mr Kunaka had allegedly gone over the top. BCHOD gave no figures. So, I can only surmise that where the plaintiff is claiming US$27 150-78 as being the actual cost of repairs, based on Mr Kunaka's report, and where the defendant is claiming that it would have done those repairs at no more than US$3 000, the figure by which Mr Kunaka must have gone over the top would be US$24 150-78.

The defendant's stance is eminently unreasonable. I am not about to give it credence by spending much time on it. US$3 000 was even less than what it had cost the plaintiff to get the consultants' expert opinions. It had cost US$5 198-05. One does not need to be an expert, like BCHOD, or Mr Kunaka, or even Mr Chand himself, to be able to dismiss the defendant's estimate of US$3 000. It was manifestly unreasonable. The cost of repairs was supported by detailed invoices and receipts. Nothing was shown to have been incurred unnecessarily. That is the one aspect about the defendant's stance on the Kunaka issue.

The other aspect of the defendant's stance on the Kunaka issue was that it presupposed that BCHOD recognised lesser damage than Mr Kunaka did. That was not the case. There was considerable convergence between the two experts on the nature and extent of the damage, especially in the "***red***" and "***purple***" rooms, where the damage was severe. BCHOD put the depth of chemical penetration at between 25mm to 52mm. When Kunaka

dug up the floors and re-did them up, he went down a depth of 30mm to 40mm. He did make up a screed in some rooms and applied a power float finish in others.

The defendant's major criticism of Mr Kunaka was that he made up completely new floors. It was argued that not all the rooms had had concrete screeds, or power float finishes before. But I consider the criticism as being unreasonable. There had to be a uniform finish. No self-respecting engineer would do patch work. BCHOD had only done sample drilling. As Mr Kunaka had gotten down to doing the work, he would discover further damage that might have escaped both his earlier visual inspection and the sample drilling by BCHOD. Whole chunks of the floor would drop off as he dealt with the practical situation on the ground.

The lease prevented the defendant from making any structural alterations, additions or improvements to the leased premises without the prior written consent of the plaintiff. I do not suppose that the carrying out of repairs to the damaged floors, even if damaged by use or the elements over time, would amount to structural alterations or additions or improvements. On the contrary, the defendant was expressly obliged to keep and maintain the premises in a clean and sanitary condition and in good order, and to redecorate the internal walls when necessary.

In casu, both parties have cited the case of *Cash Wholesalers [Pvt] Ltd v Marcus*[2]. In my view, the analysis made by the court in that case is less favourable to the defendant. Part of the damage analysed by the court related to the first floor of the building that had been leased by the plaintiff - the landlord, to the defendant - the tenant. That floor had been made of wood. Over time the wood had become worn out. When the defendant had wanted to use that floor for the first time, some years after the lease agreement had been running, it turned out that it had been latently defective. Among other things, it could not carry the load it ought to have carried. The two judge court[3] considered that the basic trouble with the first floor was wear and tear owing to age and use. It would be the landlord that would be liable for the cost of fixing that kind of trouble. But the court also said that much of the trouble with that floor had been the broken floor boards that had remained unattended to for years. The court said that the tenant would be liable for fixing that kind of trouble. Clause 7 of the lease had obliged the tenant, just as in the present case, to *inter alia*, keep the premises in good order. It

[2] 1961 [2] SA 347 [SR]
[3] HATHORN and YOUNG JJ

had prohibited the tenant from making any structural alterations, additions or improvements without the landlord's consent. Of this, YOUNG J said[4]:

> "No question of structural alterations as visualised in clause 7 of the agreement arises in this case. Replacing a floor is not a structural alteration, and it is not necessarily outside the tenant's obligations under a repair clause, even if it involves new and modern material; it depends on the wording of the agreement."

In *Radloff v Kaplan*[5], a case quoted with approval in *Marcus*, MACGREGOR J said of the fair wear and tear exception in lease agreements:

> "But if the person who is under the duty to repair lets time run on unduly without doing anything towards the upkeep and keeping in order of the place, he cannot rely on the exception of fair wear and tear."

In casu, the corrosion to the floors of the premises had been caused by the defendant's chemicals. Therefore, the defendant is liable to make good the cost of repairs. I have seen nothing excessive in the repair work done, or caused to be done, by Mr Kunaka.

In my view, the plaintiff's claim for loss of rentals from December 2013 to March 2014 at US$5 000 per month is a claim for consequential loss. In my view, that was not such direct damage as would be said to have flowed naturally from the defendant's breach. It was indirect damage. In *Gort v Tinto Industries Ltd*[6] SAMATTA J said[7]:

> "Direct damage is that which flows naturally from the breach without other intervening cause and independently of special circumstances, while indirect damage does not so flow."

Consequential or indirect damages should, objectively, be in the contemplation of the parties at the time of the contract. In the present case, if the defendant moved out of the leased premises which it knew existed for hire, but left them in an uninhabitable state, it cannot escape liability for the loss of the rent by the plaintiff during the period that it had taken to fix the premises back to their letteable state. That loss flowed naturally from the breach, albeit indirectly. The defendant has not shown that the premises could have been repaired much sooner than they had been, or that the plaintiff could have procured a tenant

[4] At p354E
[5] 1914 EDL 357
[6] 1985 [1] ZLR 66 [HC]
[7] At p 72A - B

who would have been willing and able to pay the true market rentals much earlier than the time it had taken for the repairs to be completed. On the other hand, the plaintiff has managed to show ***what*** had needed to be done to its premises to restore them back to their letteable condition; ***how*** it had been done; ***how long*** it had taken, and ***what the cost*** had been.

In the premises, the plaintiff's claim is allowed in its entirety.

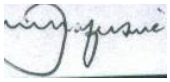
The plaintiff has prayed for costs at the higher scale of attorney and client. No justification or reason for this has been proffered. Therefore, the costs shall be at the ordinary scale.

The plaintiff has also prayed for interest on the amount of damages at the prescribed rate, currently five per cent per annum [5% p.a.] to be reckoned from 29 May 2014. I have gathered from the plaintiff's declaration that this date was the date of the demand for payment. However, I consider that interest should not be reckoned from that date, but from the date of this judgment. The plaintiff's claim, despite the supporting documents, had remained unliquidated.

In the premises, the matter is disposed of as follows:

> The defendant shall pay the plaintiff the sum of US$52 150-78 [fifty two thousand, one hundred and fifty dollars and seventy eight], together with interest thereon at five per cent per annum [5% p.a.] from the date of this judgment, namely 3 February 2016, to the date of payment. The defendant shall pay the plaintiff's costs of suit.

3 February 2016



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