Case No: B2/2016/0869

Neutral Citation Number: [2018] EWCA Civ 674
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE NORTHAMPTON COUNTY COURT
HHJ Hampton
A4QZ3380

Royal Courts of Justice
7 Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 28/03/2018

Before:

LORD JUSTICE GROSS
and
MR JUSTICE HILDYARD

- -

Between :

	J N HIPWELL & SON	**Appellant**
	- and -	
	MRS CLARE SZUREK	**Respondent**

- -

Anthony Katz (instructed by **Lamb and Holmes LLP**) for the **Appellant**
Stephen Taylor (instructed by **Tollers LLP**) for the **Respondent**

Hearing date: 12th October 2017

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Judgment

Mr Justice Hildyard:

Nature and ambit of the appeal

1. This appeal concerns a judgment in the sum of £22,750 (representing assessed business losses) in favour of the Claimant/Respondent ("the Respondent") and against the Appellant/Defendant ("the Appellant") for what was held to have been a repudiatory breach by the Appellant, which was accepted by the Respondent, of an implied or collateral obligation as to the safety of the electrical installation at business premises which the Appellant had leased to the Respondent for use as a café, meeting place or function room ("the Premises").

2. The principal question raised and the focus of the appeal is on whether there was any basis in law for treating the lease ("the Lease") as including the relevant obligation, either by way of collateral bargain or implied term. There are also questions as to whether the Respondent was in the alternative entitled to rescind on the basis of misrepresentations made to her before she signed the Lease.

3.

To the usual difficulties of establishing an implied term or collateral bargain, or in the alternative, of establishing that a consensual arrangement was induced by misrepresentation, are added in this case the particular difficulties that the Lease contained:

(1) A clause (the "Entire Agreement clause") stating that the Lease "constitutes the entire agreement and understanding of the parties relating to the transaction contemplated by the grant of this Lease and supersedes any previous agreement between the parties relating to the transaction"; and

(2) An express acknowledgment on the part of the Respondent (the "Non-Reliance clause") that in entering into the Lease it is "not relying on, and shall have no remedy in respect of, any statement or representation made by or on behalf of the [Appellant]".

(Juridically different, but complementary, I shall for convenience refer to the Entire Agreement clause and the Non-Reliance clause together as the "Entire Agreement Provisions" unless expressly stated otherwise.)

4. It must be said that the claim, though giving rise to points of some interest, is worryingly small when compared to the costs of pursuing it at a two-day trial with numerous witnesses in the multi-track.

Factual background and principal findings

5. With two qualifications, the facts are no longer substantially disputed. I can take the following description of the background from paragraphs 1 to 5 of the judgment below ("the Judgment"), as follows:

> "1. From 2008, until the events which gave rise to this action in the spring of 2013, the Claimant rented from the Defendant premises which she ran as a café trading under the style Mocha-Mamas. The target clientele for this business was new or expectant parents. The premises were situated at the Glendon Lodge Farm Complex, Glendon, Kettering, Northamptonshire. Initially the Claimant rented a building known as the Hayloft within the complex, then in 2011 she moved to The Dryer a larger building in the same complex. The parties entered into a written lease dated 15th March 2012 which provided for a three year term running from January 2012.
>
> 2. In March and then April 2013, the Claimant experienced problems at the premises, as a result, she alleges, of unsafe electrical wiring. Those problems, including a small fire and an sparking plug socket caused her to close the business. In these proceedings, she seeks to recover the losses incurred in the closure of her business.
>
> 3. The Claimant's pleaded case is that she entered into the lease relying on representations made by the Defendant as to the rewiring of The Dryer: that it had been inspected, had passed an inspection and was safe. It is asserted that these representations were false or negligent and that she was entitled to rescind the lease. Alternatively it is alleged that there was an implied term within the lease to the effect that the Defendant was to be responsible for maintenance and/or repair of electrical installations and/or there was an implied warranty within the lease that the electrical installation was, at the date of the lease safe. As a result of the problems which occurred, it is alleged that the Defendant was in repudiatory breach of the lease and the Claimant was entitled to accept that repudiation.
>
> 4. In the defence it has been asserted that there was no fire and that if there was, it was the fault of the Claimant or one of her employees. It has also been pleaded that the representations relied on by the Claimant were never made and that the Claimant's decision to cease trading was unreasonable and disproportionate. The Defendant also relies on an entire agreement clause in the lease. In addition the Claimant is put to proof that the electrical

wiring was unsafe.

5. There is a counterclaim for unpaid rent for the period 14th March to 24th July 2013 (the operative date for a break clause in the lease) and a claim for the Claimant's use of electricity."

6. As to the Judge's findings, I do not think it is necessary to refer to more than these:

(1) Before the Respondent signed the Lease, the Appellant did represent to her that the electrical wiring had been completed and certificated (see paragraph 15 of the Judgment).

(2) The Lease "did not suit either of the parties' requirements" (paragraph 25), did not "adequately reflect the understanding and expectation of either party" so that the Entire Agreement clause "is manifestly incorrect" (paragraph 27).

(3) The parties' true shared expectations, demonstrated by their discussions and actions, were that the Appellant landlord "was considered to bear responsibility for keeping in repair the structure and exterior of the premises and installations for the provision of e.g. water and electricity" (paragraph 25) and that it had "accepted responsibility for the safety of the installation of electrical wiring, its inspection and certification" (paragraph 32, and also paragraph 28). The expert evidence was that "the person responsible for the premises is required to keep a copy [Electrical Safety Certificate] as proof and future reference" (paragraph 14).

(4) On 23 March 2013 there was a fire in the distributor board at the Premises, which caused fire damage to the circuit-breaker: according to the Judge "It was, mercifully, a minor fire, but nevertheless a significant one given its location" (paragraph 19).

(5) After this fire, the parties exchanged correspondence with regard to the provision of Fire Certificates (paragraph 22). The evidence of the Respondent (which the Judge appears to have accepted in paragraph 22) was that she requested, and the Appellant promised to provide to her, copies of the electrical certificate for the installation and the faulty socket so that she could claim loss of one day's business (in consequence of the fire) under an insurance policy.

(6) By 19 April 2013, the Appellant had not provided the certificates: paragraph 22.

(7) On that date, there was another electrical incident, this time from a "sparking" electrical socket, which was subsequently diagnosed as having been caused by "arcing at this point of supply" (paragraph 17).

(8) The Appellant then, on 24 April 2013, at last did arrange and secure the electrical inspection and certification of the Premises; but by then the Respondent had already given notice (paragraph 22).

(9) The electrician, a Mr Green, who undertook that inspection on behalf of the Appellant, subsequently provided a report on 29 April 2013 (paragraph 9).

(10) Thereafter, on 9 May 2013, the Appellant informed the Respondent by email that there was no reason for her to close her Premises, and that on inspection the electrician had "found no issue" with the installation (paragraph 24).

(11) In fact (though this was not at the time disclosed to the Respondent), the Appellant's electrician, Mr Green, had reported that at the time of his inspection there were problems with regard to electrical safety, and his report concluded that the electrical installation was "unsatisfactory", that one item was dangerous with risk of injury, and four others were potentially dangerous in respect of which further "urgent remedial action was required" (paragraph 24).

(12) As it was, to inform the Respondent that there was no reason for her to close her Premises and that the electrician had "found no issue" with the installation must have reinforced the Respondent's view that the Appellant was denying there had been any electrical faults and any obligation to put them right (paragraph 24).

(13) Given the nature of the Respondent's use of the Premises, safety was particularly important (paragraph 33). In all the circumstances, she decided that she could no longer be confident about the safety of the Premises, particularly from the risk of electrical fire (paragraph 24). The Respondent's conclusion that she could no longer continue her business at the Premises "is unsurprising" (paragraph 24).

(14) The Judge found that "after the fire occurred, in an important part of the electrical installation, found to be unsafe by Mr Green, the [Appellant] was in breach of the implied terms of the agreement between the [Appellant] and the [Respondent]"; and alternatively, that "the [Respondent] relied on the representations that the electrical wiring was safe, had been inspected and certificated, when she signed the lease".

(15) The Judge concluded that "after the experience of the fire, which followed previous minor electrical problems and which was followed by the sparking of the plug some

three weeks later, combined with the failure of the [Appellant] to offer inspection or certification of the premises, I find that the [Appellant] was in repudiatory breach of the lease and the [Respondent] was entitled to accept that breach and vacate the premises" (paragraph 33) and sue for business loss.

7. It is not necessary for present purposes to recount the further detailed findings, or further assess the Appellant's general contentions (which of course the Respondent rejected) that the Respondent's decision to cease trading was unreasonable and disproportionate, that her giving of notice was repudiatory and that in reality she gave notice to terminate because her business was struggling and she was seeking to stem her outgoings and recoup her expenditure. But it is necessary to explain the qualifications to which I have referred above.

8. The first is that it is the Appellant's case on appeal (and part of its second ground) that in light of the Entire Agreement Provisions, the Respondent cannot reasonably have relied on the representation which the Judge found had been made to her in respect of the electrical installation.

9. The second is that by its Respondent's Notice (which was also subsequently amended, see below), the Respondent asked this Court to uphold the order below on the further ground that:

> "On the facts found by the Learned Judge, the Learned Judge ought also to have found that the pre-lease representations made by Mr Martin Hipwell (for the Appellant and to the effect that the wiring within the premises had been inspected, was safe, and had been or would be certificated) were representations made knowing them to be untrue (*i.e.* fraudulently)."

10. Such an invitation to an appellate court to find fraud when the lower court did not is obviously unusual. I return to it below.

11. As to the Judge's approach on the law, in summary she was persuaded that:

    (1) When the Court is construing the provisions of a lease it should do so against the background facts known to the parties at the time of the grant: she relied on *Baxter v Camden LBC* [2000] 32 HLR 148 (and see paragraph 30 of the Judgment).

    (2) When the lease is not on its face a complete bargain the Court may, in appropriate

circumstances, imply terms: she relied on *Liverpool City Council v Irwin* [1977] AC 239 (again see paragraph 30 of the Judgment).

(3) An entire agreement clause is but one piece of evidence to be weighed against other evidence; if a reasonable bystander would not consider the lease to be determinative of the parties' intentions, the Court is justified in looking at the overall intention of the parties to decide whether the entire agreement clause is effective to exclude liability or prevent the Respondent pursuing her claim: she relied on a statement in *Fulton Motors Limited v Toyota (GB)* [1998] Eu LR 327 that there may be cases where "the parties could not have intended the form of agreement including the entire agreement clause to express the entire agreements between them" (and see paragraph 31 of the Judgment).

(4) A term should be implied to reflect the parties' discussions and actions and shared understanding that the landlord accepted responsibility for the safety of the installation of electrical wiring, its inspection and certification (see paragraph 32).

Grounds of Appeal

12. The Appellant put forward seven Grounds of Appeal. These included objections based on procedural irregularity as well as error of law.

13. Ground 1 is that the Judge failed to give effect to the Entire Agreement Provisions, and determined that they did not apply on a basis that was no part of the Respondent's pleaded case. The Appellant contends that the only bases on which the Respondent sought to deprive the Entire Agreement Provisions of effect were: (a) that the Lease was induced by fraud; and/or (b) the Entire Agreement clause was contrary to the Unfair Contract Terms Act 1997 ("UCTA"). Having failed to establish fraud and abandoned reliance on UCTA at the hearing, the Respondent was left with no pleaded basis for avoiding the Entire Agreement Provisions.

14. Ground 7 may logically be addressed next; this is that the Judge was wrong to imply a term that the Appellant "would keep the electrical installation safe", since it flew in the face of the express terms, was wholly impractical in light of the Judge's finding of fact that the Respondent had installed her own commercial kitchen, and could not properly be said to be essential for the efficacy of the agreement.

15. The other Grounds may, at this stage, be summarised as follows:

(1) Ground 2 asserts that the Judgment was infected by a serious procedural irregularity, in relying on an authority which had not been cited or mentioned in argument,

namely, *Fulton Motors [supra]*, as the basis for providing the answer to the Entire Agreement clause and thus a central point in the case.

(2) Grounds 3, 4 and 5 are all based on the contention that the Judge failed to consider, or properly to consider, the fact and consequences of the Respondent's breach of duty of disclosure in failing to disclose her business accounts. The Appellant submits that the success or otherwise of the Respondent's business was a "central issue in the case", both substantively (since it went to the question whether the Respondent was always looking for an excuse to get out of the Lease if her business was failing) and in relation to quantum (for obvious reasons). It also went to credibility. The Appellant contends that the Judge both: (a) failed to attach proper weight to the Respondent's breach when assessing her credibility (Ground 3); and (b) erred in law by approaching the Respondent's failure as being mitigated by the decision or failure of the Appellant to apply for specific disclosure after noticing the deficiency (Ground 4). Further, the decision of the Judge then to accept the Respondent's explanation for £20,000 losses when the Appellant's Counsel was unable properly to cross-examine her on the accounts was a serious procedural irregularity compounded by the fact that in consequence "the Respondent unfairly benefitted from her own breach" (Ground 5).

(3) Ground 6 is that the Judge failed to consider the Respondent's duty to mitigate, which (the Appellant submitted) required the Respondent to undertake remedial works herself and charge the costs back to the Appellant in order to avoid her (larger) business loss.

16. As mentioned earlier, the Respondent sought to rely in an Amended Respondent's Notice on the following in support of the order made:

(1) The Respondent invited this Court to find that representations which induced the Respondent to enter into the Lease were fraudulent. Such a finding was and is sought because it is well established and not disputed that if an agreement is induced by fraud, an entire agreement clause within it will not derive the innocent party of its remedy of rescission. But, as is implicit, no such finding was made by the Judge, though the Respondent maintains that she:

> "was alert to the issue of fraud (see paragraph 3 of the Judgment and paragraph 12 of the Particulars of Claim) but did not conclude the issue one way or the other"

and she adds that:

> "…if the Judge concluded that these representations were negligent or innocent (*i.e.* the [Respondent] failed to make out her

allegation of fraud), that conclusion was wrong in law."

(2) The Respondent sought to uphold the decision on the further or alternative basis that the conclusions:

> "were similar to those which would have followed a claim for rectification of the Lease (so as to correct the erroneous omission [from its terms] of the Appellant's repairing obligations with regards to the building, and to have included within the Lease terms which properly reflected the parties' agreement)".

This was (as I understand it) either elaborated in or coupled to an argument (which I shall quote in order to ensure its faithful record) that:

> "…the Judge was entitled to treat the Lease as if it contained implied terms to the effect that the Appellant was responsible for the installation, repair and certification of the electrical installation because, had the Respondent sought rectification of the Lease, that would have achieved the same outcome. An entire agreement clause is not an automatic bar to rectification – *JJ Huber (Investments) Ltd v Private DIY Co Ltd* [1995] NPC 102."

(3) The Respondent, by amendment which was permitted by the Court *de bene esse* before the commencement of the appeal, latterly sought to revive an argument apparently abandoned or not pursued below to the effect that: (a) the provisions of clause 11.2 of the Lease, purporting to exclude liability for misrepresentations, were of no effect in accordance with section 3 of the Misrepresentation Act 1967; (b) the Appellant had in any event waived clause 22 of the Lease; and (c) there was a contract collateral to the Lease, under which the Appellant was obliged to provide the Respondent with an electrical installation which was safe.

17. I propose to identify what I consider to be the dispositive points in the appeal, referring where necessary to the Grounds of Appeal and Respondent's Notice but in a slightly revised order. As a general matter I should perhaps state at the outset that, for reasons which I shall later summarise relatively briefly, I do not consider that there is any sufficient basis for Grounds 2 to 6 to warrant reversal of the Judge's order. Grounds 1 and 7 seem to me to be the real 'meat' of the appeal.

Grounds 1 and 7: crux of this appeal

18. In the context of Grounds 1 and 7, as foreshadowed previously, the crucial questions are: (a) whether there is a legitimate basis for the implication of a term placing on the Appellant the responsibility for the installation and maintenance of the electrical wiring; and (b) whether the Entire Agreement Provisions stand in the way of any such implied term.

19. The Judge relied on her findings as to the parties' true intentions as the basis for concluding both that a term should be implied and that such implication should not be prevented by the Entire Agreement Provisions. Put shortly, she considered that the parties' true intentions that the landlord should be responsible for the structure and exterior of the Premises, and the plumbing and electrical installation within it, demonstrated that the Lease was incomplete (since it made no express provision in that regard); and that this was so plainly inconsistent with the Entire Agreement Provisions as to outweigh, and indeed oust, them.

20. There is undoubtedly common sense and justice in this approach. But the problems with it, again put summarily, are that: (a) although described in terms of the implication of a term, the Judge's introduction of a fresh provision based on the parties' true understandings was more akin to a collateral warranty or contract; (b) the parol evidence rule is that evidence is ordinarily inadmissible to vary or contradict the terms of a written contract; and (c) that rule is reinforced by the Entire Agreement Provisions, which under English law would ordinarily be given full force and conclusive effect as an integral part of the parties' bargain in accordance with its terms (and see *The Inntrepreneur Pub Company v East Crown Limited* [2000] 2 Lloyd's Rep. 611).

21. Lightman J there explained (at para. 7):

> "The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given

> effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence…: It is to denude what would otherwise constitute a collateral warranty of legal effect."

22. It is true that the Law Commission, as long ago as 1986, recommended that an entire agreement clause, though of very strong persuasive effect, should not be considered conclusive (which was indeed the Judge's approach). But the English cases have not adopted the view; and the recommendation has not been put into effect.

23. The Judge relied on *Fulton Motors [supra]* as providing an exception where "the parties could not have intended the form of agreement including the entire agreement clause to express the entire agreement between them" (*per* Jonathan Parker J, as he then was). But in that case, the entire agreement clause was included in a printed standard form which was to be incorporated as the terms of a contract by an offer letter (for new motor dealership terms) which stated that the printed form was to apply only insofar as not inconstant with the terms of the letter itself. Jonathan Parker J concluded:

> "The entire agreement clause and the provision for two years' notice of termination were inconsistent with the terms of the letter and accordingly did not form part of the agreement."

I am not persuaded that *Fulton Motors*, which was plainly decided by reference to the special facts identified, offers any real assistance in the different circumstances of this case.

24. Furthermore, there was no 'non-reliance clause' in that case, as there is in this; and I do not consider that *Fulton Motors* provides any basis for permitting reliance on a (non-fraudulent) misrepresentation in the teeth of the 'non-reliance' limb of the Entire Agreement Provisions. Indeed, I would not accept that the Judge's alternative basis of deciding the case (founded on pre-Lease misrepresentation) can survive that limb of the Entire Agreement Provisions in the absence of a finding of fraud. If the Judgment can be sustained it must be so on the basis of an implied term.

25. In that context, the Judge relied, and was addressed by Counsel, on *Liverpool City Council v Irwin [supra]*. She took from that case the general proposition that "where the lease is on its face an incomplete bargain, the court may, in appropriate circumstances imply terms". However, although there is some tension between the speeches of Lord Wilberforce (who put the test as one of necessity) and Lord Cross (who regarded the test as being whether the term would be one reasonable to imply "in the general run of such cases"), the case really concerned the implication of terms as legal incidents of definable

categories of contractual relationship or particular types of contract, rather than (as in this case) a tailor-made implied term. Further, and in any event, I do not think that *Liverpool City Council v Irwin* supports the Judge's approach of treating the subjective common understanding of the parties as reason enough both to imply a term to give it effect and to neutralise the Entire Agreement Provisions.

26. However, although in her Judgment the Judge did not cite any other specific authority on the issue of implied terms and the effect of an entire agreement clause, it is well established, and was not disputed before us, that a term may be implied where it is necessary to give business efficacy to the contract in question. In such a context, the touchstone is always necessity and not merely reasonableness, and the term is implied as a matter of fact in the particular case, rather than as a matter of law and as a legal incident of contracts of an identified type.

27. In that context an important concession was made by Counsel for the Appellant. This was that an entire agreement provision does not affect or prevent the implication of a term to be implied on grounds of business efficacy. In my view, that concession was entirely correctly made: a contract lacking business efficacy must, if possible, be supplemented to cure the defect. It cannot be supposed that the parties would have intended an entire agreement clause to cause the agreement to fail, and to prevent the court from saving it, if there is an available and appropriate means of doing so consistently with, and indeed to give effect to, what the Court finds must have been the true intentions of the parties.

28. The question then is whether implication of a term placing on the Appellant landlord an obligation to ensure that the electrical installation and supply at the Premises was safe and certified is necessary in order to give business efficacy to the Lease.

29. Although neither Counsel chose to address argument on the decision even after we had invited submissions, the law as to the implication or interpolation of terms on grounds of necessity to give a contract proper business efficacy has recently been reviewed, and in some respects reformulated, by the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anr* [2016] AC 742.

30. Drawing on a number of cases, Lord Neuberger of Abbotsbury PSC (with whom Lord Sumption and Lord Hodge JJSC agreed) identified or emphasised the following principles:

    (1) The starting point is to determine whether there is any provision in the agreement in question (in that case also, a lease) which expressly covers the point: only if there is

not can the implication of a term be appropriate, for the jurisdiction is to restore efficacy not improve that which, though not optimal, is workable (my phraseology). As Lord Neuberger put it, "it is only after the process of construing the express terms is complete that the issue of an implied term falls to be considered" (at [28]).

(2) The Court must take into account the possibility that the parties deliberately decided not to include the term sought to be implied: it is tempting but wrong to fashion and interpolate a term simply to reflect the merits of the situation as they appear when the issue arises: see [19] and the quotation from Lord Bingham MR's judgment in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 481-2.

(3) The question whether a term is to be implied is to be judged at the date when the contract is made (see [23]).

(4) The test is necessity, not reasonableness; but "absolute necessity" may put the bar too high, and it may be more helpful to ask the question whether without the term the contract would lack commercial or practical coherence (see [21]).

(5) Although the process of construction and the process of implying terms both involve determining the scope and meaning of the contract (see *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, and [26] in *Marks & Spencer*), the process of implication involves a rather different exercise from that of construction, and calls for strict restraint: see *per* Lord Bingham MR in the *Philips* case at page 481 and *per* Lord Neuberger in *Marks & Spencer* at [29].

31. Applying these principles to this case, the first question therefore is whether the Lease does address the point that has arisen, even if only infelicitously or even contrary to the intentions of the parties as now apparent. In that regard, the Lease is an oddly balanced document, imposing on the tenant far more extensive covenants than upon the landlord. Thus:

(1) By clause 4.4 the tenant covenanted:

> "To keep the whole of the Premises and all fixtures and fittings in good tenantable repair and decorative order (damages by any insured risk excepted unless and to the extent that any act or omission of the Tenant renders the insurance money irrecoverable) and to yield up the same and all the Landlord's fixtures and fittings annexed thereto in good repair and decorative order to the Landlord on the termination of the Term howsoever determined."

(2) Whereas the landlord covenanted as regards the condition and maintenance of the property only:

(a) By clause 5.2, "At all times to keep the premises and all additions thereto of which the Tenant has notified the landlord insured to the full cost of reinstatement under a policy complying with the terms of this clause."

(b) By clause 5.4, "To maintain Accessways and Car Parking Areas (as hereinafter defined)."

32. In my view, there is a plain and obvious gap. Except for the insurance covenant in clause 5.2, no express provision is made as regards either the exterior of the Premises itself (as a building) nor as to its plumbing or electrical installation and supply. For the avoidance of doubt, I cannot think that the intention of the parties was to include those matters as part of the Respondent tenant's obligation to keep "fixtures and fittings" in good repair and decorative order.

33. That the lack of any express obligations in respect of either the exterior of the Premises or the plumbing and electrical supply and installations is an obvious gap inconsistent with the objective intentions of the parties seems to me to be confirmed both by the evidence on behalf of the Appellant as regards its admitted obligations, and other terms in the Lease which seem to me to assume such obligations.

34. As to the evidence I have in mind in particular the fact, recorded by the Judge at +paragraph 25 of her Judgment, that it was expressly accepted on behalf of the Appellant landlord in oral evidence that the Appellant "was considered to bear responsibility for keeping in repair the structure and exterior of the Premises and installations for the provision of eg water and electricity", as indeed was necessary where the Premises were part of a development including other business premises for which "the electricity supply was from a common source."

35. As to express terms in the Lease which appear to assume such obligations, it is to be noticed (though I acknowledge it is not in the Judgment nor was it in the submissions of Counsel) that the tenant also covenanted by clause 4.7 of the Lease as follows:

> "To permit the Landlord or any person authorised by him with workmen and others to enter the Premises at any reasonable time on no less than 48 hours notice (or without notice in an emergency) to repair, maintain, cleanse or renew the Premises or any adjoining or neighbouring property or any service media

serving the same."

36. "Service media" is defined in clause 2.0 of the Lease and:

> "Means any pipes wires sewers drains ducts cables conduits or other channels through which water sewerage gas electricity and other services are conveyed which now serve or may at any time hereafter serve the Premises."

37. It is, to my mind, obvious from the reservation to the Appellant landlord of the right of access for the purpose of repairing, maintaining or renewing any service media as defined connotes at least an obligation on the part of the landlord (the Appellant) as regards the safety of the service media it had installed at the Premises.

38. In such circumstances I am in no doubt that, to ensure that the Lease does not lack commercial or practical coherence, or, in other words, as a matter of business necessity, the obvious gap should be plugged by implying a covenant on the part of the Appellant as landlord to the effect that the electrical installation and other service media provided was safely installed and continues to be covered by any requisite certificate. (The right of entry being to enable it to make good the covenant.)

39. Against this background, the covenant by the Appellant landlord which I consider should be implied is as follows:

> "that the electrical installation which serves the Premises (including all wires, ducts, cables conduits or other channels through which electricity is conveyed) is safe and the subject of a current Electrical Safety Certificate".

40. It is of course of comfort that this was indeed the understanding of the parties, on which they in fact acted. But the obligation is imposed, not by their agreement but by process of necessary implication or interpolation, to which (it is conceded) the Entire Agreement Provisions have no application.

41. That is sufficient to dispose of this appeal. However, I should address the other matters raised, for comprehensiveness and in light of the contentions based on serious procedural

irregularity.

Ground 2

42. It will be apparent, as regards Ground 2 and the Appellant's contention that the Judge's reliance on *Fulton Motors* whereby to overcome the Entire Agreement Provisions when it was not cited by the Respondent and the Appellant had not the opportunity to respond to the new ground that it was supposed to introduce, that, in my view, the case is of little assistance in the present circumstances.

43. On that basis, the Judge's reliance on *Fulton Motors* was misplaced and it is unnecessary to express a view as to what the position would have been otherwise with regard to the Judge relying on an authority without inviting submissions on it.

Grounds 3 to 5

44. Grounds 3 to 5, relating (as previously indicated) to the Respondent's breach of her duty to give standard disclosure in failing to disclose her business accounts, do raise a matter of real concern, in that nothing in this judgment should be taken as excusing or minimising the seriousness of the default. The accounts were clearly and directly relevant, and should have been disclosed. Disclosure is a fundamental feature of the adversarial process, and default in providing it strikes at the heart of that process.

45. That said, however, the Appellant did have the means of ensuring production by an application for specific disclosure as provided for by the Civil Procedure Rules. I would not say that this excused the Respondent's default. But the failure to make such an application deprives the point raised by the Appellant of any real persuasive force.

46. Furthermore, in the event, the final set of accounts were produced at the hearing, albeit disgracefully late. Counsel for the Appellant was able to cross-examine on them, however inconvenient he must have found their late arrival. He could have sought, but did not seek, either an adjournment or the production of any further accounts (say for the preceding 12 months). Ground 5 overstates, indeed misdescribes, the position: the Appellant, having chosen to proceed, cannot maintain with any coherence or conviction that he was "deprived of the opportunity to cross-examine the Respondent upon the contents of the business accounts and the annotations that appeared on the document itself." Cross-examination proceeded and the Judge ruled. I am unable to agree that, as matters turned out, there was unfairness to the Appellant, despite the Respondent's breach of her disclosure obligations.

Ground 6

47. Ground 6 asserts that the Judge failed to consider the Respondent's duty to mitigate her loss. It is said, more particularly, that the Respondent could and should have undertaken the (relatively minor, it is said) costs of electrical repair, and charging them back to the Appellant, rather than closing her business down and claiming business losses; and she should be restricted to no more recovery than the cost of repair.

48. I do not think it is an entirely fair criticism of the Judgment that the Judge failed to consider the question of mitigation. As it seems to me, and as submitted on behalf of the Respondent, she did deal with the essential question in paragraph 24, concluding that the Respondent was fairly minded to keep her business open until the Appellant's email of 9 May 2013 disavowing any issue with the electrical installation and promising certificates (which in the end were never received). The Judge held that "it was unsurprising" and by implication reasonable that the Respondent concluded from the email that the Appellant was simply bent on denying any electrical faults, and that she could not be confident about the safety of the business, particularly from the risk of electrical fire.

49. The Respondent also made the point that she had been quoted £7,000 for remedial works, and took that to be the relevant likely cost (rather than £500 as asserted by the Appellant). That also may support the conclusion that it was not unreasonable for the Respondent to have concluded that repair might be an expensive route to a still uncertain result with no firm prospect of recovery, nor willingness on the part of the landlord to abide what she regarded (correctly as it has been determined) as its obligations.

Respondent's Notice

50. Having already concluded that the appeal should be dismissed I shall address the points made in the Respondent's Notice (as amended) only briefly.

51. Suffice it to say that:

    (1) It is too late now to establish an argument based on section 3 of the Misrepresentation Act 1967. That is not so much because such an argument was conclusively abandoned below: there is a dispute in that regard, and it may be that it was simply not pursued in the face of judicial questioning as it perhaps should have been. The operative reason is that because the argument was not pursued, there are no findings of fact by the Judge such as to enable this Court to determine whether the Entire Agreement Provisions, in excluding liability for misrepresentation, were unreasonable, so as to nullify their effect. The evidential basis was simply not established. There the matter must be left.

(2) The Respondent also sought to contend that the undisputed understandings between the parties established a collateral contract, independent but contemporaneous with the Lease, which was not excluded by the parol evidence rule nor nullified by the Entire Agreement Provisions. I record the argument but this too is a matter best left for another day.

(3) The Respondent's Counsel also sought to support the outcome of the case by analogy with what the result would have been had the Respondent successfully applied for rectification. He argued, relying on *Craddock Bros Ltd v Hunt* [1923] Ch 136 at [159], that the collateral agreement between the parties justified rectification; and, relying on *JJ Huber (Investments) Ltd v The Private DIY Company Ltd* [1995] NPC 102, that an entire agreement clause is not a bar to rectification. Suffice it to say that I did not find this argument easy to follow; quite simply, no claim for rectification was ever advanced.

(4) The Amended Respondent's Notice also asserted that the Appellant had in any event waived the Entire Agreement Provisions. In support of this argument, Counsel for the Respondent referred us to *SAM Business Systems Limited v Hedley and Company (sued as a firm)* [2002] EWHC 2733 (TCC) as authority for the proposition that an entire agreement clause may be waived. We accept that, as far as it goes; but it is to be noted that in the case cited, there was no non-reliance clause such as there is in this case. As to the factual basis for the waiver alleged, Counsel for the Respondent relied, in summary, on: (a) the fact that the Appellant had carried out repairs to the heating within the Premises the subject of the Lease, which was inconsistent with the absence of any obligation on the part of the landlord; and (b) representations in an email from the Appellant's agent dated 1 February 2012 (and thus before the Lease was executed) implicitly accepting that the landlord had accepted repairing obligations, to be fulfilled within a "reasonable" time. In my view, the implied representation would fall within the Non-Reliance clause and thus not avail the Respondent; and neither the conduct nor the representation relied on is sufficiently unequivocal to sustain a plea of waiver.

(5) Finally, the Respondent invited this Court to find that though the Judge did not express a conclusion on the issue, her findings taken as a whole signify that, had she done so, she would have found that the representations made were fraudulent. It was common ground that the Entire Agreement Provisions would not apply in the context of a finding of fraud. The difficulty for the Respondent is obvious: the Judge did indeed make no such finding, and it would be wholly exceptional for this Court to make its own finding in such circumstances. As it is there is no reason for adopting such a course; but even if the appeal rested on it, I would not have substituted such a finding.

Conclusion

52. In conclusion, by a route rather different than was adopted by the Judge, it seems to me that, to ensure that the Lease has practical and commercial coherence, and to give effect to the obvious intent of the parties, a term must be implied as set out in paragraph [39] above.

53. It being common ground that the Entire Agreement Provisions did not exclude or prevent the implication of a term to give business efficacy to the Lease, and the Appellant being, on the basis of the Judge's findings, in breach of the term I consider is to be implied, it follows that in my view the order of the Judge, granting the Respondent judgment in the sum of £22,725.50, together with interest and costs to be assessed, and dismissing the Appellant's counterclaim, was substantially correct.

54. Accordingly, in my judgment, this appeal should be dismissed.

Lord Justice Gross:

55. I agree.