LANDLORD AND TENANT: IMPLIED WARRANTY OF HABITABILITY DERIVED FROM CONTRACT PRINCIPLES

In *Javins v. First National Realty Corp.*[1] the Court of Appeals for the District of Columbia Circuit held that the District of Columbia Housing Regulations[2] imply a warranty of habitability in the leases of apartments and other housing covered by the regulations. Moreover, the court suggested that even if the housing regulations did not exist, contract principles alone imply a warranty of habitability in all leases involving urban dwellings.[3] When several tenants in an apartment complex owned by the First National Realty Corporation withheld one month's rent to protest alleged violations of the regulations, the landlord filed separate actions for possession.[4] The cases were heard jointly in the Court of General Sessions which excluded evidence of the housing code violations and entered judgment for the landlord.[5] The Municipal Court of Appeals affirmed,[6] citing the established common law rule that "a landlord does not impliedly covenant or warrant that the leased premises are in habitable condition and . . . is not obligated to make ordinary repairs to the leased premises in the exclusive control of the tenant"[7] in the absence of an express covenant in the lease or a statute to the contrary. The Court of Appeals for the District of Columbia Circuit reversed the judgment and remanded the case to the District of Columbia Court of General Sessions.[8]

A lease for realty has historically been considered a conveyance of real property.[9] However, when inheritance rights must be settled, the

1. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 39 U.S.L.W. 3224 (U.S. Nov. 24, 1970).

2. HOUSING REGULATIONS OF THE DISTRICT OF COLUMBIA (1956).

3. 428 F.2d at 1080.

4. D.C. CODE ANN. § 45.910 (1901). Under section 45.911 the landlord could also have sought payment of back rent. He did not do so, probably in order to avoid a counterclaim for money damages under rule 4(c) of the Landlord and Tenant Branch of the Court of General Sessions of the District of Columbia.

5. 428 F.2d at 1072.

6. Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. Ct. App. 1968).

7. *Id.* at 838.

8. The alternatives on remand, assuming that the alleged violations were found to have occurred, were enumerated by the court:

(1) the rental obligation was extinguished by the landlord's breach;

(2) no part of the obligation was suspended by the breach; or

(3) there was a partial suspension of the rent obligation. 428 F.2d at 1080-82.

9. *See* 2 W. BLACKSTONE, COMMENTARIES *317.

interest conveyed is treated as personalty.[10] This "hybrid character"[11] of leases has not only confused courts[12] but also has encouraged them to emphasize "that aspect of [a lease] which leads to the desired result in the case before the court for decision."[13] Under traditional property law, the tenant "assumes the risk as to the condition of the premises"[14] which he rents. Only two exceptions to this basic rule have developed prior to *Javins*. The first was the implied warranty of habitability in short-term leases for furnished dwellings. The rationale of this exception is that short-term lessees are often unable to adequately inspect a dwelling they wish "to enjoy . . . without delay, and without the expense of preparing it for use."[15] In *Smith v. Marrable*,[16] when the tenant prematurely vacated a bug-infested furnished house that he had rented for five or six weeks, the landlord sued to recover the rent for the remainder of the lease term. The court held for the tenant on the ground that the landlord had breached an implied condition in the lease that the house would be habitable.[17] The court in *Ingalls v. Hobbs*[18] followed the decision in *Smith* by holding a lessor responsible for the poor condition of a furnished summer house. The *Ingalls* court reasoned that the lessor had agreed by implication to provide a house that was suitable for occupation by his lessees.[19] Both decisions are based upon a limited warranty implied in contract and make no reference to statutory requirements. *Pines v. Perssion*[20] extended the short-term lease exception to cover leases up to one year in duration; however, pleas for an expansion of this theory to all leases of dwellings met no success.[21] The second exception to the assumption of risk rule in landlord-tenant relations is a warranty of habitability

10. 1 H. TIFFANY, THE LAW OF REAL PROPERTY § 73 (3d ed. 1939).

11. 2 R. POWELL, REAL PROPERTY ¶ 221[2] (1967).

12. *E.g.*, Intermountain Realty Co. v. Allen, 60 Idaho 228, 234, 90 P.2d 704, 706 (1939); Janura v. Fencl, 261 Wis. 179, 52 N.W.2d 144 (1952).

13. 2 R. POWELL, *supra* note 11, at ¶ 221[2].

14. Brooks v. Peters, 157 Fla. 141, 145, 25 So. 2d 205, 207 (1946).

15. Ingalls v. Hobbs, 156 Mass. 348, 350, 31 N.E. 286 (1892). *See* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 522 (1966). Much of the theoretical foundation of the *Javins* opinion appears in Professor Schoshinski's article.

16. 152 Eng. Rep. 693 (Ex. 1843).

17. *Id.* at 694.

18. 156 Mass. 348, 31 N.E. 286 (1892).

19. *Id.* at 351, 31 N.E. at 287.

20. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

21. *See* McKey v. Fairbairn, 345 F.2d 739 (D.C. Cir. 1965); Bowles v. Mahoney, 202 F.2d 320 (D.C. Cir. 1952). For a strong argument in support of the implied warranty of habitability doctrine, see Judge Bazelon's dissenting opinion in *Bowles*. *Id.* at 325.

implied from statutory requirements. In an alternative holding, the *Pines* court found that because the rented property was unfit for occupancy under state law, a failure of consideration on the part of the lessor freed the lessees of all responsibility to pay rent.[22] State statutes and municipal housing codes have been used to impose tort liability on a landlord whose negligent violation of housing law requirements results in injury to a tenant.[23] Indeed, a trend now exists in landlord-tenant law toward the establishment of implied contractual obligations, based on statutes and housing codes, under which every landlord must maintain the premises in a safe condition.[24] This trend is reinforced by an increasing reluctance to permit tenants to waive the landlord's statutory duties.[25]

Although there are no other exceptions to the assumption of risk rule, two cases decided just prior to *Javins* indicate a desire to abolish the rule entirely in favor of a contractual theory of leases embodying a judicially implied warranty of habitability. The clear implication of both decisions was that the presence or absence of statutory standards of habitability would not matter. In *Reste Realty Corp. v. Cooper*,[26] the New Jersey Supreme Court stated that the "present day demands of fair treatment" are adequate to impose upon a landlord an implied warranty against latent, remediable defects.[27] In *Lemle v. Breeden*[28] the lessee sought to recover a deposit and rent payment from the lessor on the ground that the house which the lessee had rented was so rat-infested that it was uninhabitable. This "material breach of the implied warranty of habitability and fitness for the use intended . . . justified the [lessee's] rescinding the rental agreement and vacating the premises."[29] Despite the existence of opinion to the contrary,[30] it is likely that the sweeping language of *Lemle* is limited by its factual situation. The house was furnished, and the rental agreement covered two separate but quite short periods, totaling considerably less than a

22. 14 Wis. 2d 590, 597, 111 N.W.2d 409, 413.

23. *See, e.g.*, Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960); Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922).

24. *See* Brown v. Southall Realty Co., 237 A.2d 834, 836 (D.C. Ct. App. 1968). *See also* 1 POV. L. REP. ¶ 2120, at 3066 (1968).

25. *E.g.*, Halliday v. Greene, 244 Cal. App. 2d 482, 53 Cal. Rptr. 267 (1966); Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (App. Dept., Super. Ct. 1967).

26. 53 N.J. 444, 251 A.2d 268 (1969).

27. *Id.* at 454, 251 A.2d at 273 (dictum).

28. 462 P.2d 470 (Hawaii 1969).

29. *Id.* at 476.

30. 38 FORD. L. REV. 818, 822 (1970).

year. Moreover, the lessee's inspection of the property was brief.[31] These facts clearly resemble those in *Smith, Ingalls,* and *Pines.*[32]

In determining that the District of Columbia Housing Code requires a warranty of habitability to be implied in the leases of all housing subject to the code, the *Javins* court considered the housing regulations as legislative manifestations of a policy favoring reform of landlord-tenant law.[33] For its reading of the housing code, the court relied on *Whetzel v. Jess Fisher Management Co.*,[34] a tort case which held that the housing regulations impose privately enforceable duties upon a landlord to make such repairs as are necessary to prevent injuries to his tenant.[35] Furthermore, the court of appeals reasoned that a housing contract was invalid unless the dwelling was in substantial compliance with the housing code.[36] The case was remanded to determine whether violations of the housing regulations occurred during the time rent was withheld and whether such violations were substantial enough to excuse some or all of the tenants' rent obligation.

The court in *Javins* also suggested that contract principles could serve as the basis for implying a warranty of habitability, maintaining that such principles would "provide a more rational framework [than property law] for the apportionment of landlord-tenant responsibilities . . . ."[37] While conceding that it may have been reasonable in the past to expect the tenant to maintain his leasehold in a habitable condition, the court argued that the shift from an agrarian to an urban life style has stripped tenants of the resources and skills necessary for repairing their dwellings. The court equated the modern tenant with a purchaser of consumer goods, reasoning that "the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a . . . buyer must rely upon the . . . manufacturer."[38]

31. 462 P.2d at 471.

32. See notes 15-20 *supra* and accompanying text.

33. 428 F.2d at 1082.

34. 282 F.2d 943 (D.C. Cir. 1960). See note 23 *supra* and accompanying text.

35. *See also* Kanelos v. Kettler, 406 F.2d 951 (D.C. Cir. 1968). "[T]he Housing Regulations [imposed] maintenance obligations upon [the landlord] which he was not free to ignore." *Id.* at 953.

36. Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968). See note 24 *supra* and accompanying text.

37. 428 F.2d at 1080.

38. *Id.* at 1079. The opinion makes particular reference to Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), the principal case dealing with an implied warranty of merchantibility for consumer products.

The inequality in bargaining power between landlord and tenant, the need to improve existing housing, and the severe social impact of inadequate housing were cited as additional reasons why a warranty of habitability implied from contract principles should replace the common law assumption of risk rule.[39]

While the principal holding in *Javins* is squarely within the second major exception to the assumption of risk rule, the alternative holding lays the groundwork for a major alteration in the landlord-tenant relationship. If contract principles permit a warranty of habitability to be implied into all leases for urban dwellings, then any vestiges of the assumption of risk rule in leases will be abolished. This alternative holding is an acceptance of the developing legal theory "that a lease is in essence not only a demise but also a sale, in the commercial sense, of an interest in land and, more importantly, is a contractual relationship."[40] There are a number of serious questions concerning both the enforcement and consequences of such an implied warranty based on contract principles. Not the least of these is whether local courts will be able to develop a sufficient understanding of the doctrine to apply it correctly. These courts must analyze the significance of existing housing legislation and determine what sort of relief will be granted to tenants.[41] Even when these questions are answered, other problems still require resolution. The higher standards will surely increase the cost of multi-family housing. Moreover, if a landlord is sufficiently provoked, he may simply demolish the building and use his realty for other purposes. Abandonment of the building is also a possibility.[42] Thus, judicial acceptance of this new doctrine can be expected to be slow. However, when confronted with a court reluctant to accept the implied warranty of habitability doctrine, the aggrieved tenant has other avenues of relief open to him.[43] These include the revival and modification of the

39. *Id.* at 1079-80.

40. Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387, 399 (1967).

41. *See* Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287, 306 (1970).

42. *See* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORD. L. REV. 225, 258 (1970). *See also* N.Y. Times, Sept. 6, 1966, at 43, col. 3, for a discussion of official attitudes toward the landlords. Slum landlords naturally argue that their profit margins are almost nonexisent. Perhaps to the surprise of some ohservers, they are often correct. The government of New York City has concluded that some slum dwellings can never return a profit. N.Y. Times, Feb. 14, 1964, at 1, col. 1.

43. *See generally* Schoshinski, *supra* note 15, at 528-41.

constructive eviction doctrine,[44] the concept of an illegal contract when a landlord ignores the welfare of his tenant,[45] and injunctive proceedings by tenants acting on a private nuisance theory.[46] While all of these options provide tenants with a substantial degree of legal and economic protection, they fall short of the implied warranty of habitability in providing assurance that repairs to the tenant's leasehold will actually be made by the landlord. Because tenant remedies are "too spotty and too dependent on such extraneous factors as the capacity to organize tenants,"[47] the importance attached to the relative merits of the different modes of tenant action should be tempered by a realization of their ineffectiveness relative to concerted efforts by municipal and state authorities in the enforcement of housing codes.[48] Since criminal prosecutions for housing violations have also often proved disturbingly ineffective,[49] the best hope for housing reform may lie in heavy economic sanctions imposed by a civil housing court adapted specifically to the enforcement of housing regulations.[50] With nearly eight million American families living in substandard housing,[51] there is much work for such courts.

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44. *See* East Haven Associates, Inc. v. Gurian, 313 N.Y.S.2d 927 (N.Y. City Civ. Ct. 1970).

45. *See* Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968). See notes 24 and 35 *supra* and accompanying text.

46. *See* Hedrick v. Tabbs, 120 Ind. App. 326, 92 N.E.2d 561 (1950).

47. F. GRAD. LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS (Nat'l Comm'n on Urban Problems Rep. No. 14, 1968).

48. *Id.* at 148.

49. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1255, 1276 (1966).

50. *Id.* at 1281-90.

51. H.R. REP. No. 365, 89th Cong., 1st Sess. 6 (1965).