

LEGAL ASPECTS OF BUILDING MAINTENANCE WORKS

BY

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(EDMP/H/01/02/03752)

BEING A TERM PAPER IN RESPECT OF A COURSE TITLED  
PRINCIPLE AND PRACTICE OF MAINTENANCE (BLD 612)

SUBMITTED TO

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NOVEMBER, 2003.

## ABSTRACT

This paper highlights the legal facets of maintenance practice with special emphasis on Building. It begins with an overview of building maintenance and proceeds to identify the legal implications for owners and occupiers of buildings. This is done by reviewing section 72 of both the Housing Acts 1961 and 1969 of the United Kingdom, the Joint Contract Tribunal and the tort of negligence. The paper also takes a look at the building deterioration and liability in law and again highlights the defenses that are available to occupiers/repair contractors. These include the act of God, consent of the plaintiff, common benefit of the plaintiff and independent act of third party. The paper also takes a look at nuisance as a whole.

It concludes by recommending a thorough knowledge of the conditions binding on the parties so as to reduce the possibility of disputes that normally arise among the concerned parties.

## 1.0

## INTRODUCTION

Maintenance in an ordinary sense is an act of maintaining or taking care of any object to keep it in a functioning order. Maintenance can however be professionally defined, according to BS 3811, as work undertaken in order to keep, restore, improve every facility (i.e. every part of the structure, its services) and surrounds to currently acceptable standards to sustain the utility and value of the facility.

Wahab (1998) further explained the above that first, the term "work undertaken" suggests that during the life of a facility (e.g. building), additional work must be carried out for a variety of reasons. Secondly, the type of work reference may be in form of restoration, improvement, replacement, redecoration, refurbishment, rehabilitation, rectification, alterations, extensions, adaptation, enhancement, etc. Thirdly, the nature of the maintenance operation should not be limited in anyway but cover every facility, structure, services, external surrounds, etc. Fourthly the acid test in maintenance must be related to a known standard which is measurable and acceptable as yardstick for comparison. Fifth and in the final analysis, the bottom line is that the level of maintenance is designed to bring a lasting solution to the sustenance of the utility as well as value of the facility.

It has been stressed elsewhere that the primary aim of maintenance is to preserve a building in its initial state as far as practicable in order to effectively serve its desired purpose. To achieve this aim however, there must

be laws guiding the owners/occupiers which this paper sets  
to explore.

## 2.0 LEGAL ASPECT FOR OWNERS/OCCUPIERS OF BUILDING

Owners/occupiers of buildings are under a legal duty to maintain their premises in a manner as to avoid danger to life and property. According to Ikpo (1990), section 72 of the Housing Act 1969 of the United Kingdom even empowers a local authority to serve notice to whoever has control over a house to execute repairs if it is satisfied that substantial repairs are necessary. Where no statutory provisions exists, this duty arises from relationships under common law. A contractual relationship exists for structures designed and built under the Joint Contracts Tribunal (JCT) conditions. This makes a contractor to take responsibility of repairing a deteriorating (defective) structure over a six months period immediately following the practical completion period. Contractual duties to repair may also arise among lessees, lessors and assignees where there is privity of estate and/or contract.

In the words of Hind (1975) and Ikpo (1990), the tort of negligence appears to be of importance and introduces another dimension to maintenance philosophy. Under common law, a duty of care to one's neighbour is placed on everybody. The claim for damages is open to anyone who (unlike for contracts) can prove or establish injury out of negligence of another. Negligence can be expressed as the omission to do something, which a reasonable man guided upon those considerations, which ordinarily regulate the conduct of human affairs would do, or something which a

prudent and reasonable man would not do. It is a tort or civil wrong resulting from a breach of legal duty to take care, or undesired by the defendant, to take care which results in damages. The tort of negligence have three ingredients which the plaintiff must show before an action can succeed. This includes the following (Fagbenle, 2000):

- (i). There is a legal duty of care owed by one person to another.
- (ii). The breach of that duty by the person owing it.
- (iii). A resulting damage(s) to the person to whom the duty is owed and which arose from the breach.

The construction of some tenancy agreements makes it rather difficult for property to be maintained in the tenant like manner. Towards this, Ikpo (1990) cited the example of the Obafemi Awolowo University, Ile-ife where the entire repair burden lies on the landlord. The author reiterated further that in valuing properties of this nature using the investment method, the entire sum need to be deducted from the gross rental due to a landlord before capitalizing on the balance. This greatly reduces the value of properties if not let for a figure exceeding the full rental value. Here, one should of course, expect that the landlord will not wish to see his belonging(s) deteriorate without due attention. If he abides by the terms of the agreement, then his interest would have a value far less than the full market value-to the tune of the

capitalized maintenance cost discounted at the appropriate interest rate. On the other hand if he does not embark on all repairs then by the terms of the agreement, the premises may be left to dilapidate at a fast rate since the occupier has no interest at stake. To secure the full value of the interest created without prejudice on his reversion, the rental must be put at a value equal to the mean rental operating within the area including the corresponding expected annual maintenance cost for such a property.

Researches carried out by Ikpo (1990) and Fagbenle (2001) revealed that in most of the estates in Nigeria and the likes, occupiers were without formal tenancy agreements. In such a situation, however, common law recognises the mode of payment as the determinant of the type of tenancy agreement. The implied obligations of both parties (Landlord and Tenant) will therefore determine their position pertaining to repair works.

A periodic tenant is generally under an implied obligation to repair and not to commit waste. The duty not to commit voluntary waste is a clear cut issue. The part which gives room for building deterioration is that of permissive waste with regard to the popular phrase "... to keep the premises in a tenant-like manner .....". The terms have a rather wide scope of application which makes it possible for one party to often shift responsibility on the other (See a typical agreement in Appendix I).

The 1961 Housing Act of the United Kingdom specifically places the repair duty of the structure and exterior of a dwelling house on the landlord; ditto for water, electricity installations, etc. Ikpo (1990) concluded that it is easy to curb deterioration where the relationship is so clear, especially as the law also recognises an implied covenant by a lessee for the landlord to enter and view the state of repair of the premises.



### 3.0 BUILDING DETERIORATION AND LIABILITY IN LAW

Injuries giving rise to damages may occur even in the course of maintaining a building. In the case of *General Contractors, 1953*, the defendant fell off a window sash 8.84m from a basement while performing routine cleaning operations under the employment of the plaintiff - a term contractor for calendonian club Trust Limited Proprietors. The sum of £3,500.00 (Three thousand, five hundred pounds) was awarded christmas (the defendant) on the grounds that:

- (i). the occupiers had failed to warn christmas of the defective window, and
- (ii). the contractor was negligent in failing to provide safe working conditions.

In this case, the appeal of the first appellant (the contractor) was dismissed while that of the second (the occupier) was allowed. In Lord dennings judgement, an occupier could allow his premises to remain defective and dangerous "with impunity" so long as such risk is made known to an entrant or it is by itself so obvious. In the case of *Ashton Vs. Tarry* also, the defendant was held liable for a defective lamp which fall off a post and injured the plaintiff even though the lamp had just been replaced. However, it has been held that no action arises - where the resultant damage was in a bid to avert further damage to life and property (*Esso Petrolaum Co Vs Bradford Corporation*). In the decided case of christmas, it

was observed that "... in the building or repairing a house, ... or putting pots on the chimney, if a person passing along the road is injured by something falling on him, ... the accident alone would be prima facie evidence of negligence". Following Lord Wright's judgement in *Lockgelly Iron and Coal Vs. Mullan* (1934), where a party is negligent in the execution of repairs, liability ensues upon the establishment of the three underlisted conditions:

- (a). his legal duty to take care;
- (b). negligent conduct in breach of this duty; and
- (c). unintended injury caused by that act.

Ikpo (1990) reported that in the UK; the Defective Premises act 1972 links the duty of care owed by persons during "... construction, repair, maintenance or demolition..." to person who may be affected by defects in the state of the premises. All the same, the duty is mainly on invitees. Licences are expected to take the premises as they find it. Trespassers are not owed this duty but where there are concealed traps or deliberate harm, as an illustration, action may lie. The same thing is applicable to licences.

Reviewing the Law of Property act (1952), Section 116 (14) gives ten (10) indicators which anyone could constitute a Landlords' breach of his repair duty. Included are stability, dampness, ventilation, natural lighting, quality and quantity of water supply, bathroom and toilet appliances, storage and cooking facilities and "..... others as the courts may decide".

Even when effecting repairs, the factories act requires that plant be provided. Liability on the part of the contractor will arise where:

- (a). he fails to provide necessary plant;
- (b). he fails to provide sufficient plant; and
- (c). he provides defective or dangerous plant. However, he is not obliged to provide the latest plant (in terms of technology). Contractors and occupiers may not be held liable for injuries if certain defenses can be raised or established.

### 3.1 Defenses Available to Occupier/Repair Contractors

The general defenses under the tort of negligence include the establishment by the defendant that the act in question could be deemed as an "Act of God", or a direct default of the plaintiff. Others include consent of the plaintiff, common benefit of plaintiff, independent acts of third parties and statutory bodies. The factors will now be further elucidated.

#### 3.1.1. Act of God

Lord Westbury in Tennent Vs Earl of Glassgow defined this to embrace "..... circumstances which no human foresight can provide against and of which no human prudence is bound to recognise and when they occur, are calamities involving no

obligation of paying for consequences resulting from them", Generally, it cuts across natural phenomena as extra-ordinary rainfall, high tide/wind, lightening, sudden death etc.

In the case of carstairs Vs. Taylor, a rat created a hole in the box holding a rain-water gutter. Water so discharged damaged the plaintiff's goods in the ground floor. It was held that this constituted an Act of God. However, this was subsequently criticized for the fact that the damage could have been foreseen and prevented.

### 3.1.2 Default of the Plaintiff

Following the facts of the celebrated case of Rylands Vs. Fletcher, Blackburn established that where the plaintiff's action led to the injury, no action would lie.

### 3.1.3 Consent of the Plaintiff

It is commonly held in law that where a plaintiff consents to an act which subsequently causes injury, he cannot sue (Kiddle vs. City Business Properties Limited, 1942).

### 3.1.4 Common Benefit of Plaintiff

A plaintiff who shares the benefit of the source of an injury may not bring an action. This could be supported by the case of Carstair Vs Taylor (1871).

3.1.5 Independent Act of a Third Party

This provision absolves a defendant of liability for any injury therefrom.

3.1.6 Statutory Authority

Statutory corporations may not be answerable to any injury arising from their act.

Ikpo (1990) further noted that generally, the liability which lies in law over accidents or injuries arising from defective structures make owners and occupiers of premises undertake periodic maintenance operations. This is in effect inhibits deterioration of not only the structures in question but the built environment as a whole.

#### 4.1 NUISANCE

The tort of nuisance is of threetypes:

- (i). Public Nuisance
- (ii). Private Nuissance
- (iii). Statutory Nuissance

##### 4.1.1 Public Nuisance

This is an unlawful act of omission endangering or interfering with the lives, comfort, property or common rights of the pbulic eg. obstructing highways, polluting the public water supply, dumping of refuse near the commodity market, erecting the dangerous fence near the highway. Public nuisance may be prosecuted by the Attorney General. An individual may sue the person causing the public nuisance for damages, if he suffers a special and particular damage in a manner different from that suffered by the public. The special damage may be in the form of personal injury or injury to property or where the highway is obstructed, his private right of access to and from the highway may be affected e.g building repair, road repair and erecting scaffolding.

Dangerous activities carried out near the highway or estate may amount to a nuisance (castle vs. Augustine Slink, 1922). In this case, damages were awarded against a golf club to a cab driver who lost an eye when golf ball was sliced from the course onto the highway, for the hole being

sufficiently close to the highway to constitute a public nuisance.

There is no liability for things naturally on land but projected to the highway, except if the person responsible for them know and ought to know that they were in dangerous condition e.g. tree.

#### 4.1.2 Private Nuisance

It is an unlawful interference with a man's use of his property or with his health, comfort or convenience. It is a wrongful act causing material injury to property or sensible personal discomfort.

Nature of interference may include the following.

- (a). Noise                      (b) Vibrations                      (c) Smell
- (d) Smoke                      (e) Refuse.

When deciding on issues regarding nuisance, the normal "give and take", expected between neighbours must be considered. Not every noise will constitute a nuisance. The factors which have to be taken into consideration are:

- (a). the continuous nature of interference e.g. bell-ringing, smoke from chimneys and excessive use of radio. This is a temporary activity which can result in nuisance.

(b). Reasonable of behaviour - if building works have been causing nuisance, the conduct of the building and effect on victim must be considered in assessing nuisance.

#### 4.1.3 Statutory Nuisance

This can be controlled by the public health inspector through Public Health Act, 1969. They will visit the premises and issue a prohibition notice. If the situation is unchanged, at specific date, they may initiate a prosecution. The most satisfactory way of tackling a noise nuisance is the use of Control Pollution Act of 1974. This gives local authority the power to deal with noise from fixed premises including land which they consider amount to a statutory nuisance e.g. vibrations. The remedies in nuisance are that if injured party had removed it, he may sue for damages or seek for an injunction.

#### 4.2 Defense in Nuisance

The defence in nuisance may be any one of the following:

- (i). That the so called nuisance arose owing to lawful use of land.
- (ii). That the injury is very minute or trivial in use.
- (iii). That statutory authority covers the nuisance.
- (iv). Reasonable in every respect.



## 5.0 FINDINGS AND CONCLUSION

This paper has no doubt reviewed the legal facets of building maintenance practice in Nigeria and the likes. Usually, the parties to maintenance/occupation contracts in Nigeria endeavour to maintain a cordiality which mitigates or even throws into oblivion any form of litigation. In addition, individuals are usually afraid of litigation in this country even when the other party should naturally be liable to them. In as much as this paper will not advocate trifling litigation actions, it is nonetheless recommended that both owners and occupiers on one hand and both clients and contractors on the other hand be educated on the stance of the court of law in upholding natural justice and equity; and that they stand to be compensated for any damages resulting from any breach by the other parties to the contract.

It is also observed that the parties to these contracts particularly the owners/occupiers and contractors are almost completely ignorant of their locustand in the contract and thus loses sight of those aspects of the contract from which he can minimise his costs. It is therefore obvious that a thorough knowledge of the conditions binding on parties to a contract would obviate or at least mitigate the possibility of disputes between the parties - which have often been found to cause incessant crisis or stoppage of works on construction sites.

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## TENANCY AGREEMENT

An agreement

made this ..... day of .....  
 between .....  
 hereinafter called the "LANDLORD" which expression shall where the context so admits include his executors administrators and assigns on the one part AND THE COUNCIL OF THE UNIVERSITY OF IFE, a body corporate established by the University of Ife Act 1970 and all other laws in that behalf (hereinafter called the "TENANT") which expression where the context so admits include its successor-in-title and assigns on the other part.

WITNESSETH AS FOLLOWS:

1. The LANDLORD hereby agrees to let to the TENANT, and the TENANT hereby agrees to take at the yearly rate of N. .... subject to the stipulations and agreements hereinafter stated, ALL THOSE premises known as ..... from ..... for a period of ..... determinable as hereinafter mentioned.
2. THE TENANT shall pay for the said premises (.....) ..... years rent of N. .... in advance, the payment being made on the signing here of and each subsequent payment being made ..... half-year/yearly basis, on the ..... of each succeeding year.
3. THE TENANT hereby agrees with the LANDLORD as FOLLOWS:
  - (a) To pay the said rent at the times and in the manner aforesaid.
  - (b) To keep the premises in good and tenable condition. This shall not involve interior or exterior decoration.
  - (c) To pay water rates and all charges for electricity supply to the premises during the tenancy.
  - (d) Not to sublet or part with the premises or parts therein without the previous consent in writing of the LANDLORD.
  - (e) To permit the LANDLORD and his agents to enter the said Premises at reasonable times for the purposes of viewing the condition thereof and carrying out necessary repairs.
  - (f) To give up the said Premises including Permanent TENANT'S fixtures at the end of the tenancy.
4. The LANDLORD hereby agrees with the TENANT as FOLLOWS:
  - (a) To make the Premises fit for habitation and free from dangerous defects upon taking up tenancy.
  - (b) To maintain the Premises at all times at the standard acceptable to the University.
  - (c) To pay all present and future rates, taxes, assessment and outgoing payables in respect of the said Premises except charges for water rates, electricity and gas.
  - (d) To carry out all capital and minor capital maintenance to the buildings. If these are carried out by the tenant in case the landlord fails to or delays, such expenses shall be deducted from rents due.
  - (e) To carry out redecoration of the Premises internally every three years and externally every five years.
  - (f) To guarantee quiet enjoyment of the Premises without any interruption by the LANDLORD or any person rightfully claiming through or under or in trust for him.
  - (g) The LANDLORD shall bear the expenses of all damages caused by "act of God".
  - (h) The LANDLORD shall be responsible for insuring the premises against fire.
5. (a) If the rent hereby reserved or any thereof shall be unpaid for 21 days after becoming payable (whether formally demanded or not) or if the TENANT shall commit any breach of his obligations under this AGREEMENT the LANDLORD may re-enter upon the Premises and immediately terminate the tenancy.
- (b) If the LANDLORD shall commit any breach of his obligations under this AGREEMENT, the TENANT may terminate the Tenancy without any Notice.
- (c) The tenancy may be terminated by either party giving to the other the usual and proper notice in writing i.e. one month's notice in the case of monthly tenancy and six months' notice in the case of yearly tenancy if the tenancy has run for more than one year.



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TENANCY AGREEMENT

THIS AGREEMENT made this ..... day of .....  
19.....Between ..... of .....  
.....of the one part (hereinafter called the "Tenant")  
and .....  
of the other part (hereinafter called the "Landlord").

WHEREAS the Landlord is the owner of the building situated at .....  
.....  
and whereas the said Tenant agrees to hire and the said Landlord agrees  
to let to the Tenant the whole or part of the building situated at .....  
.....for a term of.....  
as from the .....day of .....  
to the .....day of .....  
at an annual/monthly rent of N.....  
(.....Naira) payable yearly/  
quarterly/monthly in advance,

NOW THE AGREEMENT WITNESSETH AS FOLLOWS:

1. THE TENANT HEREBY AGREES:-

- (a) To keep the interior of the premises in good tenatable and decorative repair and condition, reasonable wear and tear only excepted;
- (b) To keep furniture and fittings in good and tenatable repair and condition, reasonable wear and tear only excepted;
- (c) To keep in good and tenatable repair and condition the grounds of the premises;
- (d) To pay to the Landlord the rent on the day and in the manner set out in the recital;
- (e) To pay to the proper authorities all water and other rates assessed on or payable in respect of the said premises;
- (f) To permit the Landlord or his agent to enter upon the premises at any time and inspect the condition thereof and, upon notice in writing being given by the Landlord to the tenant, to repair in accordance therewith;
- (g) Not to use the premises for any illegal purpose or permit it to be used for any illegal purposes, and not therein to do or suffer any act or

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thing whereby the occupier of other properties may be annoyed  
inconvenienced or disturbed;;

- (h) Not to sublet the premises or any part, thereof without the prior consent of the Landlord in writing.
- (i) Not to make any alterations in or additions to the premises without the prior consent in writing of the Landlord which consent shall be subject to such conditions as the Landlord may impose;
- (j) That if the Eahaat makes any unauthorised alterations he may, if the Landlord requires him to do so, have to restore the building as nearly as may be possible to its original condition at his own expense;
- (k) To deliver to the Landlord or his agent at the end or sooner determination of the tenancy hereby created, the premises, furniture, and fittings in good and substantial repair and condition, reasonable wear and tear, damage by fire, tornado, earthquake or by war, riot or civil commotion only excepted, together with all locks, keys, bolts, fastenings; complete therein by whomsoever erected or fitted.

2. THE LANDLORD HEREBY AGREES:-

- (a) To keep in good and tenantable repair and condition the main structure of the premises and all drives, ditches, drains, fences and culverts;
- (b) To keep in good tenantable and decorative repair and condition the exterior of the premises;
- (c) That the tenant paying the rent here reserved and observing and performing the covenants and conditions herein contained and on its part to be observed and performed shall peaceably hold and enjoy the premises during the said term without any disturbance by the Landlord or his agent;
- (d) In the event of the premises or any part thereof at any time during the tenancy being damaged or destroyed by fire or otherwise so as to render it unfit for human habitation or use, then that proportion of the rent which has been paid in advance shall be refunded in respect of the period the whole of the premises are unfit for human habitation or use and if it shall only be a part of the premises which shall be rendered unfit then a reasonable proportion of the advance rent shall be refunded