THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0102 (LC)
Case No: LRX/62/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

LANDLORD AND TENANT – BREACH OF COVENANT – covenant against cutting wall without landlord's consent – holes cut by contractor to enable new boiler to be installed – relevance of tenant's knowledge – relevance of landlord's failure to provide contact address – section 168(4), Commonhold and Leasehold Reform Act 2002 – appeal allowed

BETWEEN:

MR FARHAD RAJA **Appellants**
JANE DOE

- and -

MR DAVID AVIRAM

Respondent

Re: 350A Romford Road,
London
E7 8BS

16 February 2016

Martin Rodger QC, Deputy President

Royal Courts of Justice, London WC2A 2LL

Richard Owen-Thomas for the appellants
The respondent, Mr Aviram, appeared in person with the assistance of Mr Warner

The following cases are referred to in this Decision:

Barrow v Isaacs [1891] 1 QB 417

Eastern Telegraph Co v Dent [1899] 1 QB 835

W Woolworth & Co v Lambert [1937] Ch 37

Hagee (London) Ltd v Cooperative Insurance Society Ltd [1992] 1 EGLR 57

Introduction

1. 350A Romford Road in Forest Gate is a two-storey semi-detached house converted into two flats. The freehold of the house now belongs to the first appellant, Mr Raja. The first floor flat, known as 350A, was demised by Mr Raja's predecessor on 20 December 1978 by a lease for a term of 99 years. The lease includes covenants by the tenant including at clause 3(ix) a general covenant against causing nuisance or annoyance to other occupiers of the building and the following covenant against carrying out unauthorised alterations:

> "3(vii) The tenant will not at any time during the said term cut maim alter or injure any of the principal timbers, roofs or walls of the Flat …. or make any structural alterations or additions whatsoever in or to the Demised Premises externally or internally…. or make any alteration in the … architectural appearance or exterior decorations of the demised premises without the consent in writing of the Lessor first obtained."

2. The lease of the first floor flat was acquired by the respondent, Mr Aviram, in January 2000. Mr Aviram describes himself as a professional landlord and lets the flat to shorthold tenants.

3. In May 2014 the boiler in the first floor flat broke down and Mr Aviram gave instructions to a plumber to install a new condensing boiler; this required a new exhaust vent and a waste pipe to be inserted through the side wall of the house. Mr Aviram did not ask for Mr Raja's consent before having his contractor carry out that work.

4. While the boiler was being installed some water escaped from the system and penetrated to the ceiling of the ground floor flat, provoking a dispute between Mr Raja and Mr Aviram and leading eventually to a hearing before the First Tier Tribunal (Property Chamber) ("the F-tT").

5. The issue in this appeal is whether, in its decision of 6 March 2015, the F-tT was correct to find that the installation of the boiler did not involve a breach of clause 3(7) of the lease of the first floor flat.

The proceedings

6. On 18 November 2014 Ms Doe, the second appellant, (acting on behalf of Mr Raja) applied to the F-tT under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that breaches of various covenants in the lease had occurred. Ms Doe's application and subsequent statement of case alleged 16 separate breaches of covenant which were all generally to the effect that the occupiers of the ground floor flat (members of the Raja family) had experienced intolerable interference with their home as a result of the unauthorised and impermissible actions of Mr Aviram and his tenants of the first floor flat.

7. It is not necessary for me to refer to any of the allegations except the one which is the subject of this appeal. It was said that:

> "[Mr Aviram] recently installed a new kitchen sink pipe and boiler discharge pipe in the premises fitted by drilling through the structural wall without obtaining permission and again it is inadequately fitted causing noise nuisance on 9 May 2014."

The installation of the "kitchen sink pipe" (which is in fact the boiler waste pipe) and the boiler discharge pipe (the exhaust vent) were said to be breaches of clauses 3(vii) and 3(ix).

8. In his statement of case in answer to those allegations Mr Aviram said that he had not drilled through the structural wall but had simply replaced the old boiler with a new one using the original fittings.

9. The application came before the F-tT on 12 and 13 February 2015 and it gave its decision on 6 March. The F-tT rejected all of the appellants' complaints and found that there had been no breaches of covenant. It considered the allegation that the building had been altered by the installation of a new boiler with an exhaust vent and an insulated waste pipe in breach of clause 3(vii) at paragraphs 49-59 of its decision. The F-tT was shown "before and after" photographs which demonstrated at least that a new waste pipe wrapped in insulating material had been installed on the exterior of the building, although the photographs did not indicate whether it or the vent had been inserted through pre-existing openings in the wall.

10. Both Mr Raja and Mr Aviram gave evidence. Mr Raja said that if he had been asked in advance he would have given permission for the work to be done (although his counsel added that the work would have to have been done properly). Mr Aviram's evidence was summarised by the F-tT in its decision as follows:

> "53. The respondent in reply stated that the builders told him that they had utilised pipes and cavities which had served the previous boiler and the vent was the same vent. Even if they misled him, and it is very difficult for him to see the pipe work from his garden, he also argues that these are very limited alterations about which he had no choice.
>
> 54. In addition he argues that he had tried to trace the freeholder for the last 6 years. He would visit the property, knock on the door of the ground floor flat to try to find the freeholder, but with no luck. He eventually wrote a letter to Mr Raja and Ms Doe of 350A Romford Road, dated 20 August 2014. In that letter he stated that he was looking to sell the upper floor flat in the near future and needed to obtain the address of the freeholder, Mr Farhad Raja. He asked if they could help. He told the Tribunal that he received no reply to that letter.
>
> 55. When cross-examined about this letter he agreed that it was a ruse to get someone to tell him who the freeholder was. He said that he had to use such a ruse as no one would tell him where the freeholder was, or indeed who the freeholder was."

11. In response to Mr Aviram's evidence about the difficulty he had had in contacting his freeholder, the F-tT asked Mr Raja whether he had ever written to Mr Aviram, explaining that

he was the freeholder and pointing out alleged breaches. Mr Raja said that he had contacted his own solicitor about the breaches but had not contacted Mr Aviram directly.

12. The F-tT determined on the basis of the evidence it had heard that there had been no breach of covenant, explaining that conclusion in the following two paragraphs of its decision:

> "58. The Tribunal accepts the evidence of the Respondent that he did not know that any alterations had been made to the building. The plumber had informed him that it was a like-for-like replacement and the pipes were barely visible from his property.
>
> 59. In addition the relevant clause states that alterations can be carried out with the consent of the freeholder. The respondent made reasonable efforts to find the freeholder, to no avail. In these particular circumstances, because of the mandatory requirement to install a condensing boiler, an opening to the walls had to be created. It is difficult to see how the Respondent could have obtained any permission to do this."

The appeal

13. This appeal is brought solely against the F-tT's conclusion that there had been no breach of clause 3(vii) of the Lease as a result of the installation of the new boiler. Permission to appeal was refused by the F-tT but granted by the Tribunal on the basis that if the F-tT was satisfied that new openings had been created in the wall, neither of the reasons given in paragraphs 58 and 59 appeared to justify the conclusion that there had been no breach.

14. At the hearing of the appeal Mr Owen-Thomas submitted that the only conclusion open to the F-tT on the evidence, in the light of its apparent finding that a new opening had been created for which Mr Raja's consent had not been obtained, was that there had been a breach of clause 3(vii).

15. In response Mr Aviram, who represented himself with the assistance of a friend, supported the approach taken by the F-tT. As far as he was aware no new holes had been drilled in the wall of the house and there was no photograph showing the condition of the wall before the installation of the boiler in May 2014. The photographs taken after that date showed the exhaust pipe and the insulated waste pipe serving the new boiler as well as a small copper outflow pipe which appeared to be very much older. The new waste pipe, which discharged into a gutter on the rear wall of the building where no waste pipe had previously discharged, could have been installed through a pre-existing opening.

Discussion and conclusions

16. The sole breach of covenant alleged is the cutting of the wall of the building to create either one or two small or medium-sized holes for pipes without first obtaining Mr Raja's consent. Mr Owen-Thomas did not suggest that the presence of the new waste pipe was a breach of the covenant against making structural alterations or additions, or that the new pipes

amounted to an alteration in the "architectural appearance" of the premises. The sole breach relied on is the cutting of the wall without consent. On any view that allegation is not of the most serious nature, as Mr Raja recognised when he told the F-tT that he would have consented to the work if he had been asked in advance. The continuation of the dispute appears to be fuelled by the wider catalogue of complaints by the Raja family against Mr Aviram's tenants which the F-tT considered and dismissed; it is regrettable that the parties have not been capable of reaching any sort of sensible compromise.

17. Before the hearing of the appeal Mr Aviram had sought permission to rely on a witness statement from the plumber responsible for the work to establish that what he had been told was correct, and that no new hole had been created. This appeal is a review of the decision of the F-tT, and not a rehearing of the original application; no reason was given why the plumber's evidence could not have been produced to the F-tT so permission to rely on it was refused.

18. In its decision the F-tT did not deal in clear terms with Mr Aviram's case that the new boiler had been installed using only pre-existing openings in the wall. It would have been preferable for there to have been a clear finding of fact on that issue. Nevertheless I accept Mr Owen-Thomas' submission that the F-tT must have been satisfied that a new hole had been created. If it had not been persuaded on the evidence that at least one new opening had been created it would have said so, as that would have been a sufficient and complete answer to the allegation that the wall had been cut without the consent of Mr Raja. Moreover, in paragraph 59 of its decision the F-tT said that because the installation of a condensing boiler was mandatory "an opening to the walls had to be created"; that statement is consistent only with the tribunal being satisfied that a new hole had indeed been created.

19. The F-tT gave two reasons for its conclusion that there had been no breach of covenant. The first was that it accepted Mr Aviram's evidence that he did not know that any alteration was to be made and that he had been told by his plumber that the new boiler would be a like-for-like replacement. The implication of the F-tT's subsequent finding that the creation of an additional hole in the wall was required to install the condensing boiler is that Mr Aviram was misled or misinformed by his contractor. But the finding that a new hole had to be created because a condensing boiler had to be installed (the flat was in an area subject to a selective licensing scheme under the Housing Act 2004 and the local housing authority insisted on the use of modern boilers) seems to me to render Mr Aviram's lack of knowledge irrelevant. Mr Aviram instructed his contractor to install the new boiler, and even if the contractor was not his agent or employee, but was wholly independent, Mr Aviram is responsible for the consequences of his instructions. If the work had been carried out by an independent contractor in breach of Mr Aviram's instruction about the manner in which the task was to be completed then the F-tT might have been justified in finding that there had been no breach of covenant by Mr Aviram (see *Hagee (London) Ltd v Cooperative Insurance Society Ltd* [1992] 1 EGLR 57). Even assuming that the plumber was an independent contractor in this case, however, there was no evidence that the contractor was instructed not to drill new holes; moreover, there was only one way in which Mr Aviram's instructions could be carried out, and that was found by the F-tT to require the creation of a new hole in the wall. Mr Aviram must therefore be taken to have authorised the creation of the additional opening or openings. It follows that the F-tT's first reason for finding that there had been no breach of covenant cannot be justified.

20. The F-tT's second reason for finding that there had been no breach was that it was satisfied that Mr Aviram had made reasonable efforts to find his landlord but without success. Its reasoning was that the installation of a new boiler was necessary and the use of a condensing boiler (rather than some other type) was mandatory. It was, the F-tT found, difficult to see how Mr Aviram could have obtained permission. Once again, this seems to me to be an insubstantial basis on which to find that there was no breach of covenant.

21. There was no evidence before the F-tT that Mr Aviram had ever asked for consent to create a new hole in the wall of the building; indeed, his understanding, as the F-tT accepted, was that no hole would be required. His own statement of case to the F-tT (which was prepared in January 2015, about 8 months after the installation of the boiler) was that by carrying out a search at the Land Registry his solicitor had discovered that Mr Raja's address was given as the ground floor flat at 350A Romford Road. The reason for Mr Aviram's interest in establishing his landlord's address was that he wished to extend the lease, and it is not clear from his statement of case whether he had acquired that information before May 2014; nevertheless, the information was obviously available to be acquired if a sufficient search was made.

22. Where a covenant against alterations is qualified by a need to obtain the consent of the landlord before works are carried out, the burden of showing that consent has been unreasonably withheld falls on the tenant. Where consent is refused unreasonably the tenant will be free to proceed with the improvement without making any further request (*WH Woolworth & Co v Lambert* [1937] Ch 37).

23. If a request for consent is made and not responded to it will readily be inferred that consent has been withheld unreasonably, so that the tenant may proceed with the proposed alteration without the need for consent. It is essential, however, that consent be sought beforehand and that the landlord be given proper information about what is proposed and time to consider the request. If an alteration is carried out before consent has been requested that will amount to a breach of covenant even if the landlord could not reasonable have refused, had its consent been requested. In relation to qualified covenants against assignment *Woodfall's Law of Landlord and Tenant* states the principle as follows at para 11.128 (citing *Barrow v Isaacs* [1891] 1 QB 417 and *Eastern Telegraph Co v Dent* [1899] 1 QB 835):

> "It is essential that consent to the assignment, etc., is sought beforehand. However unreasonable would be a refusal on the part of the landlord, mistake or forgetfulness on the part of the tenant will be no defence if in fact the assignment has been made before consent to it has been requested."

The same principle applies to covenants against alterations. A tenant's covenant not to carry out alterations without the landlord's consent is not a covenant by the landlord to give consent, or to be available to receive requests for consent. If the landlord of residential premises subject to such a covenant cannot be found, so that consent to alterations cannot be requested, the consequence is that the tenant may not carry out the alterations without being in breach of covenant.

24. Section 47(1) of the Landlord and Tenant Act 1987 requires that a landlord's name and address be included in every demand for rent and other sums payable by a tenant to his or her landlord. Section 48(1) of the 1987 Act also requires that tenants be supplied with an address in England and Wales at which they may communicate with their landlord, including in connection with proceedings. Where a landlord fails to comply with either section 47(1) or 48(1) the consequence is the same: any rent, service charges or administration charges otherwise due from the tenant to the landlord are treated as not being due until the relevant requirement is complied with (sections 47(2) and 48(2)). In this case no rent or service charge was demanded by Mr Raja and he supplied no address to Mr Aviram.

25. Parliament has not enacted that a failure by a landlord to provide a name and address means that a tenant may carry out alterations or take other prohibited steps without the need to obtain the landlord's consent. In this case it is apparent that Mr Aviram could have obtained the name and address of his landlord by searching the Land Register, as he did at some point; even if he did not have that address by the time the works were carried out, there was simply no basis on which the F-tT could find that he was relieved of the obligation of seeking consent because his reasonable efforts to locate his landlord had not borne fruit.

26. I am satisfied that the only conclusion open to the F-tT in this case was that a breach of covenant had been committed by the creation of at least one new hole in the wall of the building without the consent of Mr Raja. The fact that Mr Raja would have consented on being satisfied that the work was proposed to be carried out in a competent fashion does not alter that conclusion. It does, however, cause me to question the purpose of these proceedings. I have determined that a modest breach of covenant has been committed; given the circumstances of that breach it seems extremely unlikely that this valuable lease will be capable of being forfeited without relief against forfeiture being granted. Whether Mr Raja is entitled to any remedy at all (other than nominal damages) is not a question within the jurisdiction of this Tribunal under section 168 of the 2002 Act. I strongly recommend to both parties, however, that before any further time, effort and expense is devoted to this dispute, they consider whether a sensible compromise of their differences is possible.

Martin Rodger QC,

Deputy President

23 February 2016