

UPPER TRIBUNAL (LANDS CHAMBER)



**UT Neutral citation number: [2016] UKUT 310 (LC)
UTLC Case Number: LRX/129/2015**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

***LANDLORD AND TENANT – BREACH OF COVENANT- section 168 of the
Commonhold and Leasehold Reform Act 2002- whether breach proved-
inconsistencies in decision of First-tier Tribunal- rehearing before Upper Tribunal-
appeal dismissed***

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

BETWEEN:

MR WUI KHEONG CHONG

Appellant

and

MR JASJIT SINGH DHAMI

Respondent

**Re: 2 Wheatlands,
Heston,
Hounslow
TW5 OSA**

His Honour Judge Stuart Bridge

The Royal Courts of Justice

16 June 2016

The Appellant was represented by *Mr Varma* of counsel.
The Respondent Mr Dhami, appeared in person

DECISION

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ('Ft T') dated 7 September 2015 on an application by the appellant for a determination (pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002) that the respondent leaseholder had committed breaches of certain covenants in his lease.

2. Section 168(1) provides that a landlord under a long lease of a dwelling may not serve a section 146 notice (the necessary pre-cursor to forfeiting the lease for breaches of covenant other than non-payment of rent) in respect of a breach by a tenant of a covenant or condition in the lease unless certain conditions set out in section 168(2) are satisfied. One such condition is that 'it has been finally determined' on an application made to the First-tier Tribunal under section 168(4) that the breach has occurred. When the appellant sought such a determination, the Ft T refused its application; hence the appeal under consideration.

Background

3. The appellant is the head landlord who holds a superior lease of premises in Hounslow. The respondent leaseholder has a long lease dated 3 June 1966, granted for a term of 999 years (less 10 days) commencing on 25 December 1961, of the premises consisting of a large house, a substantial garden and a small outhouse within that garden. The estate on which the premises are situated contains 203 dwellings, mainly held on 999 year leases. A management company (Wheatlands Residents Limited) manages the respondent's property as well as other leasehold premises on the estate.

4. The respondent's lease contained two covenants (made with the landlord and the company) which are relevant to the current appeal. By clause 2(6)(a) the tenant covenanted:

Not at any time during the said term to make any addition to or alteration in the plan or elevation of the said premises or any alteration or aperture in any party walls or in the principal and bearing walls timbers or girders without the previous written consent of the Landlord but nothing herein contained shall prevent the partitioning of rooms or the removal of such partitions from time to time as may be necessary for the reasonable occupation of the said premises PROVIDED ALWAYS that no party wall or principal and bearing walls timbers or girders are in any way interfered with or damaged.

By clause 2(11) the tenant covenanted:

Not at any time during the said term without the consent in writing of the Landlord first had and obtained to carry out or permit or suffer to be carried

out in on over or under the demised premises or any part thereof any improvement or addition or any building engineering mining or other operations or works.

5. The appellant made a number of claims in the course of his application to the Ft T for a determination that breaches of covenant had occurred. He alleged that the premises had not been kept in a good state of repair, that the outhouse (described in the application as 'the outside shed') was being used for residential purposes as it was housing a family, and that the main property was being let as a property in multiple occupation. He also alleged that there had been 'additions/ alterations' to the premises for which consent had not been given. All these allegations were denied by the respondent.

6. Following an inspection of the property on 10 June 2015, and a hearing on 23 July 2015, the Ft T gave its decision on 7 September 2015. It rejected the appellant's claims that the respondent had let the outhouse in the garden separately from the main house and that the premises had been used for occupation by a number of families. It accepted the appellant's claim that the respondent had unlawfully sublet the main house in view of his admission at the hearing that he had done so in 2012. However, it rejected the appellant's claim that the respondent had made alterations to the premises in breach of covenant.

7. The Ft T therefore made a determination to the effect that the respondent was in breach of covenant in subletting the main house in 2012. It refused to determine that there had been any other breaches, finding that the appellant had 'failed to prove the other breaches he complains of.'

8. The appellant sought permission to appeal from the Tribunal, having been refused permission by the Ft T. The Tribunal granted permission to appeal limited to the first ground (that relating to unauthorised additions/ alterations) on which the appellant sought permission. There is no need to mention the other grounds further: the issues relating to disrepair and to multiple occupation of the main property are no longer live.

The decision of the Ft T

9. The Ft T inspected the property on 10 June 2015 being met by the respondent, his son and his consultant architect Mr R Gujral. A director of the management company and a leaseholder of another house were also in attendance. The appellant was neither present nor represented.

10. Having viewed the entire main house and the outhouse in the garden, the Ft T described the property in its decision as a detached two storey dwelling built in the 1960s as part of a mixed residential development. Its layout was 'unusual' with living accommodation on the first floor and bedrooms on the ground floor, the

accommodation being built around an open courtyard accessed at ground and first floor by an open staircase. The outhouse was described as a substantial single storey outbuilding offering self-contained accommodation including a bathroom/WC and kitchen. The Ft T went on to state at [15]:

The tribunal was provided with unnumbered or dated floor plans by the landlord prior to attendance. The landlord claimed these plans represented a room layout approved and consented by the landlord in 2003. The inspection revealed some differences between the layout described by the plans and the built property. The principal modifications were as follows:

- (1) the construction of stud partition walls to enclosed previous open spaces at ground floor;
- (2) the construction of several flights of stairs within hallways at ground floor to accommodate changes in level;
- (3) the closure of some door openings, again at ground level; and
- (4) the provision of an upper flight of stairs in the courtyard leading to the roof space.

Other changes may have been made but these were not evident at inspection.

11. The ‘modifications’, which were not numbered in the Ft T’s own decision, have been enumerated for the purposes of exposition. The appellant contends that the findings contained in [15] are inconsistent with the conclusion reached by the Ft T on the issue of alterations. That conclusion is set out at [32] (headed ‘Alterations’):

Turning to the allegation that alterations have been carried out without the landlord’s consent we refer again to our inspection of the property (see paragraphs 11 to 15 above). On the basis of our detailed inspection we have concluded that the landlord failed to provide specific examples of alterations that were carried out in breach of covenant.

Review of the Ft T decision

12. The appellant submitted that as this conclusion of the Ft T was inconsistent with its own findings the Ft T erred in law, and that this part of its decision is therefore susceptible to appeal. The respondent, who appeared before me in person, ably assisted by a friend Mr Mishra, did not seek to defend the decision of the Ft T in this respect, although he mounted a rigorous defence of his own actions and vehemently denied that he had broken the covenants contained in clauses 2(6)(a) and 2(11) of the lease.

13. There seems to me to be no doubt that there is an inherent inconsistency between paragraphs [15] and [32] of the decision. The difficulty with the decision of the Ft T in this respect was clearly expressed by the Deputy President when he gave permission to appeal:

2. The first-tier tribunal does not explain in its decision what the issue between the parties was in relation to the discrepancies between the plans and the features it describes as modifications. I infer from the representations received from Mr Dhami that it was his case that there had been no alterations at all. He does not appear to have contended that any alterations had been undertaken with the consent of the applicant.

3. The first-tier tribunal dealt briefly with the alleged alterations [at [32]]... It made no finding about whether alterations had been made, and confined its reasoning to a statement that the applicant had not provided specific examples of alterations carried out in breach of covenant. It is impossible to tell whether the tribunal accepted Mr Dhami's evidence that there had been no alterations, but if it did, it is difficult to reconcile such a finding with its description of specific building features as 'modifications'. At the very least the tribunal ought to have explained whether it accepted that the plan relied upon by the applicant recorded a previous condition of the building, and whether or not it was satisfied that modifications had been carried out. If it could not determine on the balance of probability whether modifications had been carried out or not the tribunal ought to have said so clearly.

14. I cannot myself improve upon that succinct statement of the problems generated by the manner in which the Ft T came to its decision. I agree with it.

15. In the course of the hearing, I informed the parties that I was minded to accept the appellant's submissions that the Ft T erred in law, and that I would therefore proceed to re-hear the original application restricted to the single issue for which permission to appeal had been granted. The appeal continued on that basis and, in pursuance of the direction made on granting permission to appeal that in the event of the review being granted, the Tribunal would proceed to re-hear the application at the same hearing, I invited the parties there and then to adduce evidence on that issue.

Re-hearing

16. The appellant chose not to call any evidence. He sought to rely upon the findings of fact made by the Ft T.

17. The respondent, Mr Dhami, gave evidence on his own behalf. His written statement (dated 18 February 2016) was treated as his evidence in chief, it being accepted that the only paragraphs of relevance to the issues under consideration were paragraphs 2 to 6:

2. I say that when I got the property under lease in year 2000 the outbuilding was already in existence and all of the alteration work, if any, had been done before by the previous lease holder who had bought the said property derelict.

3. I say that earlier this building was completely smashed and the previous owner had done the repair works (to maintain it in order) in the main building and outbuilding. To the best of my knowledge and belief, prior to the purchase of the said building by the previous owner, the said building was completely derelict for almost seven years and was boarded up with metal hoardings and the boundary walls of the building had been broken, the front and rear garden was old and overgrown and it was visible to the general public. Unfortunately the estate management company took no action at that time.

4. I say that no new floor has been inserted in the area above master bedroom and the Kitchen and no sub-division as alleged has taken place as alleged or at all. I request to carry out a timber test, which may be done at the expenses of the applicant. The kitchen has got a hood which is the original hood dating back to the time when the property was built. The access for this storage above the bedroom and kitchen was always there for the bedroom ceiling access and nothing new was added to the same.

5. I say that no unauthorised extensions have been made to the premises including a ground floor kitchenette and an externally accessed bathroom in breach of Clause 2(6)(a). I say that the exterior and interior of the property have been in reasonably good condition and that many renovation works has been conceived for the same.

6. That I have not done any internal alterations to the property without consent. I have done any unauthorised extension on the ground floor, which has been made into a kitchenette and an externally accessed bathroom, which can be taken as breach of the lease deed.

18. He elaborated a little upon what is there said in the course of being cross-examined by Mr Varma. The respondent filed with the Tribunal two further statements of evidence which I shall summarise below, although neither of these statements were referred to by the parties in the course of their submissions.

19. The appellant's case is based upon the floor plans that were provided to the Ft T prior to its inspection. As the Ft T noted at [15], these floor plans were not dated, but it is tolerably clear, and is accepted by both parties, that these were the plans annexed to a licence granted by the appellant to the respondent in 2003.

20. Briefly, the agreed background to the licence is that following the respondent's purchase of the lease in 2000 the appellant brought forfeiture proceedings alleging a number of breaches of covenant. Those proceedings were compromised, a consent order being made in the Brentford County Court on 27 January 2003 whereby relief was granted to the respondent on payments being made and undertakings being given. It was later that year that a licence, dated 5 August 2003, expressed to be entered into pursuant to the earlier consent order, was granted to the respondent 'to execute in and upon the property the several Alterations and works specified in the plans and specifications annexed hereto'. The plans annexed to the licence are to be found at PP

89 and 90 of the bundle. P89 is a plan of the ground floor and P90 is a plan of the first floor.

21. Under the licence agreement, the respondent covenanted to complete the alterations and works in the manner specified, to pay the legal costs of the licence and to indemnify the appellant and all lessees who might be affected. I should add that no complaint has been made in the course of the current application about the works done by or on behalf of the respondent pursuant to the 2003 licence. The issue is whether works not authorised by that licence were carried out subsequently, that is after the works that were authorised had been completed.

22. The appellant's central submission can be stated very shortly. He contends that in [15] of its decision the Ft T made findings to the effect that the respondent had carried out further alterations since 2003. It being accepted that the plans represented the room layout approved and consented by the landlord in 2003, any difference noticed during the inspection between that layout and the property as they found it would inevitably comprise an unauthorised alteration. Those alterations, described by the Ft T as 'modifications' to the property, must therefore have been in breach of covenants (6)(a) and (11) of the lease, and a determination should have been made to that effect.

23. The respondent contends that this is not the proper interpretation of what was being said by the Ft T at [15]. Mr Dhami gave evidence to the effect that he had purchased the lease of the premises in 2000. The previous leaseholder had carried out extensive repair works to the main building and the outbuilding following a period of some years (he believed as many as seven) when the property was completely derelict. Although he had carried out some alterations since purchasing the lease in 2000, those had all been with the express consent of the appellant pursuant to the licence granted in August 2003.

24. Mr Dhami was asked about the four specific matters noted in the course of the inspection of his property by the Ft T. He accepted that there was a stud partition wall that had been added, adjacent to some internal stairs in order to ensure the safety of those using the stairs, in particular children. He accepted that there were a number of stairs within the hallways at the ground floor, and that they were (as the Ft T put it) 'to accommodate changes in level'. He accepted that there was an upper flight of stairs in the courtyard which led to the roof space, where there was a loft. He did not accept that any door openings had been closed at any time, and did not understand what the Ft T was referring to in this respect.

25. Mr Dhami contended that the three additions which had been made (that is, (1), (2) and (4) of the matters referred to by the Ft T in [15]) all pre-dated his becoming tenant. His understanding was that they were added to the main building in the course of the extensive repair works carried by his predecessor in title. They had all been there when he had purchased the lease, and had not been added (as the appellant was alleging) since 2003.

26. In a signed statement dated 10 March 2016 Mr Rajan Gujral (a director of Oakwood Design and Build Ltd, a construction company) stated that he had been engaged by Mr Dhami for refurbishment of the property. He had inspected the property immediately after Mr Dhami had acquired it in 2000 to assess what works were required, and he has visited it several times since. He states that 'I have found the said property exactly in the same condition as it stands today, in so far as its internal structure is concerned and no alterations in internal structure except repairing, maintenance and refurbishment works have ever been done in the main building at any point of time after its acquisition by Mr Dhami.' He notes that the property is very large 'and because of certain peculiar conditions of the property it will take little more than ordinarily required time for its complete refurbishment.'

27. In a signed statement also dated 10 March 2016, Mr Sukhvinder Singh Bamrah (a management and business consultant, and a former solicitor) states that he had acted for Mr Dhami after he acquired the property in relation to a number of issues. He had also visited the premises a number of times, and he also stated that 'I have found the said property in the same condition in so far as its internal main structure is concerned and to the best of my recollection knowledge and belief, no internal alteration in the structure of the main building has been done by Mr Dhami within my knowledge and notice after the acquisition by Mr Dhami, of the said property.'

28. Neither of these witnesses give evidence which is in my judgment sufficiently clear or detailed in order to assist me in resolving the issue in this case.

29. The appellant contends that the respondent cannot be right when he says that the alterations took place before 2003, as if they had taken place before then they would have been reflected in the plans. The respondent was cross-examined about the plans in the course of his evidence. He accepted that the plans were the plans annexed to the licence, and he accepted that the plans were the plans used by the Ft T when it inspected the property, but he denied that they were sufficiently accurate in recording the four areas to which the Ft T made reference.

30. Mr Dhami had some difficulty in understanding the detail of the plans. He was unable to show where the plans represented the stud partition walls or the internal stairs referred to by the Ft T. He did not accept that the plans, being restricted to the ground and first floors, would necessarily cover the area where the upper flight of stairs leading to the roof space is situated.

31. When the appellant brought his application to the Ft T he submitted, in his statement of case, that the respondent had not complied with his covenants as follows:

(b) there have been additions/alterations to the Premises for which consent has not been given. In particular a bathroom has been added to the ground floor of the property together with a kitchenette. A new floor has been added to the premises with access via a staircase in the internal courtyard leading to three rooms being used as bedrooms with restricted height.

32. With the exception of the reference to the staircase in the internal courtyard, nothing here would have alerted the respondent to the matters noted by the Ft T and referred to as ‘modifications’. I consider that to be significant as Mr Dhami would not have been anticipating, when it came to his acceptance before the Ft T of the floor plans as substantially accurate, comments of the kind that were made following inspection. Neither the bathroom nor the kitchenette were referred to by the Ft T as evidently breaching the covenants of the lease; instead the Ft T took it upon itself to find, on the basis of the plans submitted and its own inspection, that there had been ‘modifications’.

33. Having considered the evidence of Mr Dhami, in the light of all the other evidence including that of the plans, I accept what he says. It seems to me intrinsically likely that, in the course of extensive renovations of a property described as having an unusual layout with accommodation on different levels, stairs would have been introduced. Mr Dhami made the point, which in my judgment is a strong one, that he had sought and obtained a licence for a number of alterations in 2003, and that there was no good reason why, if he were intent on altering the property as has been alleged by the appellant, he would not have similarly sought consent.

34. While I accept that until the inspection took place, the appellant had no opportunity to view the interior of the property (although it should be said that, being absent and unrepresented at the inspection, he did not take even that opportunity), it is noteworthy that save for a passing reference to a staircase in the internal courtyard the original application did not particularise any of the matters which have led to this appeal.

35. I confess that I find the failure of the appellant to seek to adduce any evidence on the re-hearing and to rely upon what it claims to be necessary inferences to be drawn from the decision of the Ft T somewhat difficult to understand. It is one thing to decide, as I have done, that the Ft T misdirected itself in finding that the ‘modifications’ it had noticed could not comprise breaches of the covenants under consideration. But it is quite another to conclude that on the basis of that decision of the Ft T it is more likely than not that the respondent’s conduct did comprise breaches of those covenants. By failing to call any evidence, the appellant has put himself in a precarious position. The burden is on him, and remains on him, to prove, on the balance of probabilities, that the respondent has breached one or other or both of the covenants concerned. I do not consider that that burden has been discharged.

Conclusion

36. I do not consider that such findings of fact as were made by the Ft T lead inexorably to the conclusion that the respondent had carried out alterations as alleged by the appellant. On the contrary, having considered such evidence as has been adduced, I find that it is more likely than not that such ‘modifications’ as were noticed by the Ft T in the course of their inspection had been made prior to 2003, indeed prior to the purchase of the lease by Mr Dhami in 2000. It follows that I am not satisfied, on

the balance of probabilities, that the respondent carried out any unauthorised alterations to the main building. The appellant not being entitled to a determination pursuant to section 168 of the 2002 Act, his appeal must therefore be dismissed.

Dated: 2 August 2016

A handwritten signature in black ink, appearing to read "Steven Bridge". The signature is written in a cursive style with a prominent initial "S" and a long horizontal stroke.

His Honour Judge Bridge