LRX/10/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – variation of lease – tenant of flat with full repairing obligations for exterior – difficulties of access for this purpose – whether lease made satisfactory provision for this – substantial rewriting of lease proposed by tenant – held lease made satisfactory provision – appeal dismissed – Landlord and Tenant Act 1987 s 35

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

BETWEEN **ANNA GIANFRANCESCO** **Appellant**

and

DEREK W HAUGHTON **Respondent**

Re: Flat 2, 3 Tichborne Street, Brighton BN1 1UR

Before: The President

Sitting at Lewes Combined Court Centre, 182 High Street, Lewes BN7 on 4 March 2008

Mr J Donegan, solicitor, of Osler Donegan Taylor, Brighton, for the appellant
The respondent in person

No cases are referred to in this decision.

DECISION

1. This is an appeal against a decision of the Leasehold Valuation Tribunal for the Southern Rent Assessment Panel on an application made to it by the appellant for a variation of a lease under section 35 of the Landlord and Tenant Act 1987. The appellant is the tenant of a maisonette or flat comprising the upper two floors of a late-Victorian inner terrace house now converted into two self-contained flats, each on two floors, sharing a small common entrance hall at street level. The building has cement rendered elevations under a pitched roof, which has been re-covered in concrete tiles. The building fronts directly onto the pavement, and because of the slope of the site this elevation is only three storeys in height. The lower ground floor of the building is below pavement level at the front but at garden level at the rear. The whole of the rear garden area is covered by a conservatory extension to the basement and ground floor flat, which is occupied by the respondent, who is freehold owner of the building. The conservatory is covered with translucent panels.

2. The appellant is tenant under a 999-year lease from 25 March 1982. She bought the lease in September 1995. Clause 2 of the lease requires the tenant:

> "(3)(a) To keep the interior and exterior of the Demised Premises and every part thereof including the walls in good and tenantable repair throughout the term ....
>
> (b) Notwithstanding the generality of the preceding sub-clause to keep the foundations of the Building (if the Demised Premises are the lower maisonette) or the roof of the Building (if the Demised Premises are the upper maisonette) and such gas and water pipes drains and electric cables and wires (hereinafter called 'the conduits') serving the Demised Premises and the other maisonette as are in or under the Demised Premises in good and substantial repair Provided always that the Tenant may if so desired recover one half of the costs thereof from the Landlord
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> (c) to pay to the Landlord on demand one half of the cost of repair of the foundations of the Building (if the Demised Premises are the upper maisonette) or the roof of the Building (if the Demised Premises are the lower maisonette) or the conduits
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> (d) If the Demised Premises are the upper maisonette to pay to the Landlord on demand one half of the cost of maintaining and keeping in good and substantial repair and condition illuminated and carpeted where appropriate the main entrance of the Building the external door of the Building and the basement area and vaults with the stairway leading thereto and the boundary walls and railing thereon (if any)
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> (4)(a) In the year 1985 and in every succeeding third year and in the last three months of the said term (whether determined by effluxion of time or otherwise) to paint with not less than two coats of good quality paint in the same colours as previously painted or such other colours as shall be agreed with the Landlord the whole of the outside wood iron stucco or cement or other work heretofore or usually painted of the Demised Premises..."

3. Clause 2(8) prevents the tenant from making any alterations to the demised premises without the landlord's consent and clause 2(17) requires the tenant to afford all necessary access to the owner or occupier of the other maisonette "for the purpose of such repairs and replacements as are mentioned in this lease."

4. The landlord's covenants are contained in clause 3. They contain the following:

> "(2)(b) That every lease or tenancy of the other maisonette in the Building hereafter granted by the Landlord shall contain covenants on the part of the tenant similar in all material aspect to those contained in this lease
>
> (3) As to the parts of the Building of which the Demised Premises form part retained by the Landlord or not for the time being let under a lease on terms similar in all material respects to the terms hereof or which may come into the possession of the Landlord by the determination or expiration of any lease of any part of the said Building at all times during the term hereby granted to observe and perform the tenants's covenants as herein contained and to make good all damage which may be caused by the Landlord or by the Landlord's servants or workmen to the Demised Premises and to repay to the tenant on demand all costs charges and expenses incurred in repairing renewing or reinstating any such premises that have been damaged as aforesaid."

5. The Demised Premises are defined in the Fourth Schedule to mean the upper maisonette together with rights and easements including the following:

> "(1) The right to use for access and egress only the main entrance hall and the external door of the Building
>
> (5) The right for the tenant with servants workmen and others at all reasonable times on notice (except in the case of emergency) to enter into and upon the lower maisonette for the purpose of repairing maintaining renewing altering or renewing the Demised Premises."

6. The intended arrangement, therefore, was that the two flats should each be maintained both internally and externally by the respective tenants. The tenant of the upper flats was to be liable for maintaining the roof and the tenant of the lower flat for maintaining the foundations, each was to maintain the common services situated in their flat, and each was to pay one-half of these maintenance costs. In the event the lower flat has not been let, and clause 3(3) thus operates to impose on the landlord the same covenants in relation to the lower flat as those to which a tenant of that flat would have been subject if the flat had been let.

7. The application to the LVT for the LVT for a variation of the lease was made because the Ms Gianfrancesco had sought to sell her lease but had been unable to do so because, she said, of certain of its provisions. Mr Donegan identified her principal concerns as being:

> (a) that under clause 2(3)(b) there was no mechanism for collecting the landlord's contribution to roof repairs;

(b) that the lease does not contain any express covenant on the part of the Respondent to maintain or repair the communal entrance, even though under clause 2(3)(d) the tenant was obliged to pay half the cost of such works;

(c) that there was a risk that the building would not be maintained to a uniform standard, since different contractors could be employed for the two flats with a resulting difference in the external appearance of the two flats; and

(d) that there is no express right to erect scaffolding at the rear of the building and the presence of the conservatory creates practical problems for maintaining that part of the premises.

8. Under section 35(1) of the 1987 Act any party to a long lease of a flat may make application to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application. Subsection (2) provides (so far as is material for present purposes):

> "(2) the grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to some or more of the following matters, namely –
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> (a) the repair or maintenance of –
>
> (i) the flat in question, or
>
> (ii) the building containing the flat ...
>
> (e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or a number of persons who include that other party."

9. Section 38(1) provides that if, on an application under section 35, the grounds on which the application is made are established to the satisfaction of the tribunal, the tribunal may make an order varying the lease in such manner as may be specified in the order. Under subsection (4) the variation specified in the order may be either that specified in the application or such other variation as the tribunal thinks fit.

10. The variations that the application sought in order to resolve the problems that were said to exist were to relieve the tenant of the obligation to maintain the exterior of the flat and to delete the provisions in clause 2(3)(b), (c) and (d) and (4)(a) in their entirety. The obligations would be imposed on the landlord, and a service charge regime for payment of the costs would also be imposed. The draft provided by Mr Donegan for this purpose ran to some 7 pages.

11. In its decision of 19 September 2006 the LVT recorded Mr Haughton's confirmation that he would be willing to allow the conservatory roofing sheets to be removed in order to permit the erection of scaffolding for access to the exterior of the upper flat but that this would have to be at the cost of Ms Gianfrancesco. It then went on:

"37. In this case there are arrangements for the repair of the flat and for the maintenance of those parts of the building which are let or occupied. We accept that the arrangements are not modern or conventional but they are satisfactory and workable. The difficulties being experienced with regard to the erection of scaffolding would exist whether or not the lease is varied in accordance with S.35.

38. Mr Haughton made a substantial concession with regard to the removal of the roofing sheets to the conservatory and this will allow a more conventional scaffolding to be erected. The additional cost involved may be unfortunate, but S.35 does identify incurring additional expenditure in order to comply with covenants as a ground to require the Tribunal to vary the lease.

39. Mr Donegan's assertion with regard to the maintenance of the common hallway has some merit as clause 3(3) of the lease is poorly drawn. We are, however, allowed to construe the lease when making our decision. We consider that the reference to '... the tenant's covenants as herein contained ...' is a reference to general covenants to repair and maintain the interior and exterior and to maintain and decorate the property as are found in the lease. There do not have to be specific covenants relating to that specific part of the building as clearly there is no lease to be granted on those communal parts retained by the landlord. This in our view allows for the proper maintenance of the common hallway to be within the landlord's responsibility and at his cost. This is implied by the provision at Clause 2(3)(d) for the recovery of one half of these costs expended.

40. with regard to the recovery by one party to the lease from another party to it under S.35(2)(e) of the Act, it is accepted that the arrangements are not entirely satisfactory. We believe that the addition of the words 'on demand' to clause 2(3)(b) of the lease as proposed by the Respondent will go some way towards rectifying this problem but this does not deal with the funding of the cost of the works which is likely to be substantial. We therefore believe that the addition of the further words 'in advance' will rectify this defect.

41. We accept Mr Haughton's assertion that the detailed variations put forward by the Applicant attempt to rewrite the lease. Although this may be desirable if all parties agree and if a modern lease was being drawn, we have no jurisdiction to deal with such a sweeping variation in the context of S.35 of the Act. This proposal is therefore dismissed."

12. The appellant sought leave to appeal to this Tribunal on the grounds that the LVT took account of an irrelevant consideration, namely the respondent's agreement to removal of the roofing sheets to enable scaffolding to be erected; that such a concession would not provide a permanent solution to the problem; that the LVT had wrongly construed the lease to mean that the landlord was obliged to maintain the communal parts of the building; and that the suggested variations, imposing on the landlord the obligation of maintaining the building and enabling him to impose a service charge would provide a just and equitable solution to the problem that he had created by covering the courtyard. I granted leave to appeal and directed that the appeal should be by way of rehearing.

13. At the hearing before me the appellant and the respondent gave evidence. Ms Gianfrancesco said that she had discussed the difficulty of redecorating the rear of the building with Mr Haughton in 2004 and again in 2005/6. His attitude was that the difficulties were her problem. She tried to sell her flat at the end of 2005 and quickly found potential buyers, but they withdrew when the problems with redecorating the rear of the property became known. She suggested to Mr Haughton that he should undertake the maintenance of the rear of the entire building and that she would bear half the cost of the work, but he did not respond. Following the LVT's decision she had tried to make arrangements for the works needed to the outside of her flat at the rear, but she had been unable to do so. She had requested access from Mr Haughton for the erection of scaffolding and also from the neighbours at number 4 Tichborne Street. The neighbours, Mr and Mrs Peyton Jones, had said that they would agree to scaffolding being brought through their house and for a leg to be set up on the edge of their garden, provided that Mr Haughton accepted liability for any damage. However, the offer, made in August 2006, was withdrawn by them in May 2007.

14. Ms Gianfrancesco was referred to the Nationwide Building Society Homebuyer Report that had been written in June 1995 in connection with her purchase of the flat. This included the sentence: "Access to the rear of the building generally for maintenance and redecoration is now considerably complicated by the provision of a Conservatory to the rear of the Lower Maisonette." She said that she had not been told by her solicitor at the time that she was responsible for the maintenance of the outside of the property. It was only in 2002 when Mr Haughton asked her to decorate the outside and she sought advice on this that she became aware of her obligation.

15. Mr Haughton said that he had erected the conservatory in about 1985. It was there when Ms Gianfrancesco bought her flat, and the Homeowner Guide showed that there was a problem. He had told her that it was for her to do maintenance on the outside of her flat. He accepted that scaffolding was needed for this purpose, but it was physically impossible to bring the poles through his flat. They would have to go through the neighbouring property. He had said that conservatory roof panels could be taken off to enable scaffolding to be erected, but he had said that it was for Ms Gianfrancesco to do this, and she would need to weatherproof it and to make good any damage. There were electrics in the conservatory and he would need an undertaking that these would be made safe. He accepted that Ms Gianfrancesco was entitled under the right of access given in the Fourth Schedule to the lease to erect scaffolding at the rear of the property.

16. Mr Haughton said that he had obtained a quotation from Austin Cradles Ltd, a scaffolding company, in August 2006 and had sent it to Ms Gianfrancesco. This provided for flying scaffolding with a pole in each of two adjoining premises and another one resting on his rear window. That would be the ideal solution.

17. Mr Donegan submitted that the lease failed to make satisfactory provision with respect to the repair or maintenance of the flat (section 35(2)(a)(i) of the 1987 Act) and the recovery of expenditure incurred (section 35(2)(e)). He contrasted the provisions of section 35 with those in section 57(6) of the Leasehold Reform, Housing and Urban Development Act 1993, which,

in the case of a statutory lease extension, enabled the terms of the lease to be excluded or modified if "(a) it is necessary to do so in order to remedy a defect in the existing lease or (b) it would be unreasonable ... to include, or include without modification, the term in question in view of changes occurring ..." Under section 35 the threshold for determining whether the lease makes satisfactory provision was, he said lower.

18. The appellant had an unconventional "maisonette" type lese, requiring her to maintain both the interior and exterior of her flat. As between the two flats there were mutual recovery provisions for half the cost of maintaining the roof and the foundations. Expenditure on the roof would not constitute a service charge under section 18 of the Landlord and Tenant Act 1985, and the same would go for expenditure on the foundations if the lower maisonette were to be let. This and the other concerns showed that the lease failed to make satisfactory provisions, and a set of provisions should be included by way of variation in the lease changing the maintenance obligations and providing for a service charge.

19. Mr Donegan drew attention to the CML Lender's Handbook for England and Wales, in particular to paragraph 5.10.4 requiring a check that (paragraph 5.10.4.1) "there are satisfactory legal rights, particularly for access ..." and (paragraph 5.10.4.2) "there are also adequate covenants and arrangements in respect of ... maintenance and repair of the structure, foundations, main walls, roof, common parts ..."

20. Mr Donegan submitted that the right of access in the lease did not extend to the erection of scaffolding. Either a bridging scaffold would be required or Mr Haughton's consent to the erection of scaffolding would be required. The former would require access over adjoining property, and, although it might be possible to obtain an access order for this purpose under section 1 of the Access to Neighbouring Land Act 1992, this would require a court order and it might not be obtained.

21. Before it can make an order under section 38 of the 1987 Act the tribunal has to be satisfied that the lease fails to make satisfactory provision with respect to one or more of the matters specified in section 35(2) and referred to in the application. I am not sure that the language used creates a lower threshold of qualification than that in section 57(6)(a) of the 1993 Act, which refers to remedying a defect in the lease, but that is not a matter that needs to be decided. Whether the lease fails to make satisfactory provision is one for the tribunal to judge in all the circumstances of the case. A lease does not fail to make satisfactory provision, in my judgment, simply because it could have been better or more explicitly drafted. For instance the need to imply a term is not necessarily, or even probably, an indication that the lease fails to make satisfactory provision for the matter in question.

22. Although it is right that the question of satisfactory provision should be determined in all the circumstances, the weight to be given to particular matters may need careful consideration. What the landlord or the tenant says that he is willing to do in addition to his obligations may have some relevance as to how, in practice, the provision in question is likely to operate. But it would normally be wrong, it seems to me, to base a decision on such an expression of willingness since the person in question could change his attitude or be replaced as landlord or

tenant by another person differently disposed. It is possible for this reason that the LVT placed too much weight on Mr Haughton's expression of willingness to allow the roofing sheets to be removed. But in all other respects, and in their particular conclusions, I am satisfied in the light of the material before me that the LVT's decision was correct.

23. Even if Mr Donegan's contentions on the respects in which the lease does not make satisfactory provision were correct this would not, in my judgment, require the wholesale replacement of the tenant's liability for external repairs and the insertion of a set of service charge provisions. Of the ways in which the lease is said to be unsatisfactory (see paragraph 7 above) (a), the lack of mechanism for collecting the landlord's contribution to roof repairs, is accepted to have been cured by the variation made by the LVT to clause 2(3)(b). Concern (b), that the lease does not contain any express covenant on the part of the landlord to maintain or repair the communal entrance, was in my view correctly dealt with by the LVT in its conclusion that clause 2(3)(d) created an implied obligation to this effect. As for concern (c), that there was a risk that the building would not be maintained to a uniform standard, since different contractors could be employed for the two flats with a resulting difference in the external appearance of the two flats, this does not appear in practice to have given rise to any difficulties and, given the provisions of clause 4(4)(a), it seems to me that significant difficulties are unlikely to arise.

24. The outstanding concern is (d), the absence of an express right to erect scaffolding at the rear of the building and the practical problems created for maintaining that part of the premises by the presence of the conservatory. There is undoubtedly physical difficulty in gaining access to the rear of the appellant's flat, and this is substantially due to the erection of the conservatory. There is no suggestion, however, that Mr Haughton was not entitled to erect the conservatory, and Ms Gianfrancesco bought in knowledge of its existence. In any event it does not affect the tenant's right of access, and the right of access secured under the Fourth Schedule must, in my view, include the right to erect scaffolding if it is reasonably necessary to do this, and Mr Haughton accepts that this is the effect in law of that provision. Indeed even a flying scaffold would need location on the land (the airspace) of Mr Haughton.

25. I can see no justification for placing the repairing obligation for the rear exterior of the upper flat on the landlord. If the lower flat were let he would be confronted by the same problems as now confront Ms Gianfrancesco in terms of the need to make access arrangements for the works. Even as things now stand, on the evidence access would be required through the next door property to take scaffold poles to the rear, and an order might have to be sought under section 1 of the 1992 Act to permit this. In my judgment the LVT was correct to reject the contention that in relation to the repair and maintenance obligation the lease failed to make satisfactory provision.

26. The LVT said that it accepted that the system of covenants contained in the lease are not modern or conventional but they are satisfactory and workable. I agree. There is thus no need for the wholesale re-writing of the obligations that Mr Donegan seeks nor any need to make variation in the lease in addition to the one that the LVT made.

27. For the above reasons I consider that the LVT came to a correct decision, and the appeal is accordingly dismissed.

Dated 6 March 2008

George Bartlett QC, President