

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2018] UKUT 0150 (LC)
Case No: LRX/103/2017**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – breach of covenant – sufficiency of reasons – F-tT failing to set out rival evidence – burden of proof – reconsideration of evidence - held tenant in breach of covenant not to maim cut alter wall without consent by making a hole in wall to replace connection to old toilet – appeal allowed.

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

BETWEEN:

MS SHAYNE TRIMNELL-RICHARD

Appellant

and

MS MELLISA TUFFLEY

Respondent

**Re: 58a Collingbourne Road,
London
W12 OJQ**

Before: His Honour John Behrens

Royal Courts of Justice, Strand, London WC2A 2LL

on

19 April 2018

**Mr Mark Loveday for the Appellant on a Direct Access basis
Mr Andrew Dewhurst B SC MRICS for the Respondent**

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The following case is referred to in this Decision:

Tintern Abbey Residents Association Ltd v Owen [2015] UKUT 0232 (LC)

DECISION

Introduction

1. This is an appeal against part of a decision of the First-Tier Tribunal (“the F-tT”) made on 14 July 2017. The application concerned property known as 58A Collingbourne Road, London W12 0JQ (“the property”)

2. The Appellant is the owner of the whole of 58 Collingbourne Road a Victorian maisonette divided into two self-contained flats, one on the ground floor and one on the first floor. She occupies the ground floor flat. I shall refer to her as the Landlord. The Respondent is the tenant of the first floor flat under a 999 year lease granted in March 1996. I shall refer to her as the Tenant.

3. There were two separate applications before the F-tT. The first was an application by the Tenant under s. 27A of the Landlord & Tenant Act 1985 as to her liability to pay various elements of the service charge claimed by the Landlord. It concerned 4 separate items totalling £10,492.

Floor Repair	1,650
Engineer roof report	250
Roof repair	6,792
Repointing	1,800
	<hr style="width: 50%; margin-left: auto; margin-right: 0;"/> 10,492

4. The second was an application by the Landlord under s 168(4) of the Commonhold and Leasehold Reform Act 2002. Under this Act a landlord under a long lease of a dwelling is prohibited from serving a notice under s 146(1) of the Law of Property Act 1925 alleging a breach of covenant until it has been finally determined by the F-tT that the breach has occurred.

5. The Landlord has in fact made a number of separate applications alleging breaches of covenant by the Tenant and the F-tT was critical of the way the Landlord had brought the proceedings but decided to determine them.

6. The Landlord alleged 2 breaches of clause 2(Q)(i) of the lease which prevented the Tenant without the consent in writing of [the Landlord] such consent not to be unreasonably withheld to “alter cut or maim any of the walls of the maisonettes”.

7. Two breaches were alleged. First, that the Tenant had enlarged or made a new hole in the wall where the soil waste pipe from her toilet in the bathroom passes through the wall to

connect to the external stack/vent pipe. Second, that the Tenant had made a hole in the wall to take the balanced flue of the repositioned boiler in the kitchen of the first floor flat.

8. The Landlord also tried to reinstate a further allegation she had abandoned in the earlier proceedings.

9. Both parties acted in person before the F-tT although the Tenant called a Surveyor, Mr Dewhurst who gave evidence on her behalf.

10. It will be seen that the F-tT had a lot of matters to deal with without the benefit of professional assistance. It dealt with the Tenant's claim as follows. It allowed £950 in respect of the floor repair, £250 in respect of the roof report, £3,840 in respect of the roof repair and nothing in respect of the repointing. In total it allowed £5,040 just under 50% of the amount claimed.

11. In respect of the Landlord's claim it rejected the claim in respect of the soil waste pipe but made the requested determination in respect of the hole made to take flue from the repositioned boiler. It rejected the attempt by the Landlord to reopen the complaint she had abandoned in the previous proceedings.

12. The Landlord sought to appeal many of the above findings. On 13 November 2017 the Deputy President rejected all of the grounds of appeal against the service charge awards. However he granted permission to appeal in respect of the refusal by the F-tT to find that there was a breach of clause 2(Q)(i) in respect of the hole in the wall near the soil waste pipe. In his view it was arguable that the F-tT may have erred in law in (i) failing to give adequate or sustainable reasons for its conclusion, (ii) failing adequately to record the evidence on the point and (iii) applying the wrong standard of proof.

13. On 8 January 2018 the Deputy President further ordered that the appeal and any consequential reconsideration of the issues would take place at a single hearing.

The Appeal

14. At the appeal the Landlord was represented by Mr Loveday and the Tenant by Mr Dewhurst. Mr Dewhurst made it clear that he was not legally qualified, but he was of considerable assistance in providing additional helpful plans and addressing me on the factual issues. I am grateful both to him and Mr Loveday for the very helpful and constructive way this appeal was conducted.

15. At an early stage in the hearing I indicated that the decision of the F-tT could not stand substantially for the legal reasons set out in Mr Loveday's skeleton argument. I did this so that I could deal with the reconsideration that had been ordered by the Deputy President. I said I would give my reasons in the written decision.

16. The F-tT dealt with the allegation relating to this hole in the wall in paras 40 – 43 of the decision. In paras 40 and 41 of the decision it describes the location of the alleged breach and points out that the Tenant's husband originally accepted that damage had been caused and offered to put it right. In para 42 it refers to limited access given to Mr Dewhurst and the Landlord's surveyor to view the area and records the fact that there are photographs in evidence.

17. Para 43 is at the heart of the Landlord's complaint:

The parties take a very different view of the cause of debris visible by the connecting point on the inner face of the wall. We will not record the conflicting evidence we heard because all we can say is [the Landlord] failed to provide convincing and conclusive evidence of the kind we would expect to see when something as serious as a breach of covenant is alleged. There has been no breach of clause 2(Q)(i) in this regard.

18. In his skeleton argument Mr Loveday complains that the decision at para 43 to "not record the conflicting evidence [it] heard" is a substantial procedural defect. The requirements for reasons appear in Rule 36(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. He referred me to the decision of the Deputy President in *Tintern Abbey Residents Association Ltd v Owen* [2015] UKUT 0232 (LC) where he pointed out that the reasons

"... need not be elaborate. They should identify the issues for decision, and provide a summary of the tribunal's basic factual conclusions. They need not to recite the evidence in detail but they must briefly explain why the tribunal has arrived at its conclusions."

19. He submitted that the failure to set out the evidence and reach a conclusion led the F-tT into the error below, namely that the F-tT seems to have misunderstood the factual allegations the Landlord was making.

20. He also submitted that the reference in para 43 to the need for "convincing and conclusive evidence" is plainly wrong in that it misstates the standard of proof which only requires proof on balance of probabilities.

21. In my view those submissions are unanswerable. The decision of the F-tT cannot stand. The matter must be reconsidered.

Reconsideration.

22. At the reconsideration there was significantly more material before me than was before the F-tT including:

- 1.** A witness statement from the Landlord dated 15 February 2018 containing a number of additional photographs. At the hearing the Landlord gave oral evidence in support of her claim and was cross-examined to a limited extent by Mr Dewhurst.
- 2.** A witness statement by Nik Laming (the Tenant's husband) dated 17 April 2018 (i.e 2 days before the hearing). Despite objection from Mr Loveday I permitted this to be admitted in evidence.
- 3.** A helpful set of additional plans and a photograph prepared by Mr Dewhurst showing schematically the old and new arrangements in respect of the connections for the toilet.
- 4.** A number of emails between the Landlord, Mr Laming and Mr Weaver, the party wall surveyor dealing with the extension being constructed by the Landlord.

23. These documents shed considerable light on the dispute between the parties with the result that there was in the end little difference between Mr Loveday and Mr Dewhurst as to the facts. I have included in the Appendix to this judgment a copy of the plans prepared by Mr Dewhurst together with 3 photographs taken at different times in the chronology.

Chronology

24. In order to understand the issues it is necessary to set out in a little detail the chronology of events relating to the works which were carried out at 58 Collingbourne Road between 2013 and 2016. In so doing I shall refer to the plans and the photographs.

25. The toilet in the Tenant's first floor bathroom backs onto the exterior side wall of No 58. Before 2013 it was connected to a vertical soil pipe on the outside of the side wall which extended from the ground to just beneath the roof. The photograph taken in 2011 shows part of the vertical pipe. The nature of the connection into the vertical pipe can be seen in part in the photograph and more clearly in the first of the 3 drawings prepared by Mr Dewhurst. As can be seen there are at least 2 pieces of pipework with connections. The effluent leaves the toilet horizontally. The first pipe is "L" shaped and takes the effluent downwards. There is then a second "L" shaped pipe which takes the effluent horizontally through the wall and which connected to the vertical pipe seen in the photograph.

26. In 2013 the Landlord built a side extension to the property. A number of party walls were involved, and she reached an agreement with the Tenant under which the Tenant agreed to

the extension and the Landlord permitted the Tenant to construct a roof terrace on the extension. At some stage a party wall surveyor was appointed to deal with the disputes which had arisen between the Landlord and the Tenant.

27. Part of the works carried out by the Landlord involved removing the vertical pipe and replacing it with a horizontal pipe which connected to a vertical pipe near the front of the building. This necessarily involved altering the connections to the Tenant's toilet. According to the Landlord all of the work was carried out from the outside of the building. The connections inside the Tenant's bathroom were not interfered with at all.

28. The new connections are shown schematically in the second of Mr Dewhurst's drawings and in the photograph taken in November 2014. That photograph shows the horizontal pipe, and the new connections both from the sink unit (in white) and from the toilet (in black). It also shows the area of brickwork removed by the Landlord's builder which had been filled with insulation. It is to be noted that the wall is two bricks thick if the bricks are laid parallel with the wall but one brick thick if the bricks are laid across the wall.

29. A number of disputes arose between the Landlord and the Tenant during the course of the Landlord's works. It is convenient to deal with these disputes in the next section of this judgment. Some time after December 2015 the Tenant's builder carried out work on her flat. The work included work to her bathroom including levelling the floor and replacing the toilet. The connections for the new toilet can be seen in the third of Mr Dewhurst's drawings. It can be seen that the two "L" shaped pipes have been replaced by a horizontal pipe which passes through the wall in a higher place than the old pipes. There is then an "L" shaped pipe on the outside of the wall in order to connect the pipe to horizontal pipe installed by the Landlord in 2013/4. The position can be seen in the photograph taken in 2016 which shows that two or three courses of brickwork have been removed for the new connexions. There can be no doubt that there is a new hole in the wall.

Disputes between the parties.

30. The emails between Mr Laming, Mr Weaver and the Landlord disclosed during the course of the hearing show that there were disputes from at least February 2015 and possibly earlier. Many of the disputes are not relevant to this dispute. Those that are may be summarised:

1. On 22/2/2015 Mr Weaver wrote to the parties and Mr Laming requesting them to set out the disputes in a form of Scott Schedule which he had devised.
2. Mr Laming set out his allegations on 2/3/2015. In relation to the bathroom he alleged that the Landlord was responsible for levelling the floor, repairing cracks in walls and ceiling and redecorating and retiling. He envisaged that it would be necessary to remove and refit the sanitary ware in order to level the floor.

3. The Landlord responded to these allegations in detail on 3/3/2015. She accepted responsibility for the cracking and some consequential repainting. She accepted no responsibility for the releveling of the floor. In her view this was not related to her works at all. She did not regard it as necessary to remove and refit the sanitary ware.

4. On 16/4/2015 Mr Weaver sent some preliminary observations which included:

“The main principle being that the party wall works (the excavation works and the undermining of the foundations) have affected the first floor flat and remedial works are necessary.

However, where the repair necessary is due to the age or works that are not party wall related, the party wall act is the incorrect method of achieving a dispute resolution.”

In his view all the allegations in relation to the bathroom were party wall related. He did not express any other view on the merits of the allegations.

5. On 6/5/2015 the Landlord sent a more detailed commentary on the allegations. In summary the Landlord accepted that cracking and redecorating to the bathroom wall was her responsibility but did not accept any responsibility for the bathroom floor. She described the allegation as “opportunistic”.

6. In early November 2015 the Landlord’s builder was on site and repaired and redecorated the cracks in the bathroom. Mr Brian Laming was on site on 6 November 2015 and there was an inspection by Mr Weaver on 5 January 2016. He was satisfied with the repair of the cracks to the wall. He accepted that the bathroom floor showed a noticeable slope. In his view:

“One would expect a degree of unevenness in the floors of a house of this age and construction. There is a chance that it has been exacerbated by the building works. A scheme of repair could be affected quite easily by means of a self-levelling screed applied directly to the floor, with the carpet re-laid directly on to it.

Whilst it is plausible that the floor has suffered as a consequence of the works, an argument that the entire amount of distortion is due to the works is, in my view unproven. I suggest a settlement of £300 as a contribution to levelling of the floor and adjustment of the bath and WC would be a fair sum.”

7. Mr Laming responded within a very short time of the award. In his view the award of £300 was not adequate as the actual cost of levelling was £1,620.

Mr Laming’s responses to the Landlord’s complaint.

31. Mr Laming’s initial reaction was a partial admission. In a letter dated 24 March 2017 he denied there was a breach of covenant because “the toilet waste was existing”. He accepted that some brickwork was temporarily removed to enable his plumber to gain access to a “poorly formed joint and pipework in the joint”. He alleged that his plumber should have made good

the bricks on the outer skin of the wall but did not. He said he would rectify the error by paying the Landlord's contractor or by putting the brickwork back.

32. In his response to the application for permission to appeal Mr Laming put the matter in this way:

"On 24 March 2017 [the Tenant] did confirm that during the bathroom repair works of January 2016 some brickwork had been temporarily removed ... The brickwork was reinstated and the hole was therefore returned to its original size position in the inner wall. [The Tenant] mistakenly believed she was responsible for the damage to the outer wall until her surveyor Andrew Dewhurst produced photographs showing the outer wall damage ...

"... [The Tenant's] plumber did not move the WC waste pipe as evidenced by the photograph ... The photograph in 2017 clearly shows the WC waste pipe going through the wall in the same position as in 2017.

33. In the witness statement signed on 17 April 2018 Mr Laming changed his position. He accepted that the connection for the new toilet was made in "a slightly different position" from the old connection. He alleged that the pipe passing through the wall that connected the WC pan to the soil pipe was broken This was removed and replaced with a new piece of pipe to allow the WC pan to be reconnected.

34. He asserted that the work was done to rectify damage caused as a result of the work undertaken by the Landlord. He alleged that she had explicitly granted permission for the repair work.

35. When she gave evidence the Landlord expressly stated that she had at no time been asked for permission to make a hole in the wall and did not discover about it until much later. In his closing submissions Mr Dewhurst accepted that the Landlord had never been asked for permission in relation to it.

Discussion and findings

36. The starting point in determining whether there is a breach is the wording of the covenant. The first question is whether the Tenant has "altered cut or maimed" any of the walls in the first floor flat. If so did she have the Landlord's written consent?

37. Despite Mr Laming's original assertions, it is now clear that the hole in the wall made by the Tenant's plumber to connect the new toilet is not in the same place as the hole for the fixings for the old toilet. It follows that the Tenant has altered cut or maimed the exterior side wall.

38. It is equally clear that that there was no written consent from the Landlord. It is not suggested that there is. Despite the assertion in Mr Laming's most recent witness statement I find as a fact that neither Mr Laming nor the Tenant asked for consent in relation to the new hole.

39. That is enough to deal with the issue of breach of covenant but in the light of the evidence and argument it is convenient to deal with some other points.

40. In the light of emails referred to above I accept the Landlord's evidence that her builder repaired the cracking to the wall of the bathroom satisfactorily and that that cracking is irrelevant to this dispute.

41. In the light of Mr Weaver's opinion, I accept that the bathroom floor was not level but (like him) I am unable to find that this was wholly due to the Landlord's works. This was an old Victorian property and, as he pointed out, I would not expect it to have been level. The works may have contributed though.

42. It is not clear why the Tenant's plumber could not use the old connections when he refitted the toilet. In his most recent statement Mr Laming suggests that the old pipe was damaged. However, this assertion is not supported by any independent evidence and was only raised one day before the hearing before me. If it was damaged the Tenant has not established on the balance of probabilities that it was damaged during the course of the Landlord's works when her builder made a new connection in 2013. It is equally not clear why the Tenant's plumber could not have replaced the old fitting.

43. If the Tenant had asked for permission in accordance with the lease it seems to me highly probable that it would have been deemed unreasonable for the Landlord to have refused consent. It is difficult to see what reasonable objection the Landlord could have had to the new fitting. This is not, of course, a defence to the claim as it is well established that in such a case the Tenant must request the consent. However, it does place in context the nature and seriousness of the breach if there are going to be further proceedings arising out of this breach.

44. However, for the reasons set out above I am satisfied that the Tenant was in breach of covenant and accordingly this appeal is allowed.

John Behrens

Dated: 10 May 2018

His Honour John Behrens

Appendix

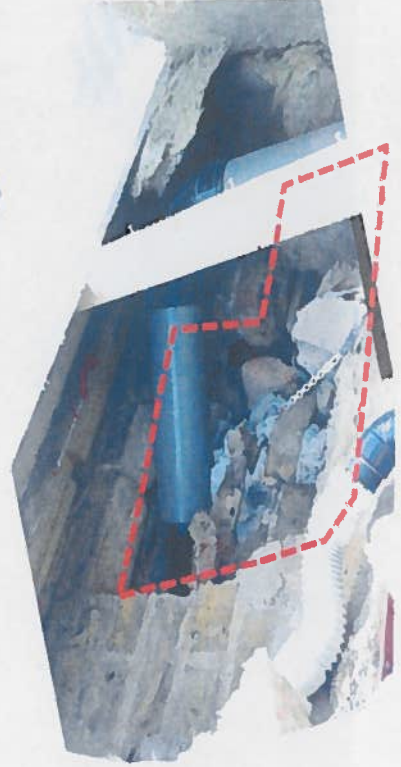
From 2011 showing the original pipework in the same area prior to the Applicant's works



PHOTOGRAPH C
From 2014 showing the pipework already damaged by the Applicant's contractor and filled with insulation



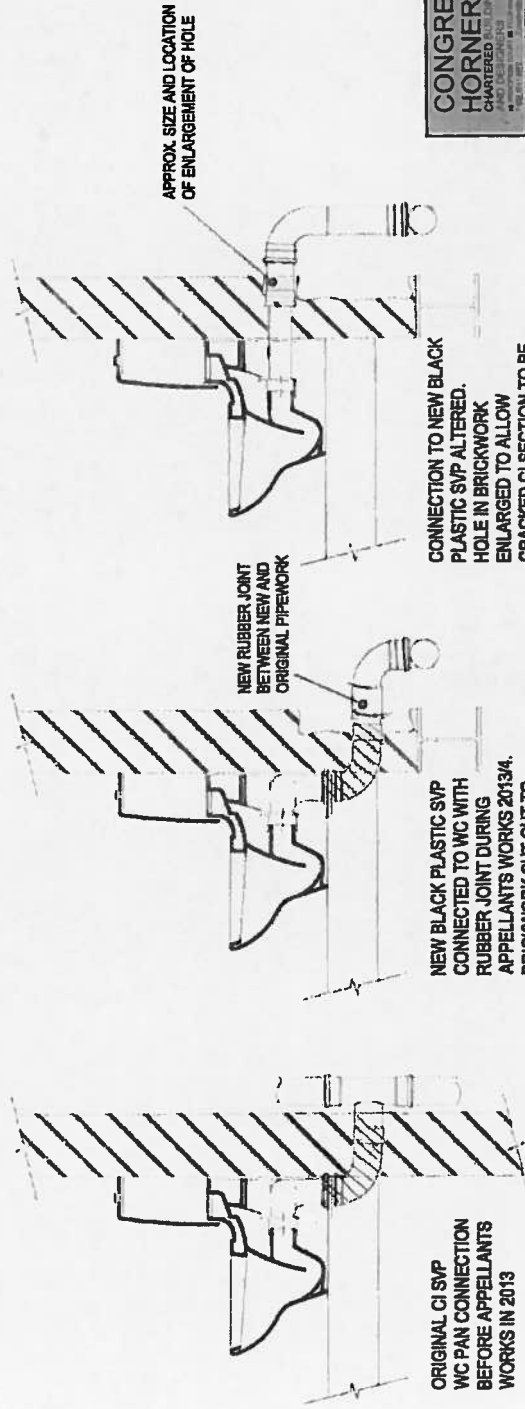
From 2017 showing the same area as photo but 3 extra bricks removed and a buffer weight pipe



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Rev. Date Description

1 01/01/2013



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 80 COLLEGEWAY ROAD LONDON
 W11 1AA

Property	80 Collegeway Road London
Client	M Tuffey & N Laming
Drawing Title	WC connection - Section through wall
Drawing No.	GP/223-01
Rev.	
Drawn: AD	Status: Information
Scale: 1:10 @ A3	Original Size: A3

B