IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 374 (LC)
Case No: LRX/34/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FORFEITURE – covenant against alteration of elevation of building – whether prohibition applicable only to front elevation – original window replaced by door giving access to flat roof – whether a breach of covenant – s.184(4), Commonhold and Leasehold Reform Act 2002 – appeal allowed

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

BETWEEN:

TRIPLEROSE LIMITED **Appellant**

- and -

PARESHKUMAR PATEL
MINAXIBEN PATEL
BRIJESH PATEL **Respondents**

Re: 2 Bridge Court,
340-354 Lea Bridge Road,
London E10 7JS

Martin Rodger, Deputy Chamber President

Royal Courts of Justice

8 November 2018

Mr Justice Bates, instructed by Scott Cohen, Solicitors for the appellant
Mr Brijesh Patel in person on behalf of all respondents

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The following cases are referred to in this decision:

Arnold v Britton [2015] AC 1619

Joseph v London County Council (1914) 111 LT 276

Russell v Watts (1885) 10 App Cas 590

Introduction

1. There are two issues in this appeal from a decision of the First-tier Tribunal (Property Chamber) ("the FTT") given on 14 March 2018. The first is whether a covenant against making "any alteration in the elevation" of a flat is capable of being broken by the making of alterations at the rear of the flat, as the appellant contends, or is concerned only with changes to the front façade of the flat, as the FTT found. The second issue, assuming the first is answered in the appellant's favour, is whether there has been a breach of such a covenant in the lease of Flat 2, Bridge Court, 340-354 Lea Bridge Road, London E10.

2. Flat 2 is on the first floor of Bridge Court, a substantial block of flats with commercial premises on the ground floor and four floors of flats above. From photographs which I have been shown the building appears to have been built in the middle of the 20th Century, and was originally fitted with metal framed Crittal windows (some of which are still present). Many of the windows in the building have been replaced by new windows of more modern design and materials. It is common ground that the windows of Flat 2 are replacements of previous windows.

3. At the rear of Flat 2 there is an area of flat roof which is not demised with the Flat itself. A door has been installed in Flat 2 giving access onto this roof. No similar door provides access to the same roof from the flat immediately adjoining Flat 2; nor does any other flat in the building have the benefit of such a door. In the same location all other flats have only a window. There seem to be a number of different designs of these windows, but none enables a person to step easily from the flat onto the roof, as the door installed in Flat 2 now allows.

4. The lease of Flat 2 was granted by a predecessor of the appellant, Triplerose Ltd, on 31 January 1990 for a term of 99 years. Neither the description of the demised premises (the flat) in Part 1 of the Second Schedule to the lease nor the rights and privileges granted with it in Part 2 of the Second Schedule make any mention of a right of access to or demise of the flat roof at the rear of the building. The demise does include the doors and door frames and window frames in the walls bounding the flat, except their external surfaces, together with the glass fitted in the window frames.

5. The lease includes a covenant by the lessee in the following terms (at clause 2(16):

> "Not during the said term (i) without the consent in writing of the lessor and the superior lessor to cut or maim any of the walls floors timbers stantions or girders of the flat, or (ii) commit or permit any waste or damage whatsoever to the flat or make or permit to be made any alteration in the elevation or in the external decoration thereof or in the means of access thereto."

6. In its decision the FTT concluded that the installation of a door in the rear wall of the building could not be a breach of clause 2(16)(ii) because it was not an alteration to the "elevation" of the flat. The "elevation", the FTT considered, meant only the front of the building and did not include changes visible only at the rear.

7. Triplerose was granted permission to appeal by the FTT and has been represented in the appeal by Mr Bates (who did not appear below). At the time the FTT made its decision the owners of the lease of Flat 2 were Brijesh, Pareshkumar and Minaxiben Patel, whom I will refer to as the respondents and who have been represented in the appeal by Mr Brijesh Patel. I am grateful to Mr Bates and Mr Patel for their assistance.

8. In May 2018 the respondents sold the lease of Flat 2 to a company named Your Next Move Ltd. Notice of the appeal was given to the company by the Tribunal in May 2018, together with directions on how it might become a party to the appeal, but no application by it to be joined as an additional respondent has been received.

The application to the FTT

9. This matter came before the FTT as an application by Triplerose under section 168(4), Commonhold and Leasehold Reform Act 2002 for a determination that a breach of covenant had taken place. The application alleged that there had been a breach of clause 2(16), in that the tenant had without consent removed a window and installed a door which, it was said, would have necessitated the cutting and maiming of the walls and would have caused damage to the flat. It was also said that the work constituted an alteration in the elevation and external decoration of the flat and an alteration to the means of access.

10. In fact there is no evidence that the installation of the door involved any cutting of the walls as the door has been fitted in to the aperture preciously occupied by the window. It is not now suggested that any breach has been committed other than the making of an alteration in the elevation of the flat.

11. The decision of the FTT was reached after the tribunal members had undertaken an inspection of the building. Having heard the evidence and seen the premises the FTT recorded in paragraph 18 of its decision that it had drawn the party's attention to *Joseph v London County Council* (1914) 111 LT 276, a decision of Astbury J, and had invited them to make written submissions on its relevance to the appeal, which they had done.

12. In the *Joseph* case Astbury J was reported as saying that "ordinarily 'elevation' meant the front view of a building as distinct from the horizontal plan." The FTT considered that to be of assistance and in paragraphs 28 and 29 of its decision it said this:

> "28. As regards whether there has been any alteration in the "elevation" we note the party's respective submissions on the meaning of the word "elevation". Whilst the decision in *Joseph v London County Council* was made over 100 years ago and has hardly been quoted since, nevertheless it would seem to be the only available legal authority on the meaning of "elevation" in the context of a claim for breach of covenant. The fact that it has hardly been quoted since does not show that there is anything wrong in Astbury J's decision. The more likely explanation is that the issue has not come up in quite this way since then. The relevant prohibition in the *Joseph* case was against any alteration in the elevation of the buildings which is very similar to the wording in our case. While obviously we accept following *Arnold v Britton* that the construction of a clause in a contract needs to have regard to the context, we see nothing in the context of this case

which distinguishes it from the *Joseph* case based on the information available. In addition we do not accept that a non-legal dictionary definition as to the general meaning of "elevation" should take precedence over a decision made by a Judge in the context of a breach of covenant case.

29. As to the fact that in some cases there has been references to phrases such as "rear elevation" or "front elevation" this may well demonstrate that when needing to distinguish between different side of the building it is convenient to talk in terms of rear elevation, front elevation, north elevation etc but in our view it does not show that the word "elevation" used by itself in a lease covenant against alterations has a wider meaning than that attributed to it by Astbury J. Furthermore there is a logic to attributing such a meaning to the word in this context as a landlord may well be much more concerned about the appearance of the front of the building than the back because it will generally be more visible. Therefore we do not accept that there has been an alteration in the elevation."

The appeal

13. As can be seen from the passages I have quoted, the FTT concluded that the alteration alleged was not capable of being a breach of covenant. It was therefore not necessary for it to decide whether any alteration had in fact occurred. I gave directions that the appeal was to be determined as a review of the decision of the FTT followed, if necessary, by a rehearing of the application under section 168. I will deal first with the review.

14. In opening the appeal Mr Bates submitted that the FTT was wrong to treat the decision of Astbury J in *Joseph v London County Council* as, in effect, establishing a rule of law that the word "elevation" used in a covenant against alteration referred only to the front elevation of a building. He reminded me of the guidance on the proper approach to the interpretation of a contract (in that case a lease) given by Lord Neuberger in *Arnold v Britton* [2015] AC 1619 at paragraphs [15] to [20]. It is necessary to refer only to the following summary:

> "[The] meaning has to be assessed in the light of: (1) the natural and ordinary meaning of the clause; (2) any other relevant provisions of the lease; (3) the overall purpose of the clause and the lease; (4) the facts and circumstances known or assumed by the parties at the time that the document was executed; (5) commercial common-sense, but disregarding subjective evidence of any party's intentions."

15. It is not necessary to refer to a specialist legal dictionary or to the observations of an Edwardian judge to identify the natural and ordinary meaning of the word "elevation". It is not a term of art, and unless it is being used in some special or technical sense it can be understood by anyone familiar with ordinary usage. The word has a number of meanings in different contexts. In architecture or surveying it means a drawing of a building on a vertical plane, as opposed to a ground plan; by extension it means not simply a drawing of the vertical plane but the vertical plane or exterior of the building itself. Unless it is qualified by reference to a specific plane even when used in the singular it denotes the external vertical surfaces of a building generally, the front, the back and the sides, rather than referring only to the front of the building.

16. An example of the word used in that general sense can be found in a decision of the House of Lords to which Mr Bates referred, *Russell v Watts* (1885) 10 App Cas 590, which concerned a covenant against altering "the height or elevation" of any building erected on a building plot. Lord Selborne made the following observations (at 599) about the meaning and effect of the covenant:

> "The express contract is not to alter the height or the elevation of the buildings without consent. Nor do I think that the word "elevation" which is coupled with "height" ought to be construed here as relating only to the street fronts of the buildings. Any important structural alterations of the buildings after their erection, not authorised by the agreement or consented to by the corporation would I conceive be waste."

In this context the word "waste" means the doing of something which damages the subject matter of a lease.

17. As for other provisions of the lease, these add little of significance, but it is noticeable that clause 2(16) as a whole is unqualified and is clearly directed against *any* activity of the type described. The tenant covenanted not cut or maim *any* of the walls floors timbers etc, not to commit or permit *any* waste or damage or to make *any* alteration in the elevation or external decoration of the flat. As the covenant is expressed in these unqualified terms it would be surprising if the parties intention had been to apply the prohibition on altering the elevation to only one elevation of the flat.

18. It is also notable that altering the rear elevation of the flat might easily amount to waste or damage or involve an alteration of the external decorations, which in each case would be a separate breach of clause 2(16)(ii). If the intention of the parties was to limit the prohibition on alterations to the front elevation only, the more natural way to convey that intention would have been by some exemption or proviso specifically allowing it, rather than by relying on a restricted meaning being given to the word elevation.

19. In my judgment the FTT read too much into the *Joseph* decision. The issue in *Joseph* was whether the erection of a lightly constructed timber advertising hoarding on the front of a building in Shaftesbury Avenue on which illuminated signs were displayed was a breach of a covenant against making any alteration in the elevation of the building. From the short report of the case there seems to have been no issue about alterations anywhere other than at the front of the building. The argument on behalf of the landlord was that any alteration to the external appearance of the building was sufficient by itself to amount to an alteration to its elevation. The contrary argument was that an alteration to the elevation meant only an alteration to the physical fabric and not to the appearance of the building, and that attaching the hoarding was not a breach. It was in that context that Astbury J referred to elevation as meaning "the front view of a building" as distinct from the horizontal plan; what mattered was what could be viewed, rather than that it was at the front. He was not asked to decide whether the back of the same building was also one of its elevations. His decision lays down no rule of law and I do not think it assists in the determination of this case.

20. The FTT also supported its preferred limitation of the covenant to the front of the building by suggesting that it was logical to interpret it in that way since a landlord may be more

concerned about the appearance of the front of a building than the back. While it is possible a landlord may have greater concern for the more prominent elevation, that relative concern does not explain why the same landlord would be unconcerned about alterations to the rear or side of a building, and it does not seem to me to be relevant to the meaning of the covenant. The overall purpose of such a clause is to ensure that a building is returned to the landlord in substantially the same form in which it was demised, and the FTT's limited meaning is inconsistent with that purpose.

21. In his submissions in response to the appeal Mr Patel drew my attention to photographs of the exterior of the building which show that there is no uniform style to the windows and that a number of the original units have been replaced over the years by others similar in design to the windows now in Flat 2. That general point does seem to be established by the photographs I was shown but it does not bear on the question of whether an alteration to the rear of the building is prohibited by the covenant against altering the elevation.

22. Mr Patel also suggested that since the replacement of the original window with the new door opening onto the flat roof, the landlord had waived the breach by accepting ground rent and service charge. Whether that is correct or not is not in issue in these proceedings. Neither the FTT nor this Tribunal is concerned with whether there has been a waiver of any breach of the covenant. If, as I will have to consider shortly, there has been a breach of covenant the Tribunal's function is to make a determination to that effect. It would then be a matter for the landlord to consider whether it wished to pursue proceedings for forfeiture and only at that stage would the issue of waiver become a live one before the County Court. I can therefore make no determination in relation to the question of waiver other than to say it does not affect the proper construction of the covenant, but I would add for the benefit of Mr Patel that the right to forfeit for a breach of covenant can only be waived after the landlord has knowledge of the breach. The case for the landlord here is that it did not acquire knowledge of the breach until 2016.

23. Mr Patel emphasised, as the FTT had found on its inspection, that no damage had occurred to the brickwork and that the new door appeared to have been fitted into the same aperture as had previously been occupied by a tall window. No point is now taken that there has been damage to the structure of the building.

24. For these reasons I am satisfied that the FTT was wrong to conclude that a change by the replacement of a window at the rear of the building with a door of the same dimensions could not be an alteration to the "elevation" of the building. The matters complained of in the application is certainly capable of being an alteration in breach of clause 2(16)(ii) and I therefore allow the appeal.

25. The FTT made no determination of the facts. Rather than sending the matter back to it for further consideration it is more convenient that the Tribunal re-hear the original application and determine whether there had indeed been a breach of covenant in this case.

The re-hearing

26. Evidence was given on behalf of the appellant by Mr Yaron Hassan, who is the managing agent responsible for the building. Mr Hassan told me that he and his client first became aware of the change in the exterior of the building in February 2016 when scaffolding was erected to enable external work to be done. It was observed that the Flat 2 had a door opening onto the flat roof rather than a window as was the case with all other flats. Mr Hassan also told me that one other example had been discovered of a leaseholder having altered a window overlooking the flat roof at the rear of the building to create a door. In that case the leaseholder had agreed, when challenged, to reinstate the original window.

27. Mr Patel has also gave evidence and informed me that the respondents had purchased Flat 2 at auction in 2014 and at that time the door opening onto the flat roof at the rear of the building was in place. Neither he nor either of the other respondents had carried out the alteration themselves. He also informed me that he believed the window to be about 14 years old. It was of a design which he recognised and which he had installed in other property belonging to the respondents when it had first become available on the market in about 2002 or 2004. It is clear from the photographs which I have seen that the door is not as old as the rest of the building and is much more modern than the examples of original windows which can be seen.

28. There is no reason to think that Flat 2 was originally designed with a door, instead of a window in this location. No other flat has such a door, and the flat roof onto which the door opens has clearly not been designed for use by the leaseholder: it is not demised, there is only a low parapet wall at first floor level, and the surface of the roof is not tiled or protected in any way from traffic across it.

29. Given that the door is not an original feature of the flat, and is of relatively modern material, the only issue is whether it was installed before or after 31 January 1990 when the lease was granted. I am satisfied on the evidence which I have heard both that there has been an alteration in the elevation of the building and that it has occurred since 31 January 1990. It is more likely than not to have occurred during this century, and if Mr Patel is right, possibly as much as 14 years ago.

30. There is no evidence that the alteration was carried out with the consent of the landlord at the time. For the reasons I have already given it would be surprising if a landlord was prepared to consent to such an alteration, at least without insisting that the roof covering be protected in some way.

31. I am therefore satisfied that it is appropriate in this case to make a determination under section 168(4) of the 2002 Act that there has been a breach of covenant by the making of an alteration in the rear elevation of the flat to replace a window with a door.

32. I am not asked to make a finding that the breach was committed by the respondents. The Tribunal's task is the limited one of determining whether or not there has been a breach and I am satisfied that the answer to that question is in the affirmative.

Martin Rodger QC,

Deputy Chamber President

16 November 2018