Neutral Citation Number: [2021] EWCA Civ 989

Case No: C3/2020/1908

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
His Honour Judge Stuart Bridge
[2020] UKUT 138 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 July 2021

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE ARNOLD
and
LORD JUSTICE BIRSS

- -

Between :

MARLBOROUGH KNIGHTSBRIDGE MANAGEMENT LIMITED	**Appellant**
- and -	
THIERRY GILLES FIVAZ	**Respondent**

- -
- -

James Fieldsend (instructed by **Bolt Burdon**) for the **Appellant**
Nick Grant (instructed by **Direct Access**) for the **Respondent**

Hearing date : 29 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 6 July 2021

Lord Justice Arnold:

Introduction

1. The Respondent ("the Tenant") owns two flats in a block of flats on long leases. He replaced the front doors of the flats. The Appellant ("the Landlord") contends that the Tenant thereby acted in breach of a covenant not to "remove any of the landlords fixtures". The First-tier Tribunal Property Chamber (Residential Property) (Tribunal Judge Andrew Dutton and S. Mason FRICS) found in favour of the Landlord in a decision dated 26 June 2019. The Upper Tribunal (Lands Chamber) (His Honour Judge Stuart Bridge) allowed the Tenant's appeal for the reasons given in a decision dated 29 April 2020 ([2020] UKUT 138 (LC), [2020] 1 P&CR DG20). I granted the Landlord permission for a second appeal because the law in this area is not as clear as it might be.

The facts

2. The Landlord is the freehold owner of Marlborough, 61 Walton Street, London SW3 2JU. Marlborough is a building containing 168 flats let on long leases. It was constructed at some point prior to June 1972.

3. The Respondent is the registered proprietor of two long leasehold interests, flats 120 and 131. A 99 year lease of flat 131 was granted on 12 June 1972 and a 99 year lease of flat 120 was granted on 27 November 1978 (together, "the 1970s Leases"), both with effect from 24 June 1970. Both are in materially identical form. On 25 March 1992 999 year leases of flats 120 and 131 were granted with effect from 25 December 1991 (together, "the "Leases"), subject to like conditions and covenants as were contained in the 1970s Leases.

4. The relevant terms of the Leases are as follows:

> "3. THE Tenant HEREBY COVENANTS with the Lessors as follows:-
>
> …
>
> (4) Not at any time during the said term to make any alterations in or additions to the Demised Premises or any part thereof or to cut maim alter or injure any of the walls or timbers thereof or to alter the internal arrangement thereof or to remove any of the landlords fixtures therefrom without first having made a written application (accompanied by all relevant plans and specifications) in respect thereof to the Lessors and secondly having received the written consent of the Lessors thereto and paying the fees of the Lessor and any Mortgagee and their respective professional advisers
>
> …
>
> 4. THE Tenant HEREBY COVENANTS with the Lessors and with and for the benefit of the owners and tenants from time to

time during the said term of the other flats comprised in Marlborough as follows:-

(1) Throughout the said term to repair maintain renew uphold and keep the Demised Premises and all parts thereof (other than such parts as are comprised and referred to in paragraphs (a) and (b) of subclause (5) of Clause 5 hereof) including so far as the same form part of or are within the Demised Premises all windows glass and doors (including the entrance door to the Demised Premises) locks fastenings and hinges sanitary water gas and electrical apparatus and walls and ceilings drain pipes wires and cables and all fixtures and additions in good and substantial repair and condition …

…

(5) Throughout the said term to observe and perform the regulations set forth in the First Schedule hereto

…

<u>The First Schedule</u>

…

17. Not at any time to do or permit the doing of any damage whatsoever to Marlborough the fixtures fittings or chattels therein the curtilage thereof or the path adjoining thereto and forthwith on demand by the Lessors to pay to the Lessors the cost of making good any damage resulting from a breach of this regulation

…

20. Not at any time to interfere with the external decorations or painting of the Demised Premises or of any other part of Marlborough

….”

5. In 2014 the Tenant replaced the entrance doors to the flats. He did not seek or receive the Landlord’s consent to replace the doors.

6. On 27 March 2019 the Landlord made an application to the First-tier Tribunal for a determination that a breach of covenant or condition in the Leases had occurred. It contended that the Tenant had breached clause 3(4) of the Leases by removing the doors since they were “landlords fixtures”, and had breached clause 4(5) of the Leases by failing to comply with regulations 17 and 20.

7. The application to the First-tier Tribunal was brought under section 168 of the Commonhold and Leasehold Reform Act 2002. That section imposes a control on

landlords' ability to exercise a right of forfeiture. Before exercising a right of forfeiture for breach of a tenant's covenant (other than the payment of rent), the landlord must first give notice under section 146 of the Law of Property Act 1925. The effect of section 168 of the 2002 Act is that, before giving notice under section 146 of the 1925 Act, there must either be an admission of breach by the tenant or the landlord must obtain a determination that a breach has occurred (from either the First-tier Tribunal, a court or an arbitral tribunal pursuant to a post-dispute arbitration agreement). The Landlord's application to the First-tier Tribunal was thus the first step to enforcing its right of forfeiture (under clause 6 of the Leases) in respect of the alleged breaches.

8. The First-tier Tribunal held that the doors were "landlords fixtures", and that the Tenant had acted in breach of clause 3(4) of the Leases by replacing them. It noted that there was no evidence that the doors were in a state of disrepair before they were replaced. It did not make any determination in relation to the alleged breaches of clause 4(5) and regulations 17 and 20.

9. The Upper Tribunal held that the doors were not "landlords fixtures", but rather were part of the land demised to the tenant, and thus the Tenant had not acted in breach of clause 3(4) of the Leases. It did not determine an alternative contention advanced by the Tenant that, even if the doors were "landlords fixtures", he had not removed them within the meaning of clause 3(4). The Tenant has renewed that contention before this Court by a respondent's notice.

<u>Were the doors "landlords fixtures"?</u>

10. The Landlord contends that the First-tier Tribunal was correct to hold that the doors were "landlords fixtures" and that the Upper Tribunal was wrong to hold to the contrary.

11. It is common ground that, in order to determine whether the doors were "landlords fixtures" within the meaning of clause 3(4), it is necessary to construe the Leases applying ordinary principles of contractual interpretation. It is also common ground, however, that the expression "landlord's fixtures" (with or without the apostrophe) is one which has a very long usage in this area of the law, which is plainly why it was adopted by the person who drafted the Leases. It is therefore idle to suppose that it was intended that it should be interpreted as if it were free from any technical meaning. Both sides' primary contention is that the established meaning of the expression supports their case, but in the alternative they rely upon the specific terms of the Leases.

12. A number of eminent judges have criticised the term "landlord's fixtures". In *Elliott v Bishop* (1854) 10 Ex 496 at 508 Martin B described the expression as "a most inaccurate one". In *Lambourn v McLellan* [1903] 2 Ch 268 at 274 Vaughan Williams LJ said that it was "not a happy expression". In *Boswell v Crucible Steel Co* [1925] 1 KB 119 at 122 Scrutton LJ said that he had "always had a difficulty in understanding what is meant by 'landlord's fixtures'." It is generally accepted, however, and not in dispute in the present case, that "landlord's fixtures" are fixtures which are not "tenant's fixtures". It is not suggested by the Tenant that, if the doors were fixtures, they were "tenant's fixtures". Thus the real issue is whether they were "fixtures" at all.

13. The starting point when considering this issue is that every building is composed of things, such as bricks, mortar and so on, which were chattels prior to their incorporation into the building. Once incorporated into the building, however, they become part of

the land. Thus their legal status changes from being personal property to being real property.

14. At one time, the same rule applied to anything which was affixed to a leasehold property, whether by the landlord or by a tenant, with the consequence that such things became the landlord's property at the expiry of the lease even if they were originally the tenant's property. Recognition of the injustice of that rule led to the acceptance of the principle that some fixtures were removable by the tenant prior to or at the expiry of the lease (in the absence of express contractual provision to the contrary). These became known as "tenant's fixtures" (although there was at one time a debate, exemplified by the split decision of the Court of Exchequer in *Elliott v Bishop*, as to whether so-called "trade fixtures" were the same as or different to "tenant's fixtures"; on appeal in that case, the Court of Exchequer Chamber in *Bishop v Elliott* (1855) 1 Ex 119 did not find it necessary to distinguish between the two).

15. In *Elitestone Ltd v Morris* [1997] 1 WLR 687 at 691 Lord Lloyd of Berwick, with whom Lord Browne-Wilkinson, Lord Nolan and Lord Nicholls of Birkenhead agreed, approved the three-fold classification set out in *Woodfall, Landlord and Tenant* as follows:

> "An object which is brought onto land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land. Objects in categories (b) and (c) are treated as being part of the land."

In that case, however, the issue was whether a bungalow or chalet was a chattel or had became part of the land, and therefore their Lordships did not need to dwell upon the distinction between categories (b) and (c).

16. For present purposes, the most relevant guidance is to be found in three decisions at this level of the judicial hierarchy.

17. In *Climie v Wood* (1868-69) L.R. 4 Exch 328 Willes J delivering the judgment of the Court of Exchequer Chamber (consisting of himself, Keating, Blackburn, Mellor, Montague Smith, Lush, Hayes and Brett JJ) said at 329-330:

> "There is no doubt that sometimes things annexed to land remain chattels as much after they have been annexed as they were before. The case of pictures hung on a wall for the purpose of being more conveniently seen may be mentioned by way of illustration. On the other hand, things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An example of this class of chattel may be found in doors or windows. Lastly, things may be annexed to land, for the purposes of trade or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land; and yet the tenant who has erected them is entitled to remove them during his term, or, it may be, within a reasonable time after its expiration."

18. In *Lambourn v McLellan* the Court of Appeal was concerned with the scope of a yielding-up covenant under which the tenant was required to deliver up the demised premises at the end of the term, together with "all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stoves, marble and other chimney-pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves and all other erections, buildings, improvements, fixtures, and things which are now or which at any time during the said term hereby granted shall be fixed, fastened, or belong to" the demised premises. The issue was whether machinery brought onto the premises by the tenant for the purposes of his business and fastened by screws or nails to the floor or walls was captured by this provision.

19. Vaughan Williams LJ said at 274 that "the things particularly enumerated in the covenant ending in the word 'shelves'" (which included "doors") are "all such as are generally described as 'landlord's fixtures'". As counsel for the Tenant pointed out, however, that statement was obiter. The Court decided the case by applying the *ejusdum generis* canon of construction in the manner in which it had previously been applied in this context in *Bishop v Elliott*: see Vaughan Williams LJ at 275-276, Romer LJ at 277-278 and Cozens-Hardy LJ at 278. Furthermore, *Climie v Wood* was not cited.

20. In *Boswell v Crucible Steel* the issue was whether plate glass windows which formed part of the walls of a warehouse were "landlord's fixtures" within the meaning of a repairing covenant. The Court of Appeal held that the windows were not "landlord's fixtures", but formed part of the original structure of the building.

21. Bankes LJ said at 122:

> "It is impossible to say that windows such as these, forming part of the original structure of the house, are landlord's fixtures."

22. Scrutton LJ said at 122:

> "… it seems to me clear that ['landlord's fixtures'] cannot include a thing which forms part of the original structure of the building. It must be regarded as confined to things which have been brought into the house and affixed to the freehold after the structure is completed."

23. Atkin LJ said at 123:

> "A fixture, as that term is used in connection with a house, means something which has been affixed to the freehold as accessory to the house. It does not include things which were made part of the house itself in the course of its construction. And the expression 'landlord's fixtures,' as I understand it, covers all those chattels which have been so affixed by way of addition to the original structure, and were so affixed either by the landlord, or, if by the tenant, under circumstances in which they were not removable by him. As these windows were part of the original structure, representing the walls of the house, so that without them there would be nothing that could be described as a

> warehouse at all, they cannot come under the head of landlord's fixtures."

24. I would add two points. First, although none of the judges referred to *Climie v Wood* despite it being cited in argument, the decision is consistent with the dictum of Willes J in that case quoted above. Secondly, for what it is worth, part of the passage from the judgment of Atkin LJ which I have quoted was cited with apparent approval by Lord Lloyd in *Elitestone v Morris* at 690-691.

25. I should mention for completeness that counsel for the Landlord also relied upon *Bickmore v Dimmer* [1903] 1 Ch 158, in which the Court of Appeal interpreted the scope of a covenant expressed in general terms prohibiting alterations and held that the subject matter of the covenant was limited to the structure of the demise: see Vaughan Williams LJ at 167 and Cozens-Hardy LJ at 168-169. This does not seem to me to be particularly germane to the present issue, however.

26. Having cited the passage from the judgment of Atkin LJ in *Boswell v Crucible Steel* set out above, the Upper Tribunal reasoned as follows:

> "43. The respondent seeks to distinguish *Boswell v Crucible Steel* on the facts. In *Boswell*, the windows were part of the structure: they were in effect the walls of the building, and without walls there would be no building. Here, the respondent contends, the doors were not part of the structure of the building, and without an entrance door to an individual flat there would still be a building. The doors had been affixed to the structure, after it had been built, by way of addition by the landlord. The respondent therefore submits that the entrance doors would fall within the ordinary meaning of 'landlord's fixtures'.
>
> 44. It is important to remember that the demised premises are not the building (the block of flats) but the tenant's individual flat. Each lease is a demise of one flat only, albeit with ancillary rights granted over the building as a whole. In that context, the entrance door to the flat assumes a far greater significance, and while the door may still not be part of the structure of the flat, the absence of a door would derogate significantly from the grant of the flat. Moreover, to paraphrase Atkin LJ, the doors had been made part of the flat itself in the course of its construction. Indeed, as both parties accept, the doors were themselves part of 'the Demised Premises' within the terminology of the lease."

27. Counsel for the Landlord repeated the submission that the present case was to be distinguished from *Boswell v Crucible Steel*. I agree with the Upper Tribunal, however, that it is indistinguishable. The entrance doors in the present case were part of the original structure of the flats. Moreover, they were an essential part of the structure, since they afforded privacy and security to the tenant(s). It is no doubt true that the doors were affixed to the walls (via door frames) by hinges after the walls were built, but that is immaterial. No one would say that the construction of a flat was complete if the entrance door had not yet been hung. I think this is what the Upper Tribunal meant

by the statement that "the absence of a door would derogate significantly from the grant of the flat".

28. Counsel for the Landlord also argued that, in the specific context of the Leases, the purpose of clause 3(4) was to enable the landlord to control changes to the flats, and that it was consistent with that purpose to interpret "landlords fixtures" as extending to the entrance doors since that would enable the landlord to maintain commonality of appearance and safety. He also pointed out that the control conferred by clause 3(4) was not absolute, since by virtue of section 19(2) of the Landlord and Tenant Act 1927 the landlord was required not be unreasonable in withholding consent. I am not persuaded by this argument. The relevant part of clause 3(4) is the promise not "to remove any of the landlords fixtures". Its purpose is limited to preventing removal of "landlords fixtures" without the landlord's consent. While one can well understand that a landlord might wish to have control over the replacement of external doors, this part of clause 3(4) is not apt for that purpose once it is concluded that an external door is part of the demised property and not a fixture. Whether other provisions in the Leases might be apt for that purpose is not an issue which is before this Court.

29. Having reached the conclusion that the Upper Tribunal was correct to hold that the doors were not "landlords fixtures", it is not necessary to consider the Tenant's argument, which the Upper Tribunal accepted, that this conclusion is supported by a comparison between clause 3(4) and clause 4(1). Nor is it necessary to consider the issue raised by the Tenant's respondent's notice.

Conclusion

30. For the reasons given above I would dismiss this appeal.

Lord Justice Birss:

31. I agree.

Lord Justice Henderson:

32. I also agree.