

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/00HB/LBC/2008/0002

REASONS

Application : Section 168(4) Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”)

Applicant/Landlord : Bishop’s Knoll Management Company Limited (“the Company”)

Respondent/Leaseholder : Mr Andrew Bradbury and Mrs Christine Bradbury

Building : Bishops Court, Bishops Knoll, Sneyd Park, Bristol, BS9 1NS

Premises : Flat 24 in the Building

Lease : the lease of the Premises dated the 6 December 1996 and made between the Company (1) Benson Bros (Bristol) Limited (2) and Kevin George Stephen Carson and Sarah Louise Hobday (3)

Date of Application : 21 January 2008

Date of Hearing : 17 March 2008

Venue : Conference Room, Whitefriars, Lewins Mead, Bristol, BS1 2NT

Attendances on behalf of the Applicant/Landlord : Mr Richard Gore (Gregg Latchams WRH), Mr Simon Hodges (Easton Bevins), Mr Joseph Kenneth Richardson (Flat 8 Bishops Court), and Mrs Christine Elizabeth Byrne (Flat 16 Bishops Court)

Attendances on behalf of the Respondent/Leaseholders : Mr and Mrs Bradbury

Members of the Leasehold Valuation Tribunal : Mr P R Boardman JP MA LLB (Chairman), Mr T N Shobrook BSc FRICS, and Mr J Mills

Date of Tribunal’s Reasons : 27 March 2008

Introduction

1. This Application by the Applicant/Landlord is under section 168(4) of the 2002 Act, namely for a determination that a breach of a covenant or condition in the Lease has occurred
2. The Tribunal gave written directions on the 25 January 2008
3. The hearing of the application took place on the 17 March 2008

Documents

4. The documents before the Tribunal are the :
 - a. application and supporting documents re-numbered 1 to 136 by the Tribunal
 - b. Respondent/Leaseholder's statement and supporting bundle of documents re-numbered 137 to 211 by the Tribunal
 - c. quotation dated 27 July 2007 from DHS
 - d. quotation dated 17 August 2007 from British Gas
 - e. statement from Mr Richardson
 - f. statement from Mrs Byrne
5. References in these reasons to page numbers are to the Tribunal's page numbering

Inspection

5. The Tribunal inspected the Building on the morning of the hearing on the 17 March 2008. Present were Mr Gore, Mr Hodges, Mr and Mrs Bradbury, and (during the inspection of Flat 16 Bishops Court only) Mrs Byrne
6. The Building was a 3-storey block of flats, with a tiled roof. It was of 1970's appearance. It was part of an estate of 3 blocks, the other 2 blocks being Woodland Court, and Orchard Court. A site plan is at page 11. The estate was laid to grass at front and rear of the blocks
7. Flat 24 was the top-floor flat at the right-hand, or north-eastern, end of the Building. The Tribunal inspected the kitchen. In the northern corner was a boiler, fixed to the rear, or north-western wall. A flue pipe at the top of the boiler exited through the rear wall. From the rear balcony of Flat 24 the flue pipe could be seen to return diagonally up the rear wall in a north-easterly direction and to protrude approximately 50 cm beyond the right-hand gable wall of the Building. About 20 cm of the 50 cm protruded beyond the eaves. There were 2 small pipes below the exit of the flue, which Mr Bradbury said were for condensation and overflow, respectively. There was evidence of a small area of new brickwork below the exit of the flue, which Mr Bradbury said was where the previous flue exit hole had been made good
8. Also visible from the balcony were the flue vents for the ground and first floors flats immediately below Flat 24, being respectively white and dark and which the parties informed the Tribunal were new and original, respectively

9. The Tribunal noted that the protrusion of the flue was visible to someone looking upwards from the front or rear of the Building down the gap between the Building and Orchard Court, but that it was soon lost to view or not noticeable on moving a short distance to either side of the gap
10. Mr Hodges showed us Flat 12 Orchard Court, which was also a top-floor flat in a corresponding position in Orchard Court to that of Flat 24 in Bishops Court, but which Mr Hodges said had a new kitchen with a new boiler venting straight out through the rear wall without a plume management kit
11. Mr Hodges also showed us Mrs Byrne's Flat (16 Bishops Court), which was a first floor flat with a boiler on the right-hand wall but with a flue returning to vent out of the rear wall. Mr Bradbury drew to the Tribunal's attention that this was a first-floor flat, and that the venting arrangement was not constrained by the eaves

The Lease

12. The Lease is copied at pages 7 to 21
13. For the purposes of these proceedings the material parts of the Lease are as follows :

Clause 1

"the Premises" means the premises hereby demised and more particularly described in the First Schedule hereto

First schedule

The Premises

All that Flat.....together with all drains pipes wires ducts and conduits used solely for the purposes of the said Flat.....except and reserving the main structural parts of the Building.....including the roof window frames foundations and external parts thereof but not the glass in the windows nor the interior facers of the external walls.....

Fifth schedule

Covenants by the Lessee with the Company

Paragraph 7

The Lessee shall pay all expenses.....properly incurred by the Company incidental to the preparation and service of any notice under sections 146 and 147 of the Law of Property Act 1925.....

Paragraph 14

The Lessee shall not make.....any additions or alterations to the Premises except with the prior consent in writing of the Company and in accordance with plans elevations sections and specifications previously approved in writing by the Company.....

Paragraph 15

The Lessee shall not do.....in or upon the Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Company or to the owner or occupier of any other Flat or to neighbouring owners or whereby any insurance.....may be rendered void or voidable or whereby the premium may be increased and shall pay all.....expenses incurred by the Company in abating a nuisance in obedience to a notice served by any competent authority

Preliminary and procedural matters

14. Mrs Bradbury objected to the admission in evidence of the statements of Mr Richardson and Mrs Byrne. They had been served on the afternoon of the Friday 3 days before the hearing, which was not in accordance with the Tribunal's directions, and had given Mr and Mrs Bradbury no time to prepare
15. However, after having considered those submissions and submissions from Mr Gore, the Tribunal found that Mr and Mrs Bradbury would not be prejudiced by the late submission of the statements, in that :
 - a. the statements were relatively short
 - b. Mr and Mrs Bradbury had had the weekend to consider them and had accordingly not been taken completely by surprise about the evidence contained in the statements, despite the very short notice
 - c. both Mr Richardson and Mrs Byrne had attended the hearing and Mr and Mrs Bradbury would be able to cross-examine them
 - d. the Tribunal would expect Mr Richardson and Mrs Byrne simply to adopt their statements and not to give any extra evidence-in-chief
 - e. the Tribunal would allow Mr and Mrs Bradbury a short time during the hearing to prepare their cross-examination if they needed it
16. The Tribunal allowed the statements to be admitted accordingly
17. The Tribunal indicated to the parties that the issues before the Tribunal appeared to be as follows :
 - a. whether there had been an "alteration" for the purposes of paragraph 14 of the Fifth Schedule to the Lease, in relation to which :
 - Mr Gore said that pipes and internal wall faces were part of the definition of "Premises" in the First Schedule to the Lease, Mr and Mrs Bradbury had altered the pipes to the boiler, they had made a new hole in the wall and had bricked up the previous hole
 - Mr and Mrs Bradbury agreed that these were "alterations" for the purposes of paragraph 14 of the Fifth Schedule to the Lease
 - this was not therefore an issue before the Tribunal
 - b. whether there had been any written consent or written approval to plans for the purposes of paragraph 14 of the Fifth Schedule to the Lease, in relation to which Mr and Mrs Bradbury agreed that there had not, so that this, again, was not in fact an issue before the

Tribunal

- c. whether there had been any other form of consent or approval by the Applicant/Landlord
- d. whether there had been a breach of paragraph 15 of the Fifth Schedule to the Lease
- e. whether there had been a breach of the Applicant/Landlord's covenants in the Lease or a trespass by Mr Richardson and Mrs Byrne in entering Flat 24 without Mr and Mrs Bradbury's consent; however, the Tribunal indicated that the Tribunal's jurisdiction under section 168 of the 2002 Act was limited to considering the question of breaches of covenant by a tenant, and that the Tribunal had no jurisdiction to consider questions of breaches of covenant by a landlord or questions of trespass
- f. whether the Tribunal should make an order that the Applicant/Landlord's costs of this application should not be recoverable from Mr and Mrs Bradbury under paragraph 7 of the Fifth Schedule to the Lease; however, again, the Tribunal indicated that the Tribunal had no jurisdiction to make such an order

Statement of Mr Hodges 18 January 2008 (pages 2 to 4)

- 18. Mr Hodges stated that in July/August 2007 Mr and Mrs Bradbury had had a new boiler installed, which had involved the installation of a new flue. The flue extended out of the wall and under the eaves. It was totally out of keeping with the flues of other flats on the estate. It did not fit in with the appearance of the Building. It was unacceptable to the Applicant/Landlord as it aesthetically detracted from the look of the Building. Photos were at pages 23 to 24
- 19. Mr Bradbury had written to one of the directors of the Applicant/Landlord on the 18 July 2007 (page 26) requesting authority for a new boiler but had not clarified that the flue would be constructed in the manner it had been. Full disclosure had not been made, and there had been no approval in writing, in breach of paragraph 14 of the Fifth Schedule to the Lease
- 20. No other flat in the estate had installed a flue of that type. It was quite possible for a much smaller, discrete flue to have been fitted as had happened with all the other flats, as shown in the photographs
- 21. It was causing a nuisance and inconvenience to the Applicant/Landlord in breach of paragraph 15 of the Fifth Schedule because it fundamentally affected the aesthetics of the Building. It was an eyesore
- 22. The Applicant/Landlord had tried to resolve the matter, but Mr and Mrs Bradbury had only shortened the flue by about 4 inches, and had refused to install a flue which was more in keeping with the estate

Joint statement of Mr and Mrs Bradbury 9 March 2008 (pages 138 to 150)

23. Mr Bradbury stated that following their letter dated the 18 July 2007 requesting approval to the installation of the boiler, they left chasing telephone messages for both Mr Richardson (director) and Mrs Byrne (chairman and director)
24. On about the 17 August 2007 Mr Bradbury met Mr Richardson at Mr Richardson's flat for about one and a quarter hours. They spoke at length about the boiler installation. Both Mr Richardson and Mrs Byrne had recently installed new boilers. Mr Bradbury showed Mr Richardson the quotations he had received from DHS and British Gas. Mr Richardson compared the quotations with the price he had paid. He called Mrs Byrne who came over with details of the cost of her boiler installation. They were fully aware of Mr and Mrs Bradbury's proposed installation. At no time did they say that Mr and Mrs Bradbury should not go ahead with the installation or that they should await written approval or that they should submit any plans or drawings to them as directors of the Applicant/Landlord. Mr Bradbury and Mr Richardson then walked out through Mr Richardson's patio doors. Mr Bradbury explained that as their flat was on the top floor, they were constrained by the overhanging eaves, and that both DHS and British Gas had indicated that their boiler flue would have to be routed along the wall and project from the corner of the Building and thereby vent out to the side, as in the photographs at pages 205 and 206, because recent more stringent Building Regulations required a clearance of the flue of 200 mm from the lowest point of the overhanging eaves. Mr Richardson did not give any indication that this would be an issue, and did not request any further explanation or information. However, Mr Richardson was adamant that the flue should not be white, but should be black or brown as the directors thought that the white flues recently installed by other residents on replacing their boilers were an eyesore
25. They heard nothing further from the directors
26. On the 8 October 2007 DHS began the installation of the boiler. The flue came out of the top, whereas the flue of the old boiler had come out about a third of the way down. This meant cutting a new hole in the wall. Mr and Mrs Richards had installed a similar boiler with a flue in a corresponding position in Flat 20 Bishops Court, on the ground floor immediately below Flat 24. Their flue was white, as shown in the photograph at page 207
27. Unlike Mr and Mrs Richards, however, the location of Mr and Mrs Bradbury's flue had to be 200 mm below the lowest point of the eaves, which required a plume management kit, specially designed for such purposes, to vent the boiler to the gable end of the building
28. Mr and Mrs Bradbury's new boiler installation was finished on the 12 October 2007. The photographs at pages 205 to 206 showed the flue as anyone looking towards their flat would see it, rather than a "zoomed-in" photograph as on page 23, which was not representative of how an onlooker would see it

29. Mrs Byrne telephoned on about the 10 October 2007 to say that she was unhappy about the brickwork and pipe, and that the flue should be removed immediately

30. Mr Hodges's letter dated the 12 October 2007 (page 171) stated that the Applicant/Landlord had been aware of the work being undertaken but that the directors had not expected the flue to be routed along the rear wall and project from the corner of the Building, that the flue looked unsightly, and that the brick repairs had not been carried out neatly. The letter confirmed that the Applicant/Landlord understood the need for the flue to be routed horizontally to avoid being too close to the eaves

31. Mr and Mrs Bradbury's reply dated the 22 October 2007 (pages 173 and 174) explained about the positioning of the boiler and flue, disagreed that the flue was unsightly, pointed out that none of their neighbours looked directly out over the flue, suggested that the directors' reaction was disproportionate and unreasonable, but agreed to ensure that gaps would be made good if the brickwork round the new flue hole could be improved with matching bricks or mortar

32. Letters from Mr Hodges dated the 29 October 2007 (page 175) and 31 October 2007 (page 176) suggested adjusting their work surface and repositioning their boiler lower down the wall as other flat owners had done

33. Mr and Mrs Bradbury responded on the 1 November 2007 (pages 177 to 180) that :
 - a. using the old boiler flue hole was not a viable option
 - b. DHS would agree to reduce the projection of the flue by 4 inches
 - c. Mr and Mrs Richards of Flat 20 Bishops Court had not requested written approval to their boiler installation work, although they had verbally kept the directors aware
 - d. Mr Maddicks of 12 Orchard Court had not requested written approval to his boiler installation work, although he had verbally kept the directors aware

34. Mrs Byrne's "Chairperson's report" (pages 192 to 193), which was read out at the Applicant/Landlord's AGM on the 15 November 2007, stated that ".....Because there have been some problems [about replacing a boiler] in future could I remind you that any work of this nature can only be carried out by applying in writing to the Management Company, and permission can only be given when the application is accompanied by detailed description of what you would like to do, including diagrams if necessary. This is outlined in the Fifth Schedule of the Underlease. In the past residents have sometimes written and sometimes simply asked by word of mouth. For the most part this has worked; witness all the windows which have been replaced with the approved design : these look good and maintain the homogenous whole – unlike a diversity of plastic frames which would devalue the site. Since problems have arisen, we shall need to put things on a more definitive basis"

35. On the 21 November 2007 Mr and Mrs Bradbury met the Applicant/Landlord's directors and representatives of Easton Bevins. The directors acknowledged that Mr and Mrs Bradbury had not wilfully disregarded the Lease, as was evidenced by their using the preferred installer when installing new windows throughout their flat. The directors indicated that "there had been a misunderstanding". Mr Richardson confirmed that he recalled the meeting and conversation with Mr Bradbury on about the 17 August, but he must have misunderstood Mr Bradbury. The remedial work in painting the pipe brown was acceptable, but the flue could not remain in its current position
36. The directors suggested an alternative internal routing for the pipe, but this would be unattractive and disproportionately expensive
37. On the 17 December 2007 (page 195) Mr and Mrs Bradbury wrote to the directors confirming that DHS had now shortened the protruding flue by some 4 inches

DHS quotation 27 July 2007

38. DHS stated that the existing boiler would be replaced with a combination boiler/water heater fitted with a fanned flue which would terminate through the outside wall to rear with "plume management kit" fitted, and stated that a plume of water vapour would be discharged from the flue where it terminated from the Building. It also stated that the "existing flue hole will be made good to a render finish"

British Gas quotation 17 August 2007

39. British Gas included a provision for a "standard horizontal flue"

Mr Richardson's statement

40. Mr Richardson stated that Mr Bradbury approached him to inform him that he was installing a boiler and was interested in discussing suppliers and costs. They had a friendly discussion. He inspected Mr Richardson's installation. Mr Richardson showed him the standard exhaust fitting on Mr Richardson's external wall which projected about 100 mm and was fitted throughout the estate. Mr Bradbury remarked that it had to vent to the side, but the configuration, size and length of the exhaust pipe were never discussed. Mr Bradbury made no indication that the pipe would run along the wall and project beyond the building, or that it would look any different from others on the estate. Mr Richardson asked him to ensure that the exhaust was black or brown, since that was the only problem they had previously encountered

41. At no time did Mr Richardson envisage anything like the resulting installation

42. A similar top-floor gable-end flat had previously installed a standard exhaust fitting through the gable-end wall

Mrs Byrne's statement

43. Mrs Byrne stated that she had not replied to Mr and Mrs Bradbury's letter dated the 18 July 2007 immediately because she had been away on holiday

44. She had later joined the meeting between Mr Richardson and Mr Bradbury to show him the quotation which she had received for a similar boiler. No mention was made of the pipe going along the back of the Building. Of course they did not object to their changing their boiler, but they had no intimation of the resulting installation

45. Mr and Mrs Bradbury could alter the installation in more than one way

46. The Management Company's action was to uphold the architectural integrity of the site. This was an unacceptable modification which would create a precedent

Mr Richardson's oral evidence

47. Mr Richardson simply adopted his statement

48. The Tribunal adjourned the hearing for some 15 minutes to enable Mr and Mrs Bradbury to consider their cross-examination of the Applicant/Landlord's witnesses

49. In cross-examination Mr Richardson said that when he had referred in his statement to Mr Bradbury remarking that it had to vent to the side, they had been outside looking at the vent for Mr Richardson's flue. Mr Richardson had not appreciated what "venting to the side" meant

50. The reference in his statement to a similar top-floor flat might have been to Mr Maddicks in a corresponding position in Orchard Court

51. He and Mr Bradbury had chatted for about one and a half hours, but did not spend the whole of that time discussing the new system. Mr Bradbury showed him a copy of the DHS quote. He looked at the final figure. Mr Richardson was not a heating engineer and did not notice anything in the quote to ring any alarm bells. The expression "plume management kit" in the third paragraph meant nothing to him. He assumed it was just a pipe from the boiler to the outside

vent. He did not read the words in the second paragraph “existing flue hole will be made good to a render finish” to mean that there would be a new flue hole, but simply to mean that the pipe would go through the existing hole and that rendering would be carried out round it, just as Mr Richardson’s own new boiler installation had done. He did not know whether Mr Maddicks had needed a new flue hole or had used the existing one. He had not been aware of Mr Maddicks’s installation of a new boiler at all

52. In re-examination Mr Richardson said that he had first become aware of the full extent of what Mr and Mrs Bradbury’s new installation looked like when a neighbour had asked him to come to look at it. He had not consented to what had now been installed

Mrs Byrne’s oral evidence

53. Mrs Byrne simply adopted her statement

54. Mr and Mrs Bradbury said that they did not need any more time and were ready to proceed with cross-examination

55. In cross-examination Mrs Byrne said that she had been at the meeting with Mr Richardson and Mr Bradbury for about 30 minutes. She did not go out on the patio with them. She was mainly discussing how much her new boiler had cost compared with the quotes which Mr Bradbury had received

56. She had referred in her statement to upholding the architectural integrity of the site because a lot of people considered the present pipe unsightly and because it would create a precedent for others to install white plastic windows, put blinds up, and enclose balconies. However, on further questioning, Mrs Byrne conceded that the only flat in a corresponding position on the estate was Mr Maddicks’s flat 12 Orchard Court

57. Mrs Byrne had written a letter to Mr Maddicks consenting to his installation, but she had not kept a copy of her letter to him, and, although she thought that she had kept his application for consent, she was not sure. She was surprised at the assertion put to her in cross-examination that Mr Maddicks had told Mr and Mrs Bradbury that Mr Maddicks had not asked for consent

58. In re-examination Mrs Byrne said that Mr Richardson had not said anything to her after the meeting with Mr Bradbury about Mr and Mrs Bradbury’s installation looking as it did now. All he had mentioned was that Mr and Mrs Bradbury’s quote was at a considerably lower price than Mr Richardson and Mrs Byrne had both paid to British Gas. They had only discussed the meeting casually. Nothing had seemed unusual with the proposal. There had not been any problems with previous boiler installations. Mrs Byrne had first been aware of the current extent

of the protrusion when a neighbour had told her about it. The neighbour referred to it as being like a stove pipe on a caravan. When Mrs Byrne saw it she thought that it was not something for which she had given consent on behalf of the Applicant/Landlord

Mr Hodges's oral evidence

59. Mr Hodges simply adopted his statement

60. In cross-examination Mr Hodges said that he did not have on file any consents to boiler installations for Mr and Mrs Richards or Mr Maddicks, even though he was company secretary of the Applicant/Landlord and he had taken over on the 1 July 2007 and had received hand-over files. He had not received at the time a copy of Mr and Mrs Bradbury's application letter dated the 18 July 2007 because such applications had normally been dealt with in the past by the directors, who had given verbal consent. Mr Hodges agreed with the suggestion put to him that everyone who had carried out alterations in the past without written consent was in breach of their leases. Mr and Mrs Bradbury had broken their leases in a fundamental way. He did not agree that those who had installed white flues rather than black or brown had broken their leases in such a fundamental way because they had simply been replacing one flue with another of the same type. Mr and Mrs Bradbury's flue was causing a nuisance because, unlike the other new flues, it had altered the character of the Building

61. He had not been aware of the satellite dish on the gable end at Woodland Court of which there was a photo on page 210, nor whether consent had been granted for it, as it had been erected before his firm had started managing the estate, but he agreed in principle with the suggestion put to him in cross-examination that a satellite dish could alter the aesthetic appearance of a block. The bird feeder of which there was a photo at page 211 was not a nuisance. It was a removable object. The question whether it needed permission to put it there depended on the terms of the lease

62. Mr and Mrs Bradbury's pipe aesthetically detracted from the Building despite being under the eaves and in shadow because it protruded from the side of the Building. They had had complaints about it. The complaints had not been disclosed in the documents before the Tribunal. There had been about 3 complaints, but the directors might have received more which Mr Hodges did not know about

63. In answer to a question from the Tribunal, Mr Hodges said that he did not know whether Mr Maddicks's flue complied with Building Regulations

64. In re-examination Mr Hodges said that in addition to aesthetically detracting from the estate, Mr and Mrs Bradbury's installation of their pipe would allow others to alter the Building in any way they liked

Mr and Mrs Bradbury's oral evidence

65. Mr and Mrs Bradbury adopted their statement. Mr Bradbury added that he was sure that Mr Maddicks's flue complied with Building Regulations because it had been installed by a Corgi engineer
66. In cross-examination Mrs Bradbury said that she was an employment lawyer. She was keen on detail, like any lawyer. When she had written the letter of the 18 July 2007 requesting consent she had expected the directors to come back to her with consent and with recommendations for a suitable engineer. When pressed in cross-examination about whether she had been expecting consent in writing she said that she had not read her lease before writing her letter. She had expected the directors to tell her if anything else was needed, such as diagrams. She had not necessarily been expecting a written response because she had been in touch with the directors and understood that everything was dealt with informally. She was quite happy with that, and was looking to the directors to guide her
67. Mr Bradbury said that when he gave copies of the DHS and British Gas quotes to Mr Richardson Mr Bradbury did know what a "plume management kit" was. He explained to Mr Richardson that the flue would come out above the existing hole, traverse the wall, and exit beyond the gable end. He had not explained it to Mrs Byrne as well because she had only been present for a short time and had simply been showing him her bill. He did not realise that he should have spoken to both of them. He was speaking to a director. He expected the directors to give them guidance if anything further was needed. As far as he was concerned he had given the directors all the information about the proposed flue
68. The DHS quote referred to the flue venting at the side where it referred to the plume management kit. DHS and British Gas explained it to Mr Bradbury, and he explained it to Mr Richardson
69. Mr Gore started to ask questions about possible alternative methods of configuring the kitchen and the boiler, but the Tribunal indicated that those questions were perhaps relevant to hypothetical questions such as whether it was reasonable to withhold consent, but were not relevant to the questions before the Tribunal
70. Mr Bradbury said that they had based their installation on Mr Richardson having given informal consent. Mr and Mrs Bradbury had not wished to upset anyone, but understood that consent was always given informally. They had given sufficient details for that informal consent to be informed consent
71. In answer to questions from the Tribunal Mr Bradbury said that he thought that the date when

they were given consent was on the 17 August 2007 at the meeting with Mr Richardson after Mr Bradbury had explained everything to him. Mr Bradbury had first been aware that there would have to be a new hole and a new pipe configuration when DHS came round on the 27 July 2007 and explained it to him. They had wanted British Gas to do the job, but their quote was too expensive. Although British Gas stated in their quote that there would be a standard horizontal flue, they had said on site that the vent would have to go out at the side

72. They had installed the boiler and flue in good faith and in the belief that they had the Applicant/Landlord's permission to do so

Submissions

73. The Tribunal adjourned the hearing for some 20 minutes to allow Mr and Mrs Bradbury to consider their submissions

74. After that adjournment the Tribunal indicated to the parties that the Tribunal's preliminary view, subject to submissions on the point, was that the boiler installation had been an alteration for the purposes of paragraph 14 of the Fifth Schedule to the Lease, that the installation had been carried out without the Applicant/Landlord's written consent and without written approval to drawings, and that accordingly, on the face of it, there had been a breach of covenant by the Respondent/Leaseholders in that respect

75. Mr and Mrs Bradbury had no contrary submissions in relation to that indication

76. However, in relation to the issue of other forms of consent, and in relation to paragraph 15 of the Fifth Schedule to the Lease, Mrs Bradbury submitted that :

- a. they thought that they had explained the nature of the installation, and that it would vent out to the side
- b. they thought that they had received consent
- c. they had not set out to flout the terms of the Lease
- d. Mr Richardson had said at the meeting in November 2007 that there had been a misunderstanding
- e. the requirement for written consent in paragraph 14 of the Fifth Schedule to the Lease had been waived by the Applicant/Landlord in relation to the moving of flue holes by other tenants such as Mr and Mrs Richards (20 Bishops Court) and Mr Maddicks (12 Orchard Court)
- f. there was then no problem if the directors of the Applicant/Landlord liked what they saw
- g. Mr and Mrs Bradbury believed that their flue was not a nuisance or an eyesore
- h. it was a subjective assessment

- i. no other top-floor flat had a kitchen configured like Mr and Mrs Bradbury's, so no precedent had been set

77. Mr Gore submitted that :

- a. on the face of it there was a breach of paragraph 14 of the Fifth Schedule to the Lease
- b. the onus had been on Mr and Mrs Bradbury to obtain written consent
- c. they had set out to do that when writing their letter dated the 18 July 2007
- d. they had been fully aware of the need for written consent, and should have obtained it before carrying out the work
- e. if Mr and Mrs Bradbury were right that consent could be given in some other way then they would have to show that there was a history of informed informal consent to other tenants
- f. Mr Bradbury was now saying that Mr Richardson gave him verbal consent at the meeting on the 17 August 2007
- g. however, Mr and Mrs Bradbury did not say that in their statement, and have never said that Mr Richardson gave express consent
- h. at best, their case was that they had explained the full details of the proposed installation and that they had then relied on neither Mr Richardson nor Mrs Byrne voicing any objection
- i. however, Mr Richardson's evidence was that the full details had not in fact been explained to him, and his evidence should be preferred to that of Mr Bradbury in that respect because :
 - it was unlikely that Mr Richardson would have agreed in advance to the flue protruding as it now did, since it altered the external appearance of the Building
 - Mr Bradbury's own evidence was that he did not explain all the details to Mrs Byrne when she was present
 - the onus was on Mr and Mrs Bradbury to give full details in order to obtain informed consent
 - Mr and Mrs Bradbury did not say in their written statement that Mr Richardson had expressly given consent
 - the British Gas quote was ambiguous and the reference in the DHS quote to a plume management kit was far from clear in that it was not apparent from its description what a plume management kit was and that it did not say that the flue would project beyond the eaves
 - consent could only be relied on if it had been based on all the facts, whereas the facts were not all available at the meeting
 - both Mr Richardson and Mrs Byrne had given evidence that the first time that they had been aware of what had been proposed was after it had been installed
 - their adverse reaction on first seeing what had been installed was evidence that they

had not known the details in advance

- j. so far as paragraph 15 of the Fifth Schedule to the Lease was concerned, the flue was a nuisance and inconvenience
- k. it noticeably affected the aesthetics of the estate by sticking out
- l. it was visible from the road
- m. it was not comparable to a bird feeder or TV aerial, both of which were removable
- n. if Mr and Mrs Bradbury were allowed to install the pipe without consent it would create a precedent, and not just in relation to the other top-floor flat which had had a similar kitchen configuration, but would open the floodgates to anyone to make any alteration without consent
- o. there was a continued risk in that respect despite the contents of Mrs Byrne's Chairperson's report in November 2007

The Tribunal's findings

Paragraph 14 of the Fifth Schedule to the Lease

78. The Tribunal finds, as indicated to the parties at the hearing, that

- a. the boiler installation involved new pipes and a new hole in the exterior brickwork, and accordingly constituted an alteration for the purposes of paragraph 14 of the Fifth Schedule to the Lease
- b. the installation was carried out without the Applicant/Landlord's written consent and without written approval to drawings
- c. there was a breach of covenant by the Respondent/Leaseholders in that respect accordingly

79. In relation to the question whether any other form of consent was given, the Tribunal finds that :

- a. the Respondent/Leaseholders requested consent for a new boiler installation in their letter dated the 18 July 2007
- b. Mr Bradbury met Mr Richardson on about the 17 August 2007 to discuss the installation
- c. Mrs Byrne joined the meeting for a short while, but only to discuss the cost in the context of the price she had paid for her new boiler installation, and she did not take part in any discussion about the detail of Mr and Mrs Bradbury's new system
- d. Mr Bradbury showed Mr Richardson the quotes from DHS and British Gas
- e. the reference in the DHS quote to "existing flue hole will be made good to a render finish" was, contrary to Mr Richardson's assertion in cross-examination, a clear indication that the new flue pipe would exit the wall by a new hole, and that the existing hole would be made good

- f. however, the reference in the DHS quote to a “plume management kit” was not itself clear, and did not itself expressly or impliedly inform Mr Richardson that the flue pipe would protrude beyond the eaves
- g. the reference in the British Gas quote to a standard horizontal flue was itself not clear, and did not itself expressly or impliedly inform Mr Richardson that the flue pipe would bend after exiting the external wall and would return along that wall and protrude beyond the eaves
- h. Mr Bradbury explained to Mr Richardson at the meeting that the new flue had to vent to the side, but, having considered all the evidence and submissions before the Tribunal in the round, the Tribunal is not persuaded that :
 - Mr Bradbury at any time expressly explained to Mr Richardson that the flue pipe would protrude beyond the eaves
 - the explanation that it was to vent to the side of itself impliedly informed Mr Richardson that the flue pipe would protrude beyond the eaves
- i. there is no evidence before the Tribunal that Mr Richardson expressly consented to Mr and Mrs Bradbury’s boiler installation
- j. it was nevertheless reasonable for Mr and Mrs Bradbury to believe that the Applicant/Landlord had impliedly consented to the boiler installation, to the flue pipe exiting through a new hole in the external wall, and to the flue venting to the side, in that the Tribunal finds that :
 - Mr Richardson, being aware of the written application for consent, the quote from DHS, and Mr Bradbury’s statement that the flue pipe would vent to the side:
 - did not object to the proposals
 - asked Mr Bradbury to ensure that the exhaust was black or brown
 - there is evidence before the Tribunal of other tenants on the estate having installed new boilers in the past, with, in some cases, a flue pipe of a different style and colour from the original and exiting the external wall through a different hole from the original
 - there is evidence before the Tribunal that the Applicant/Landlord has in the past informally consented to those installations without insisting on prior written consent or on prior written approval to drawings
- k. however, it was not reasonable for Mr and Mrs Bradbury to believe that the Applicant/Landlord had impliedly consented to the flue pipe protruding beyond the eaves, in that the Tribunal is not persuaded, for reasons already given, that it had been made clear in advance to anyone on behalf of the Applicant/Landlord that that would be the case
- l. despite that finding, the Tribunal is not persuaded that Mr and Mrs Bradbury wilfully disregarded the terms of their Lease, in that the Tribunal finds that there is no evidence before the Tribunal that Mr and Mrs Bradbury were themselves aware in advance that the flue pipe would protrude beyond the eaves, despite Mr Bradbury’s evidence that he knew the nature of a plume management kit

Paragraph 15 of the Fifth Schedule to the Lease

80. The Tribunal has taken account of the evidence and submissions on behalf of the Applicant/Landlord that some people consider the present pipe unsightly, and that the Applicant/Landlord regards Mr and Mrs Bradbury's flue as unacceptable, as aesthetically detracting from the look of the Building, as fundamentally affecting the aesthetics of the Building, as an eyesore, as visible from the road, as not in keeping with the estate, and as adversely affecting the architectural integrity of the site
81. The Tribunal has also taken account of the evidence that :
- a. Mrs Byrne had received an adverse comment from a resident
 - b. Mr Hodges had received about 3 complaints, and did not know whether others had complained to the directors
82. However, the Tribunal reminds itself that the behaviour at which paragraph 15 of the Fifth Schedule to the Lease is expressed to be aimed is that the *Lessee will not do ... in or upon the Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Company or to the owner or occupier of any other flat or to neighbouring owners or whereby any insurance.....may be rendered void or voidable or whereby the premium may be increased*
83. In relation to the new flue hole in the external wall and the bricking up and making good of the old flue hole, the Tribunal finds that :
- a. the fact that the new flue pipe exits the external wall through a different hole is not in itself a matter which is capable of being a breach of paragraph 15 of the Fifth Schedule to the Lease
 - b. in any event, there is evidence before the Tribunal of other tenants on the estate having installed new boilers in the past, with, in some cases, a flue pipe of a different style and colour from the original and exiting the external wall through a different hole, and that the Applicant/Landlord has in the past informally consented to those installations
 - c. there is no evidence before the Tribunal either that the Applicant/Landlord regards the standard of bricking up and making good of the original flue hole to be unsatisfactory, or indeed that it is unsatisfactory, or that the resulting appearance is a breach of paragraph 15 of the Fifth Schedule to the Lease
84. In relation to the flue pipe returning diagonally up the face of the rear wall, the Tribunal finds that this part of the flue pipe :
- a. can be seen only from the rear of the Building
 - b. complies with the colour requirements specified by Mr Richardson at the meeting on

about the 17 August 2007

- c. is different from other flue pipes on the estate, but not so different as to be a breach of paragraph 15 of the Fifth Schedule to the Lease

85. In relation to the protrusion of the flue pipe beyond the eaves, the Tribunal finds that :

- a. in December 2007 Mr and Mrs Bradbury arranged for the protrusion of the flue pipe to be shortened by some 4 inches
- b. it nevertheless still protrudes more than other the flue pipes to which the Tribunal's attention was drawn during the Tribunal's inspection
- c. the protrusion is visible to someone looking upwards from the front or rear of the Building down the gap between the Building and Orchard Court, but is soon lost to view or is not noticeable on moving a short distance to either side of the gap
- d. Mr Richardson and Mrs Byrne became aware that the flue pipe protruded beyond the eaves only after a call to Mrs Byrne by another resident
- e. the evidence of complaints from residents is unpersuasively vague and lacking in detail and insufficient in itself to persuade the Tribunal that the protrusion of the pipe beyond the eaves was (before its shortening in December) or now is (after its shortening) regarded by residents as a breach of paragraph 15 of the Fifth Schedule to the Lease
- f. the photographs at pages 205 and 206 are more representative of the present appearance of the protrusion of the flue pipe to an onlooker than the photographs at page 23
- g. having considered all the evidence before the Tribunal in the round, and having viewed the protrusion during the Tribunal's inspection, the Tribunal finds that the protrusion is unsightly, but not so unsightly as to be a breach of paragraph 15 of the Fifth Schedule to the Lease

86. In relation to the suggestion on behalf of the Applicant/Landlord that the Respondent/Leaseholders' actions in carrying out alterations without consent would create a precedent and "open the floodgates" for other tenants to do likewise, the Tribunal finds that :

- a. there is evidence before the Tribunal that the Applicant/Landlord has in the past informally consented to alterations without insisting on compliance with the Lease requirements for written consent
- b. Mrs Byrne's Chairperson's report in November 2007 made it clear that in future the strict Lease requirements would have to be adhered to
- c. the "floodgates" argument adds no weight to the Applicant/Landlord's case accordingly

Summary of Tribunal's findings

87. A breach of the Respondent/Leaseholders Lease has occurred in that they made alterations to the Premises without first obtaining written permission from the Applicant/Landlord and without

first obtaining written approval to drawings contrary to paragraph 14 of the Fifth Schedule to the Lease

88. However, a court, in any action for damages, forfeiture, or an injunction, may wish to take the following findings of the Tribunal into account :
- a. it was reasonable for the Respondent/Leaseholders to believe that the Applicant/Landlord had impliedly consented to the boiler installation, to the flue pipe exiting through a new hole in the external wall, and to the flue venting to the side
 - b. it was not reasonable for Respondent/Leaseholders to believe that the Applicant/Landlord had impliedly consented to the flue pipe protruding beyond the eaves
 - c. nevertheless :
 - Mr and Mrs Bradbury did not wilfully disregard the terms of their Lease
 - the whole installation, including the protruding flue pipe, is not so unsightly as to amount to a breach of paragraph 15 of the Fifth Schedule to the Lease

Dated the 27 March 2008



.....
P R Boardman
(Chairman)

A Member of the Tribunal
appointed by the Lord Chancellor