Tenant's Self-help Remedy to Enter and Repair

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The article examines the tenant's self-help remedy to enter onto his landlord's premises by means of an implied licence in order to carry out repairs which are the landlord's responsibility and deduct the cost from the rent.

We are all reasonably familiar with the legal remedies available to a tenant who finds his landlord in breach of his repairing obligations under the lease. Apart from the obvious remedy of damages, the tenant may have resort to an order for specific performance or, in more extreme cases, seek to terminate the contract of letting where the landlord is guilty of a repudiatory breach.

By way of self-help, the tenant may opt, alternatively, to do the repairs himself and deduct the cost from current or future rent. On being sued for unpaid rent by the landlord, the tenant will be able to rely on his own counterclaim against the landlord for breach of the landlord's repairing covenant as effecting a complete defence by way of an equitable set-off to the claim for rent: *British Anzani (Felixstowe) Ltd v International Maritime Management (UK) Ltd* [1980] QB 137. In addition, the tenant has a common law right to deduct the repairing cost from the rent where, having given notice to the landlord, the tenant carries out the repairs which are the landlord's responsibility: *Lee-Parker v Izzet* [1971] 1 WLR 1688.

What, however, has remained an interesting question is whether the remedy of self-help entitles the tenant, in appropriate circumstances, to enter onto his landlord's premises by means of an implied licence to effect the repairs which the landlord should have carried out pursuant to his repairing obligations.

Earlier case law

An early statement of principle is to be found in *Bond v Nottingham Corporation* [1940] 1 Ch 429, involving easements of support to adjoining buildings, where Sir Wilfred Greene MR stated, at 438-439:

> " . . . the owner of the dominant tenement is not bound to sit by and watch the gradual deterioration of the support constituted by his neighbour's building. He is entitled to

> enter and take the necessary steps to ensure that the support continues by effecting repairs, and so forth, to the part of the building which gives the support."

It is clear from the above cited passage that the dominant owner does not commit a trespass by entering onto his neighbour's building to effect the necessary repairs; the entry is lawful by reason of an implied licence arising from the parties' mutual rights of support. It appears, however, that the principle is not confined to cases where the disrepair is such that it threatens continued support to the dominant owner's premises. In *Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd* [1959] 1 Ch 592, at 608, Jenkins LJ stated that a landlord has an implied licence to enter upon demised premises for the purpose of performing his covenant to repair: see also, *Saner v Bilton* (1878) 7 Ch D 815, at 824, on the same point. Jenkins LJ said:

> "The [landlord] must be reasonable in the exercise of his licence to enter and (as I think) give the tenant sufficient notice of his intention to enter, and information as to the nature and extent of the work he proposed to carry out. On his part, the tenant must not unreasonably obstruct the landlord in the exercise of his right of entry for the purpose of doing the work . . ."

Clearly, if such a licence can be implied in the landlord's favour, there seems no reason why a corresponding right should not, in an appropriate case, be implied in favour of the tenant when the entry is to do the necessary works under the landlord's obligation to repair. Indeed, this was judicially recognised in *Loria v Hammer* [1989] 2 EGLR 249, albeit only at first instance. In that case, the tenant had been unsuccessful in making the landlord carry out his repairing obligations and so executed the necessary remedial works at her own expense. The main problem lay with the flat roof of an extension, on part of which water tanks were placed, the remainder forming a patio. Rainwater entered the house through cracks in the asphalt under the tanks in the tank housing, which caused severe penetration of water into the claimant's flat below. There was also considerable dampness and the growth of dry and wet rot as a result. In the course of his judgment, Mr John Lindsay QC (sitting as a deputy judge of the High Court) alluded to the action of the tenant in carrying out the remedial works herself as probably not amounting to a trespass but an entry under an implied licence onto the landlord's premises. In so doing, the learned judge found the decision in *Bond*, mentioned earlier, a "helpful analogy" and concluded that, even if there was a technical trespass committed by the tenant, this would not, of itself, bar the tenant's right to recover substantial damages from the landlord for breach of his repairing obligations. It was stressed that the landlord had made no complaint at the time the works were being carried out by the tenant that they represented a potential trespass. Moreover, it was apparent that, far from harming the landlord's property, the works had positively improved the premises. In those circumstances, the deputy judge concluded by attaching "no weight to the defence based on the allegation that there can be no recovery of the costs of works because the works were in the course of a trespass": ibid, at 259.

Implied licence to enter and specific performance

In *Loria*, however, the deputy judge also made reference to the observations of Sir John Pennycuick V-C in *Jeune v Queens Cross Properties* [1974] Ch 97, where the tenants of various flats sought specific performance of their landlord's covenant to maintain a balcony situated outside the areas demised as flats. In the course of his judgment, the Vice-Chancellor appears to have accepted that, notwithstanding that the landlord was in breach, it would have been a trespass for the tenants to have done the works themselves: ibid, at 100. According to the deputy judge in *Loria*, however, the Vice-Chancellor "plainly did not see the fact that it could have been a trespass as precluding the tenants from lawfully doing the works, as, at p.99F-G, he indicated that a mandatory order was more convenient 'than an order for damages leaving it to the individual plaintiffs to do the work'". The upshot, therefore, according to the deputy judge, was that *Jeune* was not preclusive of an implied licence to enter in favour of tenants and that the Vice-Chancellor's remarks regarding a trespass were concerned only with demarcating the general boundaries of a decree of specific performance rather than with specific aspects of landlord and tenant law.

Guidance

In *Metropolitan Properties Co Ltd v Wilson* [2002] EWHC 1853 (Ch), the landlord sought various interim injunctions restraining the tenants from, inter alia, trespassing on the landlord's premises by permitting scaffolding to remain on the exterior of the building. The tenants argued, by way of defence, that there was a long history of the landlord failing to carry out repairs in accordance with its obligations under the lease and that they had engaged their own contractors to carry out the required works, who had erected scaffolding on the building. As such, there was no trespass because the tenants were simply availing themselves of their right of self-help and that, at most, the landlord should be left to a remedy in damages in lieu of any injunction to restrain a trespass.

Significantly, Etherton J held that the remedy of self-help might, in appropriate circumstances, entitle a tenant to the benefit of an implied licence to enter onto his landlord's premises in order to effect repairs which were the landlord's responsibility. On the facts, however, his Lordship concluded that the tenants had no prospect of establishing at trial that they had been acting under such a licence. The scaffolding has been erected without warning or any prior notice to the landlord. Moreover, the scaffolding has gone up at a time when the tenants had not entered into any contract for the carrying out of the external works, nor had they even entered into negotiations or tenders for the work. Indeed, there had been no consultation between the residents of the building as to the selection of any contractors. Finally, the landlord's proposed scheme for the external works had already been largely agreed and instructions to the landlord's builders already given to proceed with the works. In view of the fact that (both in relation to internal and external works) a proper tendering process had been completed by the landlord, as well as the requisite notification and consultation procedures pursuant to the framework of the Landlord and Tenant Act 1985, the

tenant's action in proceeding to erect their own scaffolding was high-handed and inappropriate. In the words of Etherton J, at [62]:

> "Whatever may have been the experience of the [tenants] in the past, in relation to the conduct of the [landlord], I have, as I have said, no reason on the evidence to regard the contactors engaged by the [landlord] for the carrying out of the external and internal works as incompetent or unlikely to carry out the works efficiently or to a reasonable standard in accordance with their contractual obligations and their tenders."

His Lordship went on to point that, if the landlord's contractors did not carry out their works in a proper manner, any subsequent service charge imposed by the landlord in consequence of the works could be challenged in the normal way in accordance with the statutory procedures laud down under the 2985 Act. Moreover, it was relevant that the tenants had not pursued any of their remedies apart from self-help, namely, the appointment of a receiver or manager of the building, an order for specific performance, a challenge to the reasonableness of past service charges, or enfranchisement of the building. In addition, his Lordship was conscious that to sanction the tenant's actions would mean permitting the carrying out of works in relation to which there had been neither consultation nor agreement with the landlord. It would be odd for the court to impose the cost of the tenants' works on the landlord without giving it the opportunity to participate in the selection of the proposed contractor and the specification and terms of the building contract. No doubt, the tenants would seek (at a later date) to deduct the cost of their works from the subsequent service charges imposed by the landlord. This would inevitably have the effect of reversing the contractual rights and obligations of the parties and constitute a negation of the statutory framework imposed by the 1985 Act. This, taken together with the other aspects of the case, pointed clearly in favour of the landlord's injunctions being granted.

Conclusion

It seems that the courts will be prepared to uphold a tenant's right to enter upon the landlord's premises to carry out repairs within the landlord's repairing covenant provided that the landlord is given adequate notice of the tenant's works. It will be incumbent on the tenant to disclose the contract or specification for the repairs so as to give the landlord the opportunity for consultation and approval. If the landlord is already engaged in a tendering process himself and has initiated the statutory machinery laid down under the 1985 Act, it may prove very difficult for the tenant to argue that his entry on the landlord's property was justified. This may be so regardless of whether there has been a previous history of neglect and failure to repair. Moreover, the tenant should first consider whether other legal remedies are open to him to ensure compliance with the landlord's obligations. Ultimately, whether or not the court will be persuaded to hold that the tenant acted under an implied licence from the landlord will depend on a wide range of factors. The mere fact that the premises are in urgent need of

repair will not entitle the tenant to "steal a march" (ibid, *Wilson*, at [72]) on the landlord and oblige him to accept and unwarranted intrusion onto his property.

The law is stated as at 7 December 2022.