Landlord and tenant update

Richard Gold, St John's Chambers

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[References in square brackets are to paragraph numbers in the judgments.]

Gulf Agencies Limited v Ahmed [2016] EWCA Civ 44

1. **Date of decision**: 3 February 2016

2. **Court**: Court of Appeal

3. **Issue**: In resisting a tenant's application for a new tenancy, what does a landlord need to show in order to be able to rely on section 30(1)(g) of the Landlord and Tenant Act 1954 ("the 1954 Act") (own occupation)?

4. **Facts**: The appellant landlord was a practising solicitor. He was also the sole owner and director of a company which carried on a mini-cab business.

5. Three properties formed the background to the case:
   - 60 Bell Street, London – rented premises from where the landlord practised as a solicitor.
   - 220 Edgware Road, London – premises, held under a licence, where the landlord's mini-cab business was based.
   - 210 Edgware Road, London – freehold premises owned by the landlord.

6. The case concerned the ground floor and basement of 210 Edgware Road, which pursuant to an oral lease the landlord let to the tenant, the respondent to the appeal.

7. The landlord served a section 25 notice giving notice of termination of the tenancy. Having initially opposed a new tenancy both under section 30(1)(f) (demolition and reconstruction) and under section 30(1)(g) (own occupation), the landlord subsequently sought to rely only on the latter ground.

8. The tenant brought proceedings for the grant of a new tenancy.

9. The landlord's case was that he intended to vacate 60 Bell Street and 220 Edgware Road, and to occupy 210 Edgware Road for the purposes of both his solicitor's practice and his mini-cab business.

10. The trial judge held that the landlord had not established his entitlement to rely on section 30(1)(g).

11. The landlord appealed against that decision.

12. **Decision**: Under section 30(1)(g) of the 1954 Act, it is necessary to show: "subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence".

13. In short, the landlord had to show that he intended to occupy the premises for the purposes of a business to be carried on by him at the premises [7].

14. The Court of Appeal quoted from *Humber Oil Terminals Trustee Limited v Associated British Ports* [2012] EWCA Civ 596. There were two elements to intention:

- Subjective intention. Did the landlord have a fixed and settled desire to do that which he intended to do?

- Objective intention. Did the landlord have a reasonable prospect of being able to bring about his desired result?

15. There were three issues in the Court of Appeal [10]:

- Issue 1: Subjective intention.
- Issue 2: Objective intention.
- Issue 3: Apparent bias.

16. Issue 1: Subjective intention

The landlord's case was that for economic reasons he wanted to run his solicitor's practice and mini-cab business from 210 Edgware Road, premises which he already owned. This made more economic sense than continuing to pay for his occupation of 60 Bell Street and 220 Edgware Road.

17. The tenant's case was that the landlord was lying: the landlord had no intention of occupying the premises for the purposes of his own businesses; the landlord wanted possession because he did not like the tenant or because he wanted to sell the premises.

18. At trial the tenant relied on various matters to challenge the truthfulness of the landlord's evidence:

- There was no evidence of how the premises would be adapted for use as a solicitor's office and/or a mini-cab office. How would the premises be shared? Would clients of the legal practice have to walk through the mini-cab office [17]?
- Different versions of the lease at 60 Bell Street and the licence agreement at 220 Edgware Road had been put forward. The versions relied on by the landlord (which had earlier termination dates) had not been produced until trial. The tenant contended that these latter versions had been concocted with the landlord's knowledge [18].
- The landlord gave evidence in an evasive and argumentative manner [19].

19. The trial judge accepted the tenant's submissions about the first point (lack of evidence as to how the premises would be adapted) and the third point (the manner in which the landlord had given evidence).

20. As to the tenant's second point (the different versions of the lease and licence), the trial judge said that he found "the whole thing extremely confusing" [30] and continued:

> "It is usually done as a deliberate act of obfuscation to put a smoke screen up but it really is impossible to say how this arose. It may be that somebody else had reason to interfere with this documentation, the landlord for example. It cannot be automatically said that it is the defendant [i.e. the appellant landlord] who did it, but the reality is he produced these contradictory documents and they are unsatisfactory in the sense that it is not clear when he can leave either of the sets of premises. I cannot go any further but it cannot help the defence case when the documents are totally unsatisfactory, as they are."

21. The trial judge added that the only way to resolve the issue would have been to call each of the landlords of the relevant premises to give evidence to explain the contradictions [31].

22. The Court of Appeal held that, on what was a critical part of the case, the trial judge had made no clear findings [32]. Although the trial judge effectively found that the landlord was lying, he pulled back from making any express findings to that effect.

23. More generally, the Court of Appeal said that the trial judge had not addressed the central issue in the case [36]:

- The judgment gave the impression that the central issue was whether the landlord had formed some wish, short of a firm intention, to occupy the premises for the purposes of his solicitor's practice and mini-cab business.

- In fact, the central issue was whether the landlord genuinely wanted possession in order to run his business from the premises or whether he was seeking to recover possession so as either to remove the tenant whom he did not like or to sell the property.

24. The task of the trial judge was to decide whether he believed the landlord and, if he did not believe him, to state clearly his reasons.

25. Although the judgment implies that the judge did not believe the landlord, there was no express finding to that effect and no clear reasons for that conclusion [37]. This was unacceptable not only to the landlord but also to the tenant. A clear finding of dishonesty would have given the tenant strong grounds for applying for indemnity costs.

26. The trial judge's conclusion on subjective intention could not stand [38].

27. Issue 2: Objective intention

The Court of Appeal quoted from *Gatwick Parking Services Limited v Sargent* [2000] 2 EGLR 45, which referred to two earlier decisions of the Court of Appeal [39]:

- "In my judgment it is essentially an objective test, that is to say, would a reasonable man, on the evidence before him, believe that he had a reasonable prospect of being able to bring about his occupation by his own act of volition?" (*Gregson v Cyril Lord Limited* [1963] 1 WLR 41).
- Where the landlord needs planning permission: "A reasonable prospect in this context accordingly means a real chance, a prospect that is strong enough to be acted on by a reasonable landlord minded to go ahead with plans which require planning permission as opposed to a prospect that should be treated as merely fanciful or as one that should be sensibly ignored by a reasonable landlord. A reasonable prospect does not entail that it is more likely than not that permission will be obtained" (*Cadogan v McCarthy & Stone Developments Limited* [1996] EGCS 94).

28. At trial it was not disputed that it would be lawful for the landlord to use the premises under Class A2 (financial and professional services) for a period of two years without the need to obtain permission from the local planning authority [40].

29. As explained in *Patel v Keles* [2009] EWCA Civ 1187, the intended occupation of the landlord "must not be fleeting or illusory" and "must be more than short term" [42]. In the present case, occupation of the premises by the landlord for the purposes of his own business for a period of up to two years would be sufficient to satisfy the objective intention requirement.

30. The final position of the trial judge on the objective element of intention was less than clear but, if he concluded that the landlord had not established a real prospect of lawful occupation for more than a short period, he was wrong [43].

31. Based on the evidence that was before the trial judge, the landlord satisfied the necessary evidential test [45].

32. Issue 3: Apparent bias

At the start of the trial the trial judge challenged whether the landlord was in fact a solicitor [47]. The trial judge said that he had carried out a Law Society search and could not find the landlord. The trial judge said that he had prosecuted a lot of swindlers when at the Bar, and was naturally suspicious of everybody.

33. It then transpired that the trial judge had searched the Law Society website under the wrong name [48]. The landlord was definitely a solicitor.

34. The landlord's ground of appeal was that the trial judge's comments at the start of the trial indicated that he had a predisposition to disbelieve the landlord before he had given evidence and showed apparent bias [52].

35. The Court of Appeal criticised the trial judge for his "jaundiced view generally of parties and witnesses at the Central London County Court" [57].

36. Nevertheless, neither the judgment nor the conduct of the trial judge after the issue of the status of the landlord as a solicitor had been cleared up demonstrated any bias or apparent bias on the part of the judge [60].

37. **Result**: The appeal was allowed. The judgment was set aside because of the trial judge's failure to address and decide the central issue (not on grounds of alleged bias). There would be a re-trial in the county court before a different judge.

38. **Practical significance**: Where a landlord seeks to show under section 30(1)(g) of the 1954 Act that he intends to occupy the premises for the purposes of a business to be carried on by him at the premises, the hurdle is relatively low:

- As for subjective intention: if the tenant's case is that the landlord is lying, the judge will need to set out clear reasons for whatever conclusion he reaches.
- As for objective intention, the landlord just has to show that he has a reasonable prospect of being able to occupy the premises for his business. Although the intended occupation must be more than short-term, two years is likely to suffice.

39. The difficulty for the tenant is that the landlord will have all or most of the available evidence.

40. The only mitigating factor for the tenant is that, if the tenant is forced to leave the premises where the landlord successfully relies on ground (g), the landlord will have to pay the tenant compensation under section 37 of the 1954 Act.

41. **Related case**: In *Hough v Greathall Limited* [2015] EWCA Civ 23; [2016] Ch 37, the Court of Appeal confirmed that, despite an amendment to section 25(6) of the 1954 Act by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, it remains the case that the question whether the landlord has formed the relevant intention for the purposes of section 30(1)(f) (demolition and reconstruction) is to be judged as at the date of the hearing. The landlord need not have the relevant intention as at the date of service of the section 25 notice. This will also be the case where the landlord seeks to rely on section 30(1)(g) (own occupation). We see here again how a landlord who seeks to rely on ground (f) or ground (g) has a relatively easy task.

Willow Court Management Company (1985) Limited v Alexander; Sinclair v 231 Sussex Gardens Right to Manage Limited; Stone v 54 Hogarth Road London SW5 Management Limited [2006] UKUT 290 (LC)

42. **Date of decision**: 21 June 2016

43. **Court**: Upper Tribunal (Lands Chamber)

44. **Issue**: In what circumstances should the First-tier Tribunal (Property Chamber) ("the FTT") award costs against a party on account of its unreasonable behaviour in bringing, defending or conducting proceedings before it?

45. **Facts**: In three cases the FTT awarded costs against a party on account of its unreasonable behaviour: rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"). The appellants appealed against those costs orders.

46. The three cases shared a number of features:

- Each case arose out of a dispute over service charges payable under the lease of a flat.

- In each case the dispute was between an individual leaseholder and a management company whose members were themselves leaseholders of flats in the same building.
- In each case the sum awarded in costs was greater than the amount of the service charges in dispute.

47. In *Alexander*, the FTT found that the management company had not properly implemented the procedure in Mrs Alexander's lease for determining service charges, and had behaved unreasonably in bringing proceedings for determination of the service charges without first having complied with that contractual procedure.

48. Costs awarded in favour of Mrs Alexander: £13,095 plus VAT.

49. Service charges disputed: £5,702.

50. In *Sinclair*, the FTT was critical of Miss Sinclair's conduct in failing to pay her service charges, in defending herself on spurious grounds which were unsupported by evidence, and in generally behaving unreasonably.

51. Costs awarded in favour of the management company: £16,800.

52. Service charges disputed: £9,767.

53. In *Stone*, Mr Stone withdrew his application for determination of the service charges shortly before the FTT was due to hear it. Given the concessions which the management company had made, the FTT criticised Mr Stone for not withdrawing his application sooner, which would have saved costs.

54. Costs awarded in favour of the management company: £2,260.80.

55. Service charges disputed: £0 (there was no hearing).

56. **Decision**: The Upper Tribunal dealt with a number of issues, including:

- The source of the FTT's power to award costs.
- What amounts to unreasonable conduct?
- Discretion.
- Unrepresented parties.
- The withdrawal of claims.
- Determination of costs applications.
- Success before the FTT in the substantive claim.
- Willingness to mediate.

57. <u>The source of the FTT's power to award costs</u>

Depending on the type of case, the FTT can make costs orders in three circumstances [13]:

- In all cases, the FTT can make an order for the payment of "wasted costs" (which are costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of a representative) – rule 13(1)(a) of the 2013 Rules.
- In agricultural land and drainage cases, residential property cases, and leasehold cases, the FTT can award costs only if a person has acted unreasonably in bringing, defending or conducting proceedings – rule 13(1)(b) of the 2013 Rules.
- In land registration cases, the power to award costs is unrestricted (other than by the overriding objective) – rule 13(1)(c) of the 2013 Rules.

58. <u>What amounts to unreasonable conduct?</u>

The standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level [24]. Unreasonable conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome [24].

59. The test could be expressed in different ways [24]:

- Would a reasonable person in the position of the party have conducted himself in the manner complained of?
- Is there a reasonable explanation for the conduct complained of?

60. For a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of his own or his opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room should not be treated as unreasonable [25]. Tribunals ought not to be over-zealous in detecting unreasonable behaviour.

61. Discretion

It is a three-stage process [28]:

- Stage 1: Has a person acted unreasonably?
- Stage 2: If so, should a costs order be made in light of that unreasonable conduct?
- Stage 3: If so, what should the terms of that costs order be?

62. It does not follow that an order for the payment of the whole of the other party's costs will be appropriate in every case of unreasonable conduct [29].

63. Stages 2 and 3 involve a discretion. The tribunal must have regard to all relevant circumstances, including the nature, seriousness and effect of the unreasonable conduct. Other circumstances will also be relevant [30].

64. Unrepresented parties

There is only one set of rules which applies both to represented and to unrepresented parties [31].

65. Nevertheless, the fact that a party acts without legal advice is relevant at stage 1 [32]:

> "The behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice. The crucial question is always whether, in all the circumstances of the case, the party has acted unreasonably in the conduct of the proceedings."

66. The fact that a party who has behaved unreasonably does not have the benefit of legal advice may also be relevant, though to a lesser extent, at stages 2 and 3 [33].

67. The withdrawal of claims

Making sensible concessions and abandoning less important points of contention or even, where appropriate, an entire claim should be encouraged, not discouraged by fear that it will lead to a claim for costs [35].

68. Determination of costs applications

Applications for costs should not be regarded as routine, should not be abused and should not be allowed to become major disputes in their own right. They should be determined summarily [43].

69. Success before the FTT in the substantive claim

Although in some cases the fact that a party has been unsuccessful before the FTT in a substantive hearing might reinforce a view that there has been unreasonable behaviour, that failure cannot be determinative on its own. The residential property division of the FTT is a costs shifting jurisdiction by exception only, and parties must usually expect to bear their own costs [62].

70. Willingness to mediate

In a relatively modest dispute, an unwillingness to mediate by a party which considers itself to have a strong case is not necessarily evidence of unreasonableness [102].

71. On the other hand, a genuine willingness to mediate, even if unreciprocated, is an example of reasonable behaviour which ought to be encouraged. If for other reasons a tribunal is considering making a costs order, a party should be entitled to credit for having offered to mediate and for having made settlement proposals [103].

72. **Result**: In all three cases, the appeals succeeded. The costs orders were set aside.

73. In *Alexander*, the FTT had accorded too much weight to the fact that the management company had lost at the substantive hearing, and it had applied a standard of unreasonableness which fell well below the applicable threshold [61].

74. In *Sinclair*, the FTT's decision was both procedurally unfair (e.g. because Miss Sinclair was not given adequate notice of the costs application) [93] and substantively unfair (e.g. because the FTT's decision related to Miss Sinclair's conduct before rather than during the proceedings [95], and because the FTT did not seem to regard the testimony of Miss Sinclair herself as evidence [97]).

75. In *Stone*, Mr Stone withdrew his claim once he had been advised that there was no benefit in continuing [140]; without knowing when he received that advice, it was impossible to conclude that he had delayed for an unreasonable period before withdrawing his claim [141].

76. **Practical significance**: It is going to be difficult to obtain costs orders at the FTT:

- Losing a case should not expose someone to a risk of a costs order. There needs to be something more to make that person's conduct unreasonable.
- Similarly, abandoning a weak claim is unlikely to lead to a costs order.
- It will be particularly hard to obtain costs orders against unrepresented litigants.

- A party which has demonstrated a willingness to mediate or made a settlement proposal is still less likely to have a costs order made against it.

77. **Related case**: In *Eclipse Film Partners No 35 LLP v Revenue and Customs Commissioners (No 2)* [2016] UKSC 14; [2016] 1 WLR 1939, the Supreme Court considered the Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009, under which the first-tier tribunal could only make two types of costs order: a wasted costs order, and an order for costs where a party has behaved unreasonably. Therefore, the tribunal did not have jurisdiction to require the revenue to reimburse half of the taxpayer's expense of the preparation of bundles: this was not a wasted costs order or an order made due to unreasonable behaviour. The case shows how costs orders in first-tier tribunals can only be made in restricted circumstances.

Edwards v Kumarasamy [2016] UKSC 40; [2016] 3 WLR 310

78. **Date of decision**: 13 July 2016

79. **Court**: Supreme Court

80. **Issue**: Can a landlord be liable under section 11 of the Landlord and Tenant Act 1985 ("the 1985 Act") even where the landlord had no notice of the disrepair?

81. **Facts**: There were two relevant leases:

- By a headlease dated 28 April 2006, the freeholder of a small block of flats let Flat 10 for a term of 199 years. The headlease was vested in the appellant landlord. The headlease gave the appellant landlord a right to use the front hall of the building and a right to use an access road (which was the only or principal means of access to the building).
- By a subtenancy dated 6 April 2009, the appellant landlord granted to the respondent tenant a tenancy of Flat 10 for a term expiring on 5 October

2009. It was an assured shorthold tenancy. The tenant had a right to use shared rights of access, stairways, communal parts, paths and drives.

82. The "access road" referred to in the headlease included a paved area between a car park and the front door to the block of flats.

83. On 1 July 2010 the tenant was taking rubbish from the flat to the communal dustbins, when he tripped over an uneven paving stone on the paved area. He suffered personal injury.

84. The tenant issued proceedings against the landlord contending that his injury was caused by the landlord's failure to keep the paved area in repair, in breach of his repairing obligations implied under section 11 of the 1985 Act.

85. The procedural history was as follows:

- The tenant won before a deputy district judge and was awarded £3,750 damages.
- The landlord won before a county court judge.
- The tenant won in the Court of Appeal.
- The landlord appealed to the Supreme Court.

86. **Decision**: There were three issues in the case [15]:

- Issue 1: Was the paved area part of the exterior of the front hall?
- Issue 2: Did the landlord have an "estate or interest" in the front hall within section 11(1A)(a) of the 1985 Act?
- Issue 3: Could the landlord be liable to the tenant for the disrepair in question notwithstanding that he had no notice of the disrepair in the paved area before the tenant's accident?

87. The tenant could only succeed if the answer to all three questions was "yes" [16].

88. Issue 1: Was the paved area part of the exterior of the front hall?

This issue arose because:

- Section 11(1)(a) of the 1985 Act requires the landlord "to keep in repair the structure and exterior of the dwelling-house".
- The flat formed part of a building.
- Section 11(1A) of the 1985 Act provides that: "If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then…the covenant implied by subsection (1) shall have effect as if—(a) the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest…".
- Therefore, section 11(1A)(a) requires section 11(1)(a) to be read as if it required the landlord "to keep in repair the structure and exterior of any part of the building in which he has an estate or interest".
- The accident happened due to a defect (an uneven paving stone) on the paved area.
- The paved area was clearly not part of the building.
- But was the paved area part of the exterior of part of the building? In particular, was the paved area part of the exterior of the front hall?

89. It was held that the paved area was not part of the exterior of the front hall [17] because:

- It is not possible, as a matter of ordinary language, to describe a path leading from a car park to the entrance door (which opens directly onto the front hall of a building) as "part of the exterior of the front hall".
- The paved area was wholly outside the building, and could not fairly be described as part of the exterior of the front hall.
- The paved area may be said to abut the immediate exterior of the front hall, but it is not part of the exterior of the front hall.
- Given that section 11 imposes obligations on a contracting party over and above those which have been contractually agreed, one should not be too ready to give an unnaturally wide meaning to any of its expressions [18].

90. Issue 2: Did the landlord have an "estate or interest" in the front hall within section 11(1A)(a) of the 1985 Act?

This issue arose because:

- Section 11(1A)(a) requires section 11(1)(a) to be read as if it required the landlord "to keep in repair the structure and exterior of any part of the building in which he has an estate or interest".
- The accident happened due to a defect on the paved area.
- Therefore, if (contrary to the Supreme Court's conclusion on issue 1) the paved area was part of the exterior of the front hall, it was still necessary to consider whether the landlord had an "estate or interest" in the front hall.

91. It was held that the landlord had an "interest" in the front hall [23] because:

- Under the headlease the landlord had a right of way over the front hall.
- Although the right of way was not an "estate", the right of way was a legal easement and therefore constituted an "interest" under section 1(2)(a) of the Law of Property Act 1925.
- Even though the landlord ceased to gain any practical benefit from the easement when he sublet the flat to the tenant, the landlord still retained his easement and hence still had an "interest" in the front hall.

92. Issue 3: Could the landlord be liable to the tenant for the disrepair in question notwithstanding that he had no notice of the disrepair in the paved area before the tenant's accident?

Subject to any express terms in the lease as to whether or not notice of disrepair is required, it is necessary to distinguish two situations:

- Where a landlord or a tenant (or anyone else) covenants to keep premises in repair, the general principle is that the covenant acts as a warranty that the premises will be in repair. Therefore, where the premises are out of repair, the covenantor is in breach even if he has no notice of the disrepair [29].

- However, as an exception to that general principle: *a landlord* is not liable under a covenant with his tenant to repair premises *in the possession of the tenant* unless and until the landlord has notice of the disrepair [30].

93. Two questions arise as to the applicability of the general principle and the exception to that principle where there is a letting of a flat:

- Where a landlord of a flat is under an obligation to repair the structure and exterior of the flat, is notice of the disrepair required? It all depends on whether the part of the structure which is out of repair is part of the demise to the tenant. The rules are applied strictly. Therefore, if the relevant part of the structure is excluded from the demise (i.e. is not in the possession of the tenant), the general principle applies: no notice is required. If the relevant part of the structure is included in the demise (i.e. is in the possession of the tenant), the exception applies: notice is required [39].
- Where a landlord covenants with one tenant to repair the structure but lets part of that structure to another tenant, is notice of disrepair of that part required? The answer is that the general principle applies: notice of the disrepair is not required. The logic for this is that the exception to the general principle only applies where the relevant tenant is in possession of the part of the premises out of repair: where the tenant is in a position to know of the disrepair, the landlord should not be liable until the tenant gives notice of the repair. However, where the relevant tenant is not in possession of the part of the premises out of repair, no notice is required [42].

94. The next question is: does section 11 of the 1985 Act always require notice? The answer is "no". Notwithstanding the view taken in Dowding & Reynolds, *Dilapidations: The Modern Law and Practice*, the covenant implied by section 11 is to be interpreted in the same way as any other landlord's repairing covenant. Therefore, if the property out of disrepair is in possession of the landlord, the

general principle applies: notice is not required. If the property out of disrepair is in possession of the tenant, the exception applies: notice is required [46].

95. The final question is: how do the rules apply to the paved area? The paved area:

- was not in the possession of the landlord or the tenant;
- was property over which the landlord and the tenant each had a right of way.

96. The Supreme Court held that the landlord was not liable until he had notice of the disrepair [49]. This was because:

- During the term of the subtenancy, the landlord had effectively disposed to the tenant his right to use the front hall and paved area (just as the landlord had disposed to the tenant his right to use and occupy the flat).
- During the term of the subtenancy, it was the tenant who (along with the tenants of the other flats) used the common parts, such as the front hall and the paved area.
- Therefore, the tenant had the best means of knowing of any want of repair in the common parts, and it was right that the landlord should not be liable until the tenant gave him notice of the disrepair [52].

97. In summary, the tenant's ability to know of the disrepair is the crucial factor:

Location of part in disrepair	**Is tenant able to know about disrepair?**	**Must the landlord have notice of the disrepair before the landlord can be liable?**
Within demise to tenant	Yes	Notice required
Outside demise; within possession of landlord	No	Notice not required
Outside demise; within property sublet to another tenant	No	Notice not required

Outside demise; within property over which tenant has right of way	Yes	Notice required

98. **Result**: Although the tenant was successful on issue 2 (the landlord had an "interest" in the front hall):

- the landlord was successful on issue 1 (the paved area was not part of the exterior of the front hall);
- the landlord was successful on issue 3 (the landlord could not be liable without notice of the disrepair).

99. Therefore, the landlord was not liable for the disrepair which caused the tenant's injury, and the Supreme Court allowed the landlord's appeal. [60].

100. **Practical significance**: A tenant who has notice of disrepair would be well advised to give notice of that disrepair to the landlord, and thereby avoid any debate about whether any notice is in fact required. (This will not assist a tenant who has no notice of the disrepair before he suffers an accident. It seems unlikely that the tenant knew of the uneven paving stone before he tripped over it.)

101. **Related case**: *Sternbaum v Dhesi* [2016] EWCA Civ 155 was another personal injury claim against a landlord. However, this time the claimant who suffered the injury was not the tenant but a person who had an interest in the tenant company. Hence, the claim was brought not under section 11 of the 1985 Act but under section 4 of the Defective Premises Act 1972 ("the 1972 Act").

102. The claimant slipped and fell as she walked up a set of stairs which had no bannister. The Court of Appeal held that the claim failed. The claim did not

come within section 4 of the 1972 Act because the premises were not in disrepair:

- The walls and stairs themselves were apparently sound. There was nothing wrong with the floor covering.
- Although the lack of a bannister made the stairs a hazard, this did not amount to disrepair. There was no bannister at the start of the lease. The landlord was not under an obligation to improve the premises or make them safe.

Riverside Park Limited v NHS Property Services Limited [2016] EWHC 1313 (Ch)

103. **Date of decision**: 27 July 2016

104. **Court**: Chancery Division, Leeds District Registry (Judge Saffman)

105. **Issue**: Has a tenant which leaves partitioning and other items in the premises failed to give vacant possession in accordance with a break clause?

106. **Facts**: A tenant of commercial premises duly gave six months' notice that it wished to rely on a break clause. The lease provided that a notice would only be effective to determine the lease:

> "If the Tenant gives vacant possession of the Premises to the landlord on or before (24 September 2013)".

107. It was common ground that at the break date there were present on the premises the following items (which had been brought onto the premises by the tenant after the start of the lease):

- A large amount of partitioning.
- Kitchen units.
- Floor coverings.

- Window blinds.
- An intruder alarm.
- Water stand pipes within a large meeting room.

108. The claimant landlord contended that the defendant tenant had failed to yield up the premises with vacant possession and hence that the break notice was ineffective. The landlord sought a declaration that the lease had not come to an end and that the tenant should comply with its continuing obligations under the lease, including the obligation to pay rent.

109. The tenant contended that the lease had come to an end because the tenant had given vacant possession. The basis of the defence was that the items left at the premises were tenant's fixtures which the tenant was not obliged to remove in order to give vacant possession.

110. Alternatively, the tenant contended that, if the items were chattels, their presence did not negate the fact of vacant possession because their presence did not substantially prevent or interfere with the landlord's right to possession.

111. **Decision**: There were three main issues in the case [14]:

- Issue 1: Were the items left at the premises chattels or tenant's fixtures?
- Issue 2: If the items were chattels, then does their existence in the premises at the break date mean that vacant possession was not given?
- Issue 3: If the items were tenant's fixtures, was the tenant still obliged to remove the items in order to give vacant possession?

112. <u>Issue 1: Were the items left at the premises chattels or tenant's fixtures?</u>
The judge quoted from *Hellawell v Eastwood* (1851) 6 Ex 295 at 311 [26]:

> "whether the machines when fixed were parcel of the freehold…is a question of fact depending on the circumstances of each case and principally on two considerations: first, the mode of annexation to the soil

or fabric of the house and the extent to which it is united to them, whether it can be easily removed, integre, salve and commode or not without injury to itself or the fabric of the building; secondly on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling…or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel."

113. The second test is more important, in light of the move away from considering an article to be part of the land simply because it was affixed to it [28-29].

114. The parties were agreed that, if the items were fixtures, they were tenant's fixtures rather than landlord's fixtures [31]. The question was whether they were chattels or fixtures.

115. The judge concluded that the partitions were chattels because:

- They were standard demountable partitions [52].
- The partitions were held in place by screw fixings affixed to the raised floor and suspended ceiling: they could be removed without injury to themselves or the fabric of the building (the first test in *Hellawell*) [52].
- As to the object and purpose of the annexation (the second test in *Hellawell*), the configuration of the partitioning was unique. It resulted in a series of small offices that is not what prospective tenants generally want. The object of the partitioning was to benefit the tenant rather than afford a lasting improvement to the premises. The very fact that the tenant chose to erect demountable partitioning and not to affix the partitioning to the structure shows that it was seen by the tenant as temporary [53].
- Paragraph 25-13 of *Dowding and Reynolds on Dilapidations: the Modern Law and Practice 2013-2014* says that: "freestanding demountable partitions fixed only by brackets and screws would, in an appropriate case, be held to remain chattels" [54].

116. For similar reasons (e.g. the ease with which they could be removed), the kitchen units, the floor coverings, the window blinds, the intruder alarm and the water stand pipes were all chattels [59-61].

117. Issue 2: If the items were chattels, then does their existence in the premises at the break date mean that vacant possession was not given?

The presence of the chattels in the premises at the break date meant that vacant possession was not given because:

- The partitions were "an impediment which substantially prevents or interferes with the right of possession" (*Cumberland Consolidated Holdings v Ireland* [1946] KB 264 per Lord Greene MR) [63].
- The director of the landlord company gave unchallenged evidence that the configuration of the partitions did not make the premises an attractive proposition for prospective tenants [64].

118. Although the items other than the partitions may not have frustrated vacant possession, the tenant's case "is only as strong as its weakest link" [65]. In other words, the presence of the partitions was fatal to the tenant's claim to have given vacant possession: the other items left at the premises were irrelevant.

119. Issue 3: If the items were tenant's fixtures, was the tenant still obliged to remove the items in order to give vacant possession?

Although the judge held that the items left at the premises were chattels, the judge briefly considered what consequences would follow if (contrary to the judge's view) the items were in fact tenant's fixtures.

120. The consequences that would follow if the items were in fact tenant's fixtures depended very much on the terms of the lease and of a licence for alterations entered into on the same day as the lease.

121. The tenant argued that, if the partitions were tenant's fixtures, they had therefore been incorporated into the premises. Hence, there was no obligation to remove them in order to give vacant possession [69].

122. However, the judge held that, even if the items were tenant's fixtures, the tenant was still obliged to remove the items in order to give vacant possession because:

- The lease did not incorporate the partitioning into the definition of the "Premises" [77] because, among other reasons, the lease specifically excluded from the definition of "Premises" items that were tenant's fixtures.
- Even if the partitioning was part of the "Premises", clause 5.7 of the licence for alterations created a specific obligation on the tenant to reinstate the premises to the condition that they were in before the tenant had undertaken any works [87].

123. **Result**: The items left at the premises were chattels. The tenant failed to give vacant possession. The break was ineffective.

124. **Practical significance**: A tenant which seeks to rely on a break clause should make sure that it complies strictly with the terms of the break clause:

- The break clause may require the giving of vacant possession, or there may be other requirements, e.g. for there to be no rent arrears.
- There may be disastrous consequences for a tenant which unsuccessfully tries to rely on a break clause. In this case, a failure to undertake work worth a few thousands of pounds meant that the tenant was liable for rent of £111,766.50 at the date of the issue of the claim (and no doubt more by the time of the trial).

125. From a landlord's point of view, it may be useful for a director or employee to give evidence as to how the condition in which the tenant has left the premises is likely to make them unattractive for prospective tenants. However,

the landlord should not remarket the premises: the landlord's case will be that the premises are not free to be remarketed because the lease is still extant.

126. **Related case**: *South Essex Partnership University NHS Foundation Trust v Laindon Holdings Limited* [2016] EWCA Civ 377 was a dilapidations case. An agreement for a lease had provided for a substantial programme of "tenant's fitting out works". These works were carried out at the tenant's expense but by contractors engaged by the landlord. The works included the lifting, cleaning and re-installation of tiled carpets.

127. The Court of Appeal held that:

- Though re-laid at the tenant's cost, the carpet tiles were landlord's fixtures or chattels, rather than tenant's fixtures or chattels. The carpet tiles had belonged to the landlord prior to their removal and reinstatement. Following the refurbishment, much the largest part of the carpeting system consisted of refurbished carpet tiles rather than new carpet tiles.
- The carpet tiles were fixtures rather than chattels, since they were probably glued to the floors. (This is consistent with paragraph 25-17 of *Dowding and Reynolds on Dilapidations: the Modern Law and Practice 2013-2014*, which states that carpets "are unlikely to be held to have become fixtures unless some more permanent method of attachment, such as adhesive, is used".)

Richard Gold
St John's Chambers
richard.gold@stjohnschambers.co.uk
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