D70-OX-0288

IN THE COUNTY COURT AT OXFORD

Before:

RECORDER BERKLEY QC

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Between:

OXFORD CITY COUNCIL

Claimant

- and -

DR STEFAN PIECHNIK

Defendant

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- -

Justin Bates (instructed by **Knights plc**) for the **Claimant**
Joshua Dubin (instructed by **Hedges Law Ltd**) for the **Defendant**

Hearing date: 31 July 2019

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JUDGMENT

The Claimant

1. The Claimant is a local housing authority and the freehold owner of Plowman Tower, Westland Drive, Headington, Oxford, a 15-storey building built in the 1960s, comprising some 85 flat dwellings.

2. Following the introduction of the Housing Act 1980 (now Housing Act 1985), Plowman Tower was used by the Claimant to provide social housing but some of the flats were sold to tenants under the Right to Buy Scheme. Whilst most of the flats are occupied by secure tenants, there are currently some 16 long leaseholders whose title is derived from the Right to Buy Scheme.

3. Plowman Tower is one of five residential tower blocks, which have been the subject of a scheme of major works ("**the Major Works**") recently undertaken by the Claimant. It is the carrying out of the Major Works, against the wishes of the Defendant and others, which has given rise to the dispute between the parties.

The Defendant

4. The Defendant is an engineer and a postdoctoral scientist at Oxford University. In 2016 he was appointed an Associate Professor of Biomedical Imaging at the University.

5. In September 2012, the Defendant purchased the leasehold interest in 57, Plowman Tower ("**the Premises**") and is the registered proprietor of the leasehold estate. The Premises comprise a 2 bedroom flat, situated on the 10th floor of Plowman Tower. By his purchase, the Claimant became the successor in title of the original lessee, who had exercised his right to buy. The Defendant is therefore one of the 16 long leaseholders. The Premises are conveniently situated for the Defendant's workplace, he enjoys the commanding views and is otherwise congenial for his purposes.

6. According to his witness statement, at the time of his purchase, the Defendant was concerned about the extent of his potential service charge liability and in that context discussed with his solicitors the distinction between repair and improvement.

The FTT

7. In January 2016, the Claimant served notice of an intention to undertake qualifying works and estimated the service charge per flat at £44,462.04. In response and alarmed by the intended charge, the Defendant, and others, formed an interest group, the Oxford Tower Block Leaseholders' Association, of which the Defendant was, for a time, Chairman.

8. The Oxford Tower Block Leaseholders' Association instructed solicitors, who wrote to the Claimant objecting to the leaseholders having to pay, purportedly under the service charge provisions, for works which they regarded as improvements rather than repairs.

9. The Defendant was actively involved from the start and I note that, in addition to the Oxford Tower Block Leaseholders Association's solicitor's letter dated 5 February 2016, the Defendant, himself, made detailed submission, dated 7 February 2016. The Claimant responded to the objections on 29 February 2016 and the issues raised by the Oxford Tower Block Leaseholders' Association were referred to the First-tier Tribunal (Property Chamber) ("**FTT**").

10. The FTT has issued a number of decisions including:-

    (1) The Decision dated 7 September 2016;
    (2) The Decision on Preliminary Legal Issues dated 27 February 2017; and
    (3) The Final Decision dated 4 October 2017.

The Claim

11. As part of its interest in undertaking the Major Works, the Claimant repeatedly requested from the Defendant access to the Premises, including by a solicitor's letter dated 12 May 2017. The Defendant was not willing to grant access to the Claimant.

12. On 5 July 2017, the Claimant issued the present action, being a claim seeking an injunction to compel the Defendant to give access to the Premises and to permit the performance of the Major Works.

13. The Claimant's claim is set out in the Particulars of Claim and an application for an injunction was made supported by the first Witness Statement of William David Graves, the Claimant's Landlord Services Manager.

14. The first return date was on 24 July 2017, when the matter came before Recorder Auerbach. The Claimant was then represented, as now, by Justin Bates of counsel; and the Defendant appeared unrepresented.

15. The Claimant's application for an injunction order was compromised by the parties providing undertakings and it being recorded that the parties' agreement to enter into the undertakings and disposing of the application was "*without prejudice to any other legal rights or remedies in these or any other proceedings*". On that basis the Claimant's application was adjourned generally to be struck out if not restored within 12 months.

16. The Claimant provided, inter alia, a typical cross-undertaking in damages but also undertook not to rely on the order as establishing any liability for the payment for any of the works. The Defendant, for his part, undertook that, for a period of 9 months, he would allow defined access to the Premises and permit the performance of the works identified in Schedule 3 to the Order.

17. On 14 November 2016, the Claimant commenced works at Plowman Tower and the Major Works were substantially completed by July 2018.

18. On 19 July 2018 the Defendant applied to the Court to reinstate the Claim and wished to serve a Defence and make a Counterclaim.

19. By an order dated 8 August 2018, District Judge Devlin reinstated the Claim. The Defendant duly served his Defence and Counterclaim on 18 September 2018 in which he contends that several items of the Major Works were undertaken improperly and without any legitimate exercise of any rights of entry into the Premises; and in breach of the covenant of quiet enjoyment ("**the Disputed Works**").

20. The Disputed Works which are likely to comprise much if not all of the Major Works include the following:-
    (1) The new ventilation system
    (2) The sprinkler system
    (3) The digital aerial socket
    (4) New fire alarm system
    (5) New windows

(6) Additional walls and panels to balcony
(7) New insulation and cladding
(8) New water boiler insulation.

21. The Claimant served its Reply and Defence to Counterclaim on 17 October 2018 and maintained that it was exercising express or implied rights of access in entering the Premises to carry out the Major Works.

The Issues

22. At the Costs and Case Management Conference, held on 5 March 2019, District Judge Matthews was persuaded to order the trial an issue to heard in advance of the other issues in the claim.

23. The issue was defined in paragraph 2 of his Order. The parties subsequently agreed a further issue to be included in the trial of issues and it is common ground that there were two issues for me to determine at hearing.

24. Those issues are identified as two Questions:-

(1) Whether the relevant Lease can be construed so as to give the Claimant the right to enter the Premises for the purpose of carrying out works of improvement which are not works of repair, further or alternatively whether it contains an implied term or covenant to that effect? ("**Question One"**);

(2) Whether the decisions of the FTT bind the Court (*sic*) to determine that the Disputed Works identified at paragraphs 5(a)-(h) and 14(a)-(k) of the Defendant's Defence and Counterclaim dated 18 September 2018 are works of improvement which are not works of repair, within the meaning of Question 1 ("**Question Two**").

25. In argument, it was acknowledged by each counsel that the issue in Question Two was in effect whether or not the decisions of the FTT gave rise to an issue estoppel binding on the present parties and I have approached the issue on that basis.

The limits of the Trial of the Issues

26. I should make it clear, that I am not required to determine any factual issues as such. My function is to decide the points of principle which Question One and Question Two raise.

27. Inevitably, in attempting to construe the terms of the lease or considering the implication of terms, I can or even must have regard to a factual matrix, but neither party has led any live evidence, or has pushed me to make factual findings. Instead, the parties have agreed a detailed statement of facts for which I am grateful.

28. I recognise, therefore, that my Judgment will not necessarily provide any determination of the parties' specific claims and, as will be made clearer later in

the judgment, I have resisted the temptation to usurp the fact finding functions of the person whom for convenience I will refer to as "**the Trial Judge**".

The Lease

29. The relevant lease was made on and dated 18 February 2003 between the Claimant of the one part and Donald Anthony Elliott of the other ("**the Lease**").

30. By the Lease the Claimant, in consideration of the sum of £43,680.00 paid by Mr Elliott as the price payable under Part V of the Housing Act 1985 and *in consideration of the rents and covenants by the Tenant and conditions reserved and contained in* [the] *Lease and those implied by statute* granted a term of years to 18 January 2113.

31. The Premises are defined in the First Schedule to the Lease in these terms:

> ALL THAT the flat situate on the tenth floor of the said building and known as 57 Plowman Tower Westlands Drive Headington Oxford OX3 9RA including one half part in depth of the structure between the ceilings of the said flat and the floors of the flat above it and of the structure between the floors of the said flat and the ceilings of the flat below it and (subject to clause 8.2 hereof) of the internal walls Together with the lock up store on the ground floor ALL WHICH premises hereby let are for the purposes of identification only coloured pink on the plan annexed ('the Plan').

32. By clause 7.1 the Claimant provided a standard covenant for quiet enjoyment that

> the Tenant .. performing and observing the several covenants conditions and agreements on the Tenant's part …shall peaceably hold and enjoy the premises during the term without any interruption …

33. The Tenant's relevant covenants (which are binding on the Defendant as Mr Elliot's successor in title) are contained in clause 3 of and the Fourth Schedule to the Lease and are set out below.

34. In addition to clause 3, the Tenant covenanted at Clause 5 of the Lease

> At the expiration or sooner determination of the term to peaceably surrender and yield up to the Council ALL AND SINGULAR the premises painted repaired cleansed maintained and kept as mentioned below TOGETHER with all additions and improvements made in the meantime and all fixtures of every kind in or upon the premises or which during the term may be affixed or fastened to or upon the premises EXCEPT tenants' fixtures which the Tenant shall be at liberty to remove but making good all damage caused to the premises.

35. Although I was taken to Clause 5 and to the references to “improvements” and fixtures, I do not consider Clause 5 to be relevant to, or helpful to me, in deciding the question of whether the Claimant had a right to enter the Premises for the purpose of carrying out works of improvement which are not works of repair. The Tenant’s obligation under Clause 5 only arises at the expiry of the term or sooner determination, neither of which are currently in scope; and the reference to “improvements” for the purposes of the Tenant’s obligations to yield up the Premises, or the issue of what might constitute a fixture are not matters that I have to decide, or which inform either of the Questions.

The Claimant’s Obligations

36. What however is critical is the extent of the Claimant’s repairing obligations under the Lease, because, to the extent that the Claimant was under a duty to carry out works including the Major Works, the Defendant might well have a corresponding duty to permit access to the Premises for the purposes of carrying out those works.

37. The Claimant’s express repairing obligation is to be found at clause 7.3 of the Lease and required the Claimant at all times during the term to

> …*maintain* the external main walls foundations and roof of the building the party walls and party floors and ceilings *not included in this demise* and the pipes including water drainage gas supply pipes television cables and electric supply cables (excluding meters) serving the building and used in common with the owners lessees or occupiers of the other flats in the building main entrance passages landings staircases stores and drying areas and the lift(s) enjoyed or used by the Tenant in common with the other owners lessees or occupiers of the other flats in the building and (where applicable) the accessways paths forecourts car parking areas landscaped areas boundary fences and walls adjoining the building and being part of the Estate *in good and substantial repair and condition*…(emphasis added).

38. The Claimant seeks to impress upon me its role as a local housing authority. Certainly, one distinction between the status of the Claimant and that of a private sector landlord, is that the grant of a lease under the Right to Buy Scheme has to comply with the provisions of Schedule 6 of the Housing Act 1985 (as mandated by section 139 of the 1985 Act); and that those provisions become terms in the Lease, and are therefore capable of extending the Claimant’s express obligations.

39. Paragraph 14 of Schedule 6 imposes certain implied covenants, on the part of the landlord including:-

> (1) to keep in repair the structure and exterior of the dwelling-house [which would in the present context be a reference to the Premises] and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure;

(2) to keep in repair any other property over or in respect of which the tenant has rights by virtue of this Schedule;

(3) to ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services;

(4) to rebuild or reinstate the dwelling-house and the building in which it is situated in the case of destruction or damage by fire, tempest, flood or any other cause against the risk of which it is normal practice to insure.

40. The Claimant therefore points not only to the *express* covenant at clause 7.3 but also to the *implied* covenants imposed by the Housing Act 1985.

41. Whilst I am not making any factual findings, it does appear that the Major Works include or might possibly entirely comprise items of work which are not either works which the Claimant is strictly obliged to perform in discharge of its duties under clause 7.3 or in discharge of the implied covenants derived from Schedule 6 of the Housing Act 1985.

42. So the Claimant needs to, and does seek to go further, and contend that, in addition to its duties under clause 7.3, or the implied covenants derived from Schedule 6 of the Housing Act 1985, there are yet further duties or at least powers which can be implied into the Lease which are wider than those identified thus far and which impose a corresponding duty upon the Defendant to permit access so that those duties or powers can be performed.

The Tenant's Covenants

43. It is perhaps convenient at this point to examine some of the Tenant's obligations in the Fourth Schedule of the Lease and which by virtue of clause 3 become covenants on the part of the Defendant:

44. Whilst there are specific obligations to permit access at paragraphs 8 and 10, what is principally relied upon by the Claimant is paragraph 12 of the Fourth Schedule. That requires the Tenant to

> …*permit* the Council and its Surveyor or Agent and (as respects work in connection with the premises and any neighbouring or adjoining premises) their lessees or tenants with or without workmen and others at all reasonable times during the term on giving 2 days previous notice in writing (or in case of emergency without notice) *to enter into and upon the whole or any part of the premises* for the purpose of *repairing any part of the said building or any other adjoining or contiguous premises* and for the purpose of *making repairing maintaining supporting rebuilding cleansing lighting and keeping in order and good*

> *condition* all roofs foundations sewers pipes cables watercourses gutters wires television aerials and associated apparatus (if any) or other structure or other conveniences belonging to or serving or used for the whole or any part of the building AND ALSO for the purpose of *laying down* maintaining repairing and testing drainage gas and water pipes and electric wires and cables television aerials and association [sic] apparatus (if any) and for similar purposes the Council its lessees or tenants (as the case may be) making good all damage caused to the premises. (emphasis added)

45. The Tenant's covenant to permit access is not coextensive with and is likely to be significantly wider than the Claimant's repairing obligations even as extended by the implied terms derived from the Housing Act 1985.

46. In my judgment under the relevant Lease the Defendant would be under an obligation to permit the Claimant access for purposes which went beyond the express or implied repairing obligations. So, to use as the following hypothetical example (it being my intention to avoid making factual findings in respect of the Major Works themselves):

    suppose that the Claimant wanted to *lay down* new cables or *make* a new structure or convenience which fell within the terms of paragraph 12, then it would neither be a derogation from grant, or a breach of the covenant for quiet enjoyment, for the Claimant to enforce the Tenant's covenant to permit access.

47. I am not expressing any view as to the propriety of the Claimant's conduct in the present case; and I am not going to enter into the realm of public law issues or Convention Rights which might be engaged in an extreme or specific case but, as directed by Question One, as a matter of construction, the Lease has in my Judgment plainly provided the Claimant with a right to enter the Premises for the purpose of carrying out works which are not necessarily works of repair within the ambit of the Claimant's repairing obligations.

Beneficial Works

48. So we have established thus far rights of entry which arise under one or more of the following three sources:-

    (1) a counterpart to the duty to perform the covenant in clause 7.3; and

    (2) a counterpart to the duty to perform the implied covenants imposed by the Housing Act 1985; and

    (3) arising from the corresponding duty to permit access expressly covenanted for by the Tenant in paragraph 12 of the Fourth Schedule.

49. I consider that the Trial Judge will be able to take each of the items of Disputed Works and determine whether or not such Works fall within the ambit of those specific rights of entry.

50. The Claimant however wants to go yet further and suggests that it can undertake and demand access for what I will call for these purposes *beneficial* works which are not strictly obligations arising either under clause 7.3 or the implied covenants imposed by the Housing Act 1985, and in respect of which access has not been specifically covenanted for in paragraph 12.

51. The argument is based on the existence of general powers of management set out in section 21(1) of the Housing Act 1985 which provides that

> The general management, regulation and control of a local housing authority's houses is vested in and shall be exercised by the authority and the houses shall at all times be open to inspection by the authority.

52. A local housing authority has responsibilities to manage housing estates as was emphasised in *Akumah v Hackney London Borough Council* [2005] 1 WLR 985. There it was emphasised that the authority's powers should not be narrowly construed. In that case the works were for the prevention of unauthorised parking and was the objective which was beneficial to the good management of the relevant estate. However that case, in contrast to the present one, did not concern an interference with the quiet enjoyment of a leaseholder or the enforcement of an obligation to permit access.

53. Whilst the Trial Judge, when considering any specific item of works might *properly* have regard to the background and the duties of the Claimant as a housing authority in order to determine whether or not such Works fell works fell within the ambit of the specific rights of entry, in my judgement, *Akumah*, itself, does not provide an answer to the First Question.

54. In my judgment, the invasion of the Premises by the Claimant cannot be ignored, since good estate management includes respecting the covenant for quiet enjoyment.

55. Equally the covenant for quiet enjoyment does not extend to justifying the Tenant's refusal to comply with his obligation to permit access in accordance with his covenants or so as to allow the Claimant to perform its obligations.

56. What the Claimant therefore is seeking to establish for the purposes of the forthcoming trial is a right to enter upon the demised premises to carry out *beneficial* works which works are not in performance either of clause 7.3 or the implied covenants imposed by the Housing Act 1985, or in respect of works for which access has not been specifically covenanted in paragraph 12.

57. In my judgment there is a limited basis for implying such a right but such right has to be circumscribed and is not wide or free-ranging or based on a general management power in a portmanteau sense.

58. I say it is limited because:-

    (1) In the case of this Lease the parties granted to each other specific rights and privileges and made express reservations, which should form the

basis for their contractual rights and obligations, subject only to the implied rights imposed by statute under the Housing Act 1985, which were no doubt intended to protect the interests of the Tenant as he moved from his protection as a secured tenant into the private sector.

(2) I do not regard that there is any need to imply any other terms in order to give business efficacy to the Lease.

(3) The covenant for quiet enjoyment in the domestic context is in effect a contractual expression of the Tenant's right to a home life and privacy and should not be lightly interfered with, save as provided for in the Lease.

59. Whilst bearing those points in mind, I do accept that under a secure tenancy a landlord might have an implied right to enter the demise to carry out works to avoid injury.

60. So in *McAuley v Bristol CC* [1992] QB 134 it was stated that

> A reasonable tenant could not sensibly object to such a right. If the council became aware of a dangerous defect in the steps of a steep garden, as in this case, and asked the tenant for access to repair it, in the interest of all persons who might be expected to be affected by the defect, the court could, in my judgment, properly require the tenant to allow such access upon the basis of an implied right in the council to do the work.

61. In *Lee v Leeds CC* [2002] 1 WLR 1488 the Court following *McAuley* was willing to sanction the landlord carrying out works against the wishes of a tenant, where those works were intended to remedy an inherent defect which caused excessive condensation, in order to prevent a danger to health.

62. What is notable about *McAuley* and *Lee* is the exercise of a right of access, not otherwise provided for, in the furtherance of an object to prevent the risk of personal injury or danger to health.

63. In my judgment there is a limited right of access which arises independently from the express terms of the Lease or the implied term derived from statute, where the Tenant's refusal of access interferes with powers otherwise available to the Landlord and which the Landlord wishes to exercise so as to avoid the risk of death or personal injury or to remedy a state of affairs which is injurious to health. That far I am able to go, in eroding the tenant's right to quiet enjoyment in the context of Question One, but no further. It seems to me that such limited right of access is impressed upon the grant of lease, by virtue of paragraph 2(2)(b) of Schedule 6 to the Housing Act 1985, it being a right which was available against the tenant, under or by virtue of the existing secure tenancy, for the benefit of other property.

64. Without wishing myself to make any factual finding, the Claimant might seek to persuade the Trial Judge that the introduction of specific fire precaution measure was necessary to avoid the risk of death or personal injury or to remedy a state of affairs which was injurious to health.

65. So the answer to Question One is as follows:-

(1) the Lease does give the Claimant the right to enter the Premises for the purpose of carrying out works of improvement which are not works of repair, because

(a) Clause 7.3 includes obligations to carry out specified works irrespective independent of whether they works of repair, as such ("**the Express Duties**").

(b) the Claimant has duties to carry out works in accordance with the implied terms imposed by the Housing Act 1985 which might be wider than the repairing covenant at clause 7.3 ("**the Implied Duties**");

(c) in order to facilitate the performance by the Claimant of the Express Duties and the Implied Duties there is a corresponding right of access ("**the Implied Right of Access")**; and

(d) in addition to the Implied Right of Access, the Tenant has covenanted in clause 3 and paragraph 12 of the Fourth Schedule to permit access for works which are not necessarily works of repair ("**the Express Right of Access**");

(e) in addition to the Implied Right of Access and the Express Right of Access, the Claimant has the right to enter the Premises for the purposes of carrying out works in order to avoid the risk of death or personal injury, or to remedy a state of affairs which is injurious to health ("**the Extended Right of Access**").

(2) The Trial Judge will have to consider each of the disputed items to determine whether or not they fall within the ambit of the Implied Right of Access or the Express Right of Access or the Extended Right of Access, as formulated. I have not expressed any view.

66. Question Two would be important if the FTT made findings which determined whether any of the Disputed Works were

(1) carried out in the performance of Express Duties or the Implied Duties;
(2) carried out in reliance upon the Express Right of Access.
(3) carried out in reliance upon the Extended Right of Access.

67. It is common ground between the parties that Issue Estoppel can arise in the context of the FTT, as they were each parties to the proceedings at the FTT and will be bound by any factual findings. So for example the issue of whether or not

the balcony was within the Premises might well have been determined by the FTT.

68. From my reading of the FTT decisions, it does not appear at first blush that there are many issues which have been determined in that forum or which would be likely to have resolved the matters identified in paragraph 64. Given that the Trial Judge would be better placed than I am to consider those questions I will not, and do not need to, go further for the purposes of this Issue.

69. The short answer to Question Two is that the FTT Decisions are binding upon the parties but only to the extent that they have determined that any of the Disputed Works are improvements rather than repairs.

70. The Trial Judge will have to bear in mind that the primary question for the FTT was the *recoverability* of the costs from the tenants as repairs rather than as improvements.

71. The repairs / improvement dichotomy was critical for the FTT. But as the determination of Question One demonstrates, the rights of access issue is not itself dependent upon a distinction between repairs and improvements.

72. Whilst it could be said that *all* genuine repairs might create a right of access, not every improvement to the Premises, carried out against the wishes of the tenant, constitutes a breach of the covenant for quiet enjoyment or is unlawful conduct on the landlord's part.

73. I wish to conclude by thanking counsel for their well-argued and efficient submissions.