A balancing act: a landlord's right to build and a tenant's right to quiet enjoyment

By Elizabeth Tremayne

Introduction

1. Judgment has been handed down by the High Court in the matter of *Timothy Taylor Ltd v Mayfair House Corporation and another* [2016] EWHC 1075 (Ch), a case which raised in an acute form the conflict between a landlord's right to build and a tenant's right to quiet enjoyment.

The facts

2. The Claimant, Timothy Taylor Ltd, was the lessee of ground and basement floor premises operating what was described by the court as a '*high-class modern art gallery*' in Mayfair. The Claimant had been granted a 20 year lease which had 11 years left to run and paid an initial rent of £360,000 which had risen to £530,000 by the time of the trial. The Defendant owned the building within which the gallery was situated and the five stories above which comprised apartments. Since 2013 the landlord had been engaged in substantial works of development to those flats. The tenant complained, in particular, of offensive levels of noise generated by the works and of the wrapping of the whole building in scaffolding, obscuring its frontage.

3. The tenant recognised that the landlord was entitled, under the terms of the lease, to carry out works in the adjoining building and accepted that some disruption to its use and enjoyment of the premises was inevitable but complained that the manner in which the work had been carried out was unreasonable. The tenant had sought some measure of compensation from the landlord for the disruption before commencing litigation but the landlord refused. The tenant sought damages for past breaches and declaratory and injunctive relief to regulate how the works would be carried out in future. The landlord accepted that its right to build under the lease

was not without limit but claimed that it had not, through its contractors, carried out works unreasonably.

The law

4. HHJ Steinfield QC sitting as a deputy judge of the Chancery Division acknowledged that there was little, if any, dispute between the parties as to the applicable law. In 2001 the House of Lords handed down its decision in *Southwark London Borough Council v Tanner* [2001] 1 AC 1 in which tenants of an apartment block sued the landlord for breach of the covenant of quiet enjoyment by reason of excessive noise from an adjoining flat. The House of Lords found that an action for breach of quiet enjoyment was separate and distinct from a tortious claim, it being irrelevant whether the activities would also support an action in nuisance.

5. In the well known case of *Lechouritis v Goldmile Properties Ltd* [2003] EWCA Civ 49 which followed, the Court of Appeal considered the relationship between the covenant for quiet enjoyment and an implied right of the landlord to carry out works. There was no express right in the lease but the landlord had agreed with the lessees he would carry out repairs. The tenant's restaurant business was seriously disrupted by the works. The Court of Appeal observed that neither the landlord's right to works nor the covenant for quiet enjoyment trumped the other, the two must be held in balance. The landlord was obliged to take 'all reasonable' but not 'all possible' precautions to minimise the disturbance. There was found to be no general obligation to remit rent or service charge to reflect a disturbance though an offer to do so would help a landlord demonstrate he had met the requirements of reasonableness.

6. More recently in *Century Projects Limited v Almacantar (Centre Point) Limited* [2014] EWHC 394 (Ch) the tenant of premises in the Centre Point Tower sought an injunction against the landlord to restrain it from carrying out building works to the concrete façade of the tower using scaffolding. The lease contained a reservation to

the landlord of a right to build akin to the right reserved to the landlord by the lease in *Timothy Taylor*. Nugee J found that where a lease contains both a covenant for quiet enjoyment and an obligation or right on the landlord to do repairs, neither provision trumps the other - on the contrary, they have to be made to 'fit together'.

7. HHJ Steinfield QC extracted the following principles from the authorities:
   a) A landlord's reservation of any right to build should be construed as subject to the requirement to take all reasonable steps to minimise the disturbance of the tenant;
   b) In considering what can reasonably be carried out the tenant's knowledge or, conversely, ignorance of the works at the commencement of the lease is relevant;
   c) An offer by the landlord of financial compensation is a factor which the court is entitled to take into account in considering the overall reasonableness of the steps the landlord has taken;
   d) Both *Goldmile* and *Century Projects* were cases in which the landlord was carrying out repairs for the benefit of all tenants. In *Timothy Taylor* the works were, by contrast, for the personal benefit of the landlord and conferred little or no advantage on the tenant. The court considered it was entitled to take the share of benefit into account when viewing the reasonableness of the landlord's behaviour.

Judgment

8. In light of the applicable principles the Court considered that the landlord had not taken all reasonable precautions to minimise its interference with the tenant's right of quiet enjoyment. It is notable that the assessment of reasonableness included a consideration of the purpose for which the premises were let and the level of rent: '*it seems to me we are dealing here with premises which were let for use as a high class art gallery in the centre of Mayfair for a high rent. In my judgment that requires that the right to build should be exercised with a particular regard, so far as that was reasonably*

possible, to the need of the Tenant to keep the gallery running and with as little disturbance to it and its customers and staff as possible' [at paragraph 82]. Accordingly there are grounds upon which to argue that the higher the rent the greater the degree of reasonable precautions which will be expected.

9. The landlord's contractual right to build in this case was expressed in wide terms. Nevertheless, the landlord was not liberated from an obligation to carry out the works reasonably. Tightly drafted clauses permitting redevelopment around a sitting tenant will not render a landlord immune from potential allegations that it has not behaved reasonably in exercising that right.

10. The Court acknowledged that though the landlord was not obliged to offer the tenant any form of discount for the works, it did consider as significant the fact that the landlord had refused to grant such a discount. The Court considered that such refusal *'somewhat raises the bar as to what reasonableness requires'* [paragraph 83]. Accordingly landlords should be alive to the importance of considering whether the carrying out of certain works merits a rent or a service charge reduction.

11. Where a range of development options are available landlords should tread carefully before pursuing the option which does not minimise the impact upon the tenant. In *Timothy Taylor* the landlord faced criticism for failing to proceed with a different design of scaffolding which could have been erected using pillars or towers that would not have obstructed the entrance and signage to the gallery to such a great degree. The landlord claimed that it had behaved reasonably because it had relied upon a firm of specialist scaffolding contractors employed by a reputable building contractor. The Court considered this reliance was inadequate to discharge the landlord's burden and that it would have expected that in commissioning the company to design the scaffolding the landlord would have expressly instructed it to favour an option with minimal impact upon the tenant. In other words, landlords should beware of leaving redevelopment decisions to third-party contractors

without specifically stipulating that those contractors must consider the detrimental impact upon the tenant's quiet enjoyment.

12. The court noted a failure to consult, on the part of the landlord and its contractors, with the tenant. Regular meetings with the project manager and a representative of the tenant would have assisted not least in devising a plan as to how noisy work could be minimised. '*In planning an operation of this magnitude it seems to me that it was incumbent upon the landlord via its project manager and other professionals employed to 'sit down with the tenant' and explain to the tenant carefully what was proposed and, as I have said, seek to agree the method whereby the work could be carried out with the minimum of disturbance'* [at paragraph 104].

13. The tenant was originally seeking damages referable to an alleged loss of profit, though the accounts showed that during the time of the works it had not suffered any loss of profit indeed, its sales had increased. The judge favoured an alternative basis for damages – what the tenant had lost in use and enjoyment was best found to be represented by a reasonable rebate in rent. In other words, even where a commercial tenant's business has not been demonstrably injured by redevelopment works, the tenant may nevertheless claim for a sum in damages. The Court awarded a 20% reduction in rent for the breach of covenants from August 2014 when the scaffolding started to be erected to the date of judgment.

14. In relation to a claim for injunctive relief for future breaches the Court considered that such an injunction, which sought to limit the decibel level and to remove the scaffolding in situ and replace it with a tower design, was impracticable and unworkable. HHJ Steinfield QC noted that there were few cases in which an injunction of this sort had been granted though referred to an exception - the Chancery case of *Hiscox v Pinnacle* [2008] EWHC 145 (Ch) in which an injunction was considered to have been justified but only on an interlocutory basis. The Court in *Timothy Taylor* granted damages in lieu of the injunction, also quantified at 20% of

the rent for the premises from the date of judgment until the work was completed. However, HHJ Steinfield QC stressed that this did not give the landlord carte blanche to finish the work in any way it saw fit. If the landlord did not act reasonably the tenant had liberty to return to the Court to revisit the basis upon which the damages in lieu were to be assessed.

In conclusion

15. The essence of the assessment of reasonableness is a common sense balancing exercise between the rights of landlord and tenant. Where the landlord is carrying out works for the tenant's benefit there will be a de facto lower threshold of reasonableness to be crossed. Conversely, where the landlord is building or developing for his commercial benefit, and in particular where a tenant is paying a significant rent, the reasonableness threshold will be higher. The courts have indicated their expectation that landlords must consider the impact on the tenant's quiet enjoyment and take all reasonable steps to minimise the disturbance even where the permitting clauses are widely drafted. The courts have not been prescriptive about those steps but they are likely to include consideration of whether the tenant was put on notice of the likelihood of works when entering the tenancy, an offer of (or conversely a rejection of a request for) compensation, evidence that minimal-impact options have been considered, active instructions given by the landlord to contractors and third parties that they must take the tenant's rights into account in the design and planning of works, and regular and adequate consultation with the tenant. Parties and advisers should also be alive to the fact that even where a commercial tenant continues to thrive in its business the Court may still award significant damages.

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