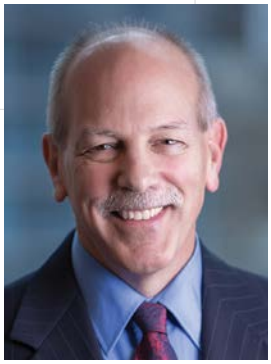

Landlord's Covenant of 'Quiet Enjoyment' v. Landlord's Covenant to Repair

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Leases often contain an express covenant from the landlord in favour of the tenant to provide 'quiet enjoyment.' In the absence of an express covenant, the common law implies such a term.

The covenant of 'quiet enjoyment' was described by one court as follows:[1]

> 18 ... The *meaning* of the landlord's obligation to provide 'quiet enjoyment,' however, must be first examined as a matter of law. The term was expressed in this case, but is implied in any lease. Such a covenant protects against a landlord's derogating from his own grant ... Richard Olson, in *A Commercial Tenancy Handbook* (looseleaf), describes the covenant for quiet enjoyment as a right to "exclusive occupancy of the premises without interference *by the landlord*." (At 3.20.1; my emphasis.) The author cites *Firth v. B.D. Management Ltd.* (1990), 73 D.L.R. (4th) 375 (B.C.C.A.),
>
> in which this Court observed:
>
> > To establish a breach of the covenant of quiet enjoyment the appellant [tenant] must show that the ordinary and lawful enjoyment of the demised premises is **substantially interfered with by the acts of the lessor**. It is conceded by counsel that the question of whether there has been a substantial interference is a question of fact. Mere temporary inconvenience is not enough — the interference **must be of a grave and permanent nature**. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession: see *Kenny v. Preen* [1963] 1 Q.B. 499.

In addition to the covenant for quiet enjoyment, the landlord commonly covenants to keep the building in which leased premises are located in good repair. What happens then, when repairs substantially interfere with the tenant's quiet enjoyment?

Quiet Enjoyment and the Covenant to Repair

The British Columbia Supreme Court decision in *0824606 B.C. Ltd. v. Plain Jane Boutique Ltd.*[2] [*Plain Jane*] illustrates the analysis courts undertake and the factors considered in a contest between the quiet enjoyment covenant and the covenant to repair. In *Plain Jane*, the landlord sued the tenant for rent arrears. The tenant counterclaimed alleging a breach of the landlord's covenant of quiet enjoyment. The landlord pointed to the covenant to repair to meet the tenant's counterclaim. As a result, the court found that the rent arrears were offset by damages flowing from the landlord's breach of the covenant of quiet enjoyment.

Plain Jane **– factual summary**

Plain Jane Boutique Ltd. leased retail space in a building located in Victoria, B.C. from which women's clothing was sold. The landlord undertook repair to external cornices of the building without advance notice to the tenant. The tenant received notice only after the scaffolding was erected.

The work originally planned to take three or four weeks took 10 weeks and fell within a prime selling season for the tenant's retail business. The repairs required cranes and boom trucks and scaffolding was installed over the first-floor sidewalk obstructing the street visibility of, and access to, the retail premises.

Without advance notice, Plain Jane Boutique Ltd. was unable to alter inventory purchases and was otherwise unable to plan for and take steps to reduce the ill effects of the repair work on its business. There was a sharp drop off in customers, the loss of a prized employee when patronage dropped off, and inventory that had to be sold at a substantial discount. The court found that the scaffolding, boom trucks, presence of construction workers and "... overall gloomy atmosphere inside the store were driving customers away." The construction activity

also prevented street parking.[3] In the end, Plain Jane Boutique Ltd. went out of business.

The court found that the effects of the repairs and lack of notice persisted beyond the construction period.[4]

Plain Jane – Court analysis of 'Quiet Enjoyment'

The lease in *Plain Jane* provided in part that "... the Tenant will and may peaceably possess and enjoy the Leased Premises for the Term hereby granted, *without interruption or disturbance from the Landlord* ..."[5] [Emphasis added.] The court noted that there was no qualification permitting some amount of interruption or disturbance as might be permitted under an implied covenant of quiet enjoyment (i.e., something less than substantial interruption or interference). Also, within the lease was the landlord's covenant to keep the building "... in a good and reasonable state of repair ...".[6] The lease contained a variety of provisions the purpose of which was to limit the landlord's liability. Relying upon case precedent, the court recognized that the obligation to repair must be balanced against the tenant's right to quiet enjoyment during the repair work[7] despite the provisions seeking to limit landlord liability.

The court began its analysis of quiet enjoyment by explaining the principles underlying the common law implied covenant of quiet enjoyment:[8]

a) it is a question of fact whether the covenant has been breached and the result depends upon the particular facts in each case;
b) a temporary inconvenience is not sufficient; the interference must be grave and permanent;
c) the covenant is a qualified right of a tenant exercisable only against a landlord and those claiming through the landlord;
d) a breach of the covenant may occur even though there is no direct physical interference with the tenant's possession and enjoyment; and
e) the fact the landlord has acted reasonably is not relevant to whether the tenant's right to quiet enjoyment has been breached. [This statement is problematic given some of the cases reviewed in *Plain Jane*. The point is revisited below.]

The court provided examples of breaches of the covenant of 'quiet enjoyment:'[9]

a) seepage of greasy, smelly fluid into the tenant's premises preventing the carrying on of business;
b) putting a tenant out of possession;
c) interfering with power and water supply;
d) a landlord's repeated threats to evict a tenant along with shouting at her and knocking at her door;
e) dust and dirt from construction invading a commercial tenant's premises;
f) construction noise from building repairs that interfered with a tenant's tutorial service.

Examples cited where no such breach was found included:[10]

a) untraceable creosote-like odours affecting a retail clothing business;
b) inoperative HVAC in a restaurant where an effect on business was not proven;
c) repeated sewer backups in a pizza restaurant where the problems resulted in minimal consequences to the operation.

The court referred to cases involving scaffolding.[11] In one restaurant case, the scaffolding and repair work caused serious disruption, made the restaurant appear closed, and contaminated the interior with dust, but it was held not to be a breach because the landlord had taken all reasonable steps to respect the tenant's contractual interests, advance notice of the work had been given, and the landlord postponed the start date for three months because the tenant complained that the repair work would interfere with the Christmas trade. In another case of ground floor retail space where the landlord did what it could to minimize inconvenience, repairs were completed in two weeks and the scaffolding hindered, not prevented, access and obscured display of wares an award of only nominal damages was made in favour of the tenant.

After a review of the case law, the court turned to apply the law to the facts in *Plain Jane*.

Application of the law to Plain Jane Boutique

The court gave importance to the precise wording of the covenant of quiet enjoyment in the lease – "without any interruption or disturbance."[12] The court held this provided more protection for the tenant than the covenant implied by the common law which addresses 'substantial' interruption and interference. Nonetheless, for a breach of the express covenant, there had to be a grave and permanent effect which was found in the loss of the Plain Jane customer base that would never return. The court held that the repair work was a breach of the express covenant of quiet enjoyment as well as the covenant implied by law.[13]

However, there remained the issue of the landlord's covenant to repair. Again relying on previous case authority, the court in *Plain Jane* determined that the obligation to repair must be exercised in a way that minimizes inconvenience to the tenant. The tenant is to be burdened only with the inconvenience that cannot be avoided. Neither covenant trumps the other; the landlord can carry out the repair work provided he acts reasonably in the exercise of that right. In *Plain Jane*, the landlord took no steps to provide advance notice that the repairs would be done, took no steps to minimize inconvenience, and did not work with the tenant to mitigate interference.[14]

The landlord sought to rely upon the various provisions of the lease that excluded the landlord from liability. The court made short shrift of the argument referring to the Supreme Court of Canada's authority for the proposition that the first consideration when dealing with attempts at the exclusion of liability is to determine if the wording of an exclusion clause rightly applies to the situation at hand. The *Plain Jane* court held that the exclusion clauses relied upon by the landlord did not clearly and precisely exclude liability for breaches of the covenant of quiet enjoyment when undertaking repair work. For example, one exclusion of liability applied to alterations and additions but not to repairs and the cornice work was a repair.[15]

As for the appropriate remedy for breach of the covenant of quiet enjoyment, the court found that the landlord's disturbance was significant enough in all the circumstances to have warranted the tenant terminating the lease. But, on the facts, the

tenant had not terminated the lease and, therefore, an award of damages was ordered calculated based on the evidence adduced by the tenant respecting the business losses.

A troubling aspect of 'quiet enjoyment' is the statement of principle in *Plain Jane* that the reasonableness of a landlord's actions is not relevant to whether the tenant's right to quiet enjoyment has been breached. By way of example, the *Plain Jane* court referred to *Watchcraft Shop Ltd. v. L&A Development (Canada) Ltd.*[16] which is found in the following:

> 32 The fact that a landlord may have acted reasonably in undertaking repairs or may have taken all possible steps to minimize the disruption to tenants is not relevant to whether or not the tenant's right to quiet enjoyment has been breached. If there has been a substantial interference with quiet enjoyment, then there has been a breach of the tenant's contractual rights ...

This statement seems to be at odds with those cases finding no breach of the covenant of quiet enjoyment at least, in part, because the landlord took all reasonable steps to minimize the inconvenience to the tenant. Indeed, the court's determination in *Plain Jane* was influenced by the fact that the landlord conducted itself in an unreasonable manner.[17] The landlord took no steps to warn the tenant ahead of the construction and did little to minimize the effects of the construction. In particular, the court found that advance notice would have enabled the tenant to plan and reduce the inventory it acquired, thereby avoiding in the end the sell-off at a discount of items when customers did not readily return to the store after construction.

Perhaps in referring to the reasonableness of the landlord's conduct, the court is investigating whether the landlord's conduct has reduced what would otherwise be a substantial interference for the tenant to a mere temporary inconvenience. If the landlord is successful in minimizing the inconvenience to temporary imposition, then there will be no breach of the covenant of quiet enjoyment. Another possibility is that, in the specific instance of a contest between quiet enjoyment and an obligation to repair, reasonableness does become a factor.

Closing

As noted above, determining if there has been a breach of the covenant of quiet enjoyment will depend on the particular facts of each case. This will naturally lead to a degree of uncertainty for situations that are not clearly at one end or the other of a 'quiet enjoyment' continuum. The fundamental question will always be whether there has been an interference that rises above a mere 'temporary inconvenience.'

The contest between the landlord's covenant to provide quiet enjoyment and the landlord's obligation to repair involves a balancing of interests and obligations, whereby it seems that the landlord is allowed to affect the repairs, but only by arranging for the minimal amount of inconvenience that is reasonable in all the circumstances.

Lastly, where there are provisions in a lease seeking to limit the liability of a landlord, the courts look for wording that precisely fits the circumstances of the case before the landlord will escape liability for breach of the covenant of quiet enjoyment.

Endnotes

1 *Stearman v. Powers*, 2014 BCCA 206, para. 18
2 2018 CarswellBC 2985, 2018 BCSC 1887,
3 *Ibid.*, paras. 38-47
4 *Ibid.*, para. 56
5 *Ibid.*, para. 97
6 *Ibid.*, para. 117
7 *Ibid.*, para. 118
8 *Ibid.*, para. 100
9 *Ibid.*, paras. 101-102
10 *Ibid.*, para. 103
11 *Ibid.*, paras. 104-105
12 *Ibid.*, para. 115
13 *Ibid.*, para. 116
14 *Ibid.*, paras. 117-127
15 *Ibid.*, paras. 128-134
16 1996 CarswellOnt 2268, para. 32
17 *Plain Jane,* para. 113