Costs and Co-operation: What Tenants Must do to Assist with Fire Safety

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Despite being such an important and topical issue, the key piece of fire safety legislation has received very little judicial or academic analysis. This article argues that, properly understood, the Regulatory Reform (Fire Safety) Order 2005 requires tenants to assist landlords in two ways. First, art.17 requires tenants to allow their landlord access to the demised premises to undertake fire safety repairs and improvements. Secondly, the key duties in the Order provide landlords with a strong defence to any challenge to the reasonableness of fire safety-related service charges.

Introduction

As awareness of fire safety grows in the aftermath of the Grenfell Tower disaster, landlords will increasingly take steps to correct lapses in standards. However, where a lease does not expressly deal with fire safety alterations, as many older leases do not, two issues arise. First, can a landlord demand entry to demised premises to make fire safety changes to it? Secondly, can a landlord demand that the tenant pays for the fire safety works? This article will argue that, on a proper interpretation of the legislation, the answer to both questions should generally be "yes".

The law of fire safety

Fire safety legislation has been around for centuries, but the law has largely developed reactively. For example, after the Great Fire of London in 1212, the first Mayor of London, Henry fitz Ailwin, introduced regulations that banned thatched roofs in London. Centuries later, the Act for Rebuilding the City of London of 1667 (19 Car II c.8), which prohibited the building of houses made of wood in London, was passed in response to the Great Fire of London in 1666. More recently, the Fire Precautions Act 1971 was passed in response to a fire in the Rose & Crown Hotel in Saffron Waldon on Boxing Day 1969. That Act was later extended to cover football stadiums after the Bradford football stadium fire of 1985 (H. Carr, "Grenfell Tower and the failure of building and fire safety regulations" [2017] J.H.L. 110). No doubt there will be further legislative changes in response to the Grenfell disaster and the findings of the subsequent inquiry.

The modern law of fire safety is found in the Regulatory Reform (Fire Safety) Order 2005 (the RRFSO). The RRFSO was passed to consolidate and simplify nearly 50 pieces of fire safety legislation (schedules 4 and 5). In essence, "responsible persons" (as defined in art.3) must undertake such "general fire precautions" (as defined in art.4(1)) as are reasonably necessary to ensure that the premises are safe (art.8(1)). In practice, the responsible person must undertake regular risk assessments to determine what general fire precautions are necessary and then

implement those measures (art.9). On top of this general duty, responsible persons are required to undertake various specific steps. For example, in the domestic context, a landlord must ensure that the property has appropriate fire fighting equipment, fire detection equipment and fire escapes (arts 13-14).

Article 6(2) states that the RRFSO applies to all types of premises, save for those mentioned in art.6(1). Confusingly, art.6(1)(a) confirms that the RRFSO does not apply to "domestic premises, except to the extent mentioned in article 31(10)". However, art.31(10) states that "'premises' includes domestic premises other than premises consisting of or comprised in a house which is occupied as a single private dwelling". In other words, taking these articles together, the RRFSO applies to all multiple-occupancy domestic premises.

Even though fire safety is such an important and topical issue, this writer has been unable to find a single reported civil law case in which the provisions of the RRFSO have been discussed at length. Similarly, there is very little academic commentary on the RRFSO. However, it is submitted that, when properly interpreted, the RRFSO requires tenants to co-operate with the landlord's works and effectively prevents tenants from challenging the reasonableness of the cost.

Fire safety improvements within demised premises

To ensure that a building fully complies with fire safety legislation, the responsible person must often undertake improvements to demised premises as well as to the shared parts. For example, in the domestic context, interconnected fire alarms may be needed inside flats to alert vulnerable tenants and compartmentation may require front doors to be changed and external bin cupboards to be sealed. Similarly, in the commercial context, ducts and flues may need to be properly contained and maintained.

This can sometimes cause difficulties for landlords. Every lease will have an express or implied term for the tenant's quiet enjoyment (*Budd-Scott v Daniell* [1902] 2 K.B. 351). Furthermore, leases typically only contain express or implied licences allowing the landlord to enter the demised premises to examine it and/or to repair it. However, such clauses may not permit the landlord to enter to undertake improvements (*Yeomans Row Management Ltd v Bodentien-Meyrick* [2002] EWCA Civ 860; [2003] L. & T.R. 10). Therefore, landlords may face resistance from tenants when attempting to enter a demised premises for fire safety purposes. Tenants may also object on practical grounds. For example, a tenant may simply not want workmen entering the demised premises to undertake time-consuming and expensive improvements that largely benefit other people in the block. Alternatively, tenants may object on business grounds. For example, a tenant may fear that commercially sensitive information about their demised office or their work may be disclosed through open co-operation with the landlord, which may be a company of which other tenants are members or directors (T. Hodgson, "A problem shared" [2010] H.S.W. 36). Nevertheless, all domestic landlords are bound by the RRFSO to take steps to make their blocks fire safe. So, how can landlords get around such resistance?

Commentators have typically suggested one of three possible solutions, but all three suffer from significant drawbacks. First, landlords can include express covenants in their leases that require tenants either to comply with the RRFSO themselves or to comply with the landlord's reasonable requests when complying with the RRFSO (N. Dowding, QC; K. Reynolds, QC; A. Oakes, *Dilapidations: the Modern Law and Practice*, 6th edn (London: Sweet & Maxwell, 2017), at para.17-01). However, many existing leases do not contain such covenants. Furthermore, such covenants are often restrictively construed (e.g. *Johnsey Estates (1990) v Secretary of State for the Environment*, unreported TCC, 6 August 1999 (HH Judge Moseley QC)). Thus, in

many cases, a landlord may still face difficulties persuading a tenant that they are required to cooperate.

The other "workarounds" were recently expounded by Dr Nicholas Roberts ("Fire Safety Post-Grenfell" (2017) 167 N.L.J. 16). Second, where the lease permits, the landlord could rely on its general power to make "house rules" (i.e. regulations for the wellbeing and good order of the block) to require tenants to co-operate with the landlord on matters of fire safety. Third, the landlord could seek to vary the terms of the leases under s.37 of the Landlord and Tenant Act 1987. However, even Dr Roberts concedes that there is little case law support for either option and that the latter involves a "notoriously cumbersome" process.

In short, unless tenants are willing to comply or the lease has unusually favourable terms in it, landlords may struggle to compel tenants to allow works to be undertaken within demised premises. However, it is submitted that a fourth option exists. It is submitted that the RRFSO places an express obligation on tenants to co-operate with their landlords to implement RRFSO modifications, even where that requires work within demised premises. This argument has three steps. First, art.17(1) of the RRFSO imposes on the responsible person a duty to maintain and repair any fire safety equipment or facilities. In maintaining the premises, the responsible person "may make arrangements with the occupier of any other premises forming part of the building" (art.17(2)). Second, any such occupier "must co-operate with the responsible person for the purposes of paragraph (2)" (art.17(4)). Third, "[p]aragraph (2) applies even if the other premises are not premises to which this Order applies" (art.17(3)). Put simply, arts 17(2) and 17(3) confirm that the occupiers of any type of premises, including self-contained demises, are obliged to co-operate with their landlord to achieve fire safety compliance.

This interpretation of art.17 has five benefits. First, it provides the landlord with a clear, statutory response to an unco-operative tenant. Second, it gives tenants clear guidance on what they are required to do to help achieve fire safety compliance (which many tenants prefer over vague duties: Editor, "Impact and Effectiveness in the Fire Safety Order" (2009) 16(2) H.S. at W. 1). Third, requiring tenants to co-operate with their landlord in this context supports the general public good of understanding and promoting fire safety. Fourth, this approach makes art.17 consistent with art.22 of the RRFSO, which requires jointly or severally responsible persons to co-operate and co-ordinate their actions. Interpreting art.17 as advocated would ensure that landlords and tenants must all co-operate in the pursuit of fire safety. Fifth, this approach would make the RRFSO consistent with the general common law rule that a duty to repair imports with it an implied licence to enter the premises to carry out the repairs (*Saner v Bilton (No 1)* (1878) 7 ChD 815 at 824).

Recovering the costs of fire safety works

Even if landlords can persuade tenants to cooperate with the works, there are likely to be an increasing number of challenges to the costs of such works. This section will discuss the landlord's options when trying to reclaim the cost of fire safety compliance.

Some leases contain express terms permitting the landlord to comply with the terms of relevant legislation and to recharge the cost to tenants. Such clauses will very likely cover the landlord's costs incurred in complying with the RRFSO (P. Dollar and K. Fenn, "Practitioner's Page" (2017) 21 L. & T.Rev. 29, 32). Unfortunately, many leases, especially older leases, do not contain such clauses. Furthermore, the RRFSO repealed the previous rule that permitted a court to apportion the expenses incurred in carrying out fire precautions (s.28(3) of the Fire Precautions Act 1971). Thus, landlords may legitimately be concerned about whether they can recover the often-high costs of fire safety works.

Fortunately, there are two sources of funds from which a landlord can seek to draw. First, from July 2019, freeholders of certain high-rise blocks may apply for government funding to cover the cost of replacing certain types of cladding. Other funding may become available over time, so landlords should always investigate this possibility. Second, landlords may be able to recover the cost of fire safety works via a "sweeping up" service charge clause covering "estate management" or "the provision of services" (A. Rosenthal et al, *Commercial and Residential Service Charges* (Bloomsbury Professional, 2013), para.7.15). These clauses are very common in modern leases and provide landlords with a potentially powerful tool for securing reimbursement. Although it is simply a matter of construction whether a particular clause covers fire safety expenditure, it is at least traditionally suggested that courts are more likely to adopt a benevolent construction where a landlord seeks to recover the cost of services that protect tenants (Tanfield Chambers, *Service Charges and Management* 4th edn (London: Sweet & Maxwell, 2018), para.5-16). If a landlord is unsure whether particular works would fall within the scope of the "sweeping up" clause, it may be prudent to apply to the First-tier Tribunal for a determination on the issue in advance of starting the work (s.27A(3) of the Landlord and Tenant Act 1985).

However, even if a landlord can persuade a court that fire safety costs are generally within the scope of the relevant service charge provisions, residential tenants may seek to challenge the reasonableness of particular expenses (s.19 of the Landlord and Tenant Act 1985). For example, tenants may allege that the landlord caused the problems itself by originally installing defective cladding (Tanfield Chambers, above) or overzealously replaced certain parts of the property when repair would have been sufficient (*Southwark LBC v Various Lessees of the St Saviours Estate* [2017] UKUT 10 (LC)).

One of the most likely grounds on which fire safety costs will be challenged is that the works constitute improvements rather than simply repair or maintenance. Of course, landlords can legally recover the cost of improvements to the property via service charges (s.18(1)(a) of the Landlord and Tenant Act 1985), and indeed maintenance often includes both repair and improvement to a certain extent (*Wates v Rowland* [1952] 2 Q.B. 12). However, a court will take into account different considerations when assessing the reasonableness of (optional) improvements as opposed to the reasonableness of (necessary) repairs (*Waaler v Hounslow LBC* [2017] EWCA Civ 45; [2017] L. & T.R. 19 at [42]). In particular, the landlord's choices of whether to undertake improvements and, if so, what improvements to make are constrained by a rationality test (*Waaler* at [23]). Furthermore, where the landlord has installed something new, or something that will only benefit some tenants, the court will give greater weight to the tenant's views when considering the question of reasonableness (*Waaler* at [43]). Thus, landlords need to be prepared to justify the costs of fire safety improvements.

However, it is submitted that landlords can again use the RRFSO to their advantage. First, a landlord can point to the specific actions required by the RRFSO that inherently anticipate improvement as well as repair. For example, art.13(1)(a) requires landlords to ensure that premises are "equipped with appropriate fire-fighting equipment". If no suitable fire fighting equipment exists, it is surely an improvement rather than a repair to purchase some. Similarly, two of the principles that a landlord must consider when deciding what steps to take are "adapting to technical progress" and "replacing the dangerous by the non-dangerous or less dangerous" (art.10 and paras 1(d) and 1(e) of Schedule 3 RRFSO). Upgrading unsafe fire safety equipment in line with technical progress is again surely improvement rather than repair. Thus, it is submitted that in either case a landlord could strongly defend a decision to make fire safety improvements.

Second, and more generally, landlords can argue that the essence of the RRFSO *requires* them to take certain steps, which may include undertaking improvements, so it is inherently reasonable for them to do so. In general, landlords "must … take such general fire precautions as may reasonably be required in the circumstances of the case to ensure that the premises are safe" (art.8(1)(b) RRFSO). However, to know what steps to take, landlords "must make a suitable and sufficient assessment of the risks to which relevant persons are exposed" (art.9(1) RRFSO).

Practically, in most cases, a landlord will outsource the risk assessment to a fire safety expert and will not be in a position to doubt the expert's recommendations. Furthermore, it would appear that a landlord is legally required to comply with those recommendations. First, the duties in articles 8(1)(b) and 9(1) are mandatory—the landlord "must" take those steps. Second, the risk assessment is intended to describe the steps that the landlord "needs to take" (art.9(1)). Third, art.32(1)(a) RRFSO makes it a criminal offence for a landlord to "fail to comply with any requirement… imposed by articles 8 to 22 … where that failure places one or more relevant persons at risk of death or serious injury in case of fire". Depending on the terms of the risk assessment, tenants could very well be put at risk if the fire safety recommendations are not implemented.

In short, looking at the essence of the RRFSO, it is submitted that landlords could legitimately argue that it is not just reasonable to implement recommended fire safety improvements, but that it would be dangerous and potentially illegal *not* to do so. Given that landlords are accorded "a margin of appreciation" when deciding what works to undertake (*Waaler* at [37] and [39]), it is submitted that this is a powerful argument in the landlord's favour.

Conclusion

In summary, it is submitted that the RRFSO, properly interpreted, greatly assists landlords in achieving tenants' co-operation with fire safety works in their blocks. First, art.17 imposes a duty on tenants to allow the landlord to undertake works within demised premises. Second, provided a landlord can persuade a court that a "sweeping up" service charges clause permits recovery of fire safety works, the essence of the RRFSO gives the landlord a strong hand in arguing that such costs are inherently reasonable.

The law is stated as at 14 August 2019.