

# Landlord and Tenant - Breach of Covenant for Quiet Enjoyment - Owen v. Gadd and Kenny v. Preen

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Commentary

## Citation Information

Middleton, Edward B.. "Landlord and Tenant - Breach of Covenant for Quiet Enjoyment - Owen v. Gadd and Kenny v. Preen." *Osgoode Hall Law Journal* 3.1 (1964) : 132-136.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol3/iss1/13>

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LANDLORD AND TENANT — BREACH OF COVENANT FOR QUIET ENJOYMENT — OWEN V. GADD AND KENNY V. PREEN — For some time it seemed to be settled in English and Canadian law that in order to succeed in an action for breach of an express or implied covenant for quiet enjoyment contained in a lease, the lessee had to establish a substantial interference of a direct and physical character with the enjoyment of the demised premises, for which the lessor was responsible.<sup>1</sup> The meaning and efficacy of this test have been considered recently by the English Court of Appeal in *Owen v. Gadd*<sup>2</sup> and *Kenny v. Preen*<sup>3</sup> The purpose of this comment is to examine the background and basis of the test and the effect of these decisions upon it.

The first stage in the development of the test was a series of decisions in which it was held that there must be a *substantial* interference with the enjoyment of the demised premises. In *Sanderson v. The Mayor &c., of Berwick-upon-Tweed*,<sup>4</sup> there was a series of drains on adjoining farms. The defendant let one farm to the plaintiff and another on a higher level to a tenant who improperly used the drains with the result that the plaintiff's land was flooded. The court held that there was a breach of the covenant for quiet enjoyment.

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<sup>37</sup> *Ibid.*, 264.

<sup>38</sup> 59 S. Ct. 668, 306 U.S. 601, 307 U.S. 609. See also *N.L.R.B. v. Townsend*, 185 F. 2d 378, 71 S. Ct. 621, 341 U.S. 909.

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<sup>1</sup> Woodfall—Law of Landlord and Tenant, 629 (26th ed. 1960).

<sup>2</sup> [1956] 2 Q.B. 99.

<sup>3</sup> [1962] 3 W.L.R. 1233.

<sup>4</sup> [1884] 13 Q.B.D. 547.

Fry L.J. said:

But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land, nor the possession of the land may be otherwise affected.

A year later, Baron Pollock in *Edge v. Boileau*<sup>5</sup> held that where a landlord directed his tenant's subtenant to pay the rent to him rather than to the tenant and this was done, a "substantial disturbance of the plaintiff's quiet enjoyment of the property demised" had been established.

The requirement that the interference with possession or enjoyment be of a physical character seems to date from the case of *Tebb v. Cave*.<sup>6</sup> There the defendant leased a house to the plaintiff, to be used *inter alia* as a dwelling, and covenanted for quiet enjoyment. After the date of the lease and the taking of possession under it, the defendant raised the height of certain flats, which were under construction on his adjoining land, above the level of the plaintiff's house. The result of this was that when the wind blew from certain directions, a down draft was created in the plaintiff's chimneys causing them to smoke and rendering certain rooms uninhabitable. The plaintiff brought action for *inter alia* damages, alleging a breach of covenant for quiet enjoyment. Buckley J. held for the plaintiff and, in discussing the defendant's contention that the plaintiff must show something in the nature of physical interference, said:

Supposing (that the plaintiff must show something in the nature of a physical interference) it appears to me that *this is physical interference*. There is interposed something which causes the ordinary current of wind to be diverted and driven down the chimneys, with the result that the chimneys smoke. It seems to me that *this is substantial interference* with the enjoyment of the plaintiff's house, and is contrary to the covenant for quiet enjoyment. (Emphasis added.)

This decision was doubted by two members of the Court of Appeal in a similar case; *Davis v. Town Properties Investment Corporation, Limited*,<sup>7</sup> where the plaintiff was granted a fourteen year lease of offices on the ground floor of a building. After about a year the reversion was assigned to the defendant. Two years later the defendant purchased a house next door, tore it down and erected new buildings which were higher than the building occupied by the plaintiff, and the change in draughts caused the plaintiff's chimney to smoke. The court rejected the plaintiff's claim based on breach of the covenant for quiet enjoyment, holding that the lessor's covenant was personal and did not run with the land. However, in the course of his judgment Romer L.J. said:

. . . in the case of an alleged breach of the ordinary covenant for quiet enjoyment, where by the alleged breach neither title to the land, nor the possession of the land is affected, and what the lessee complains of is

<sup>5</sup> [1885] 16 Q.B.D. 117.

<sup>6</sup> [1900] 1 Ch. 642.

<sup>7</sup> [1903] 1 Ch. 797.

only an interruption of his enjoyment of the land by some act of the lessor, I doubt whether the act complained of is a breach of the covenant unless it amounts to a direct interference with the enjoyment. I doubt, therefore, whether *Tebb v. Cave* was rightly decided on the ground of breach of covenant, seeing that in that case the defendant was not directly interfering with the plaintiff's house.<sup>8</sup>

The notion that the interference must be of a physical character was affirmed in *Browne v. Flower*.<sup>9</sup> There the defendant landlord built an iron stairway on the outside of the building in which the plaintiff tenant had leased the ground floor. The stairway was located between the windows of two of the bedrooms in the plaintiff's flat. Persons using the stairway could see directly into the plaintiff's rooms thus interfering with his privacy.

The plaintiff brought action for injunctive relief alleging, *inter alia*, breach of covenant for quiet enjoyment. In holding that the action could not succeed on the basis of breach of this covenant, Parker J. said:

It appears to me that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as noise, invasion of privacy, or otherwise is not enough.<sup>10</sup>

For many years this statement has been accepted by Canadian courts.<sup>11</sup> For example in *Hormidge v. Magur*,<sup>12</sup> the tenant's children had been slapped by the landlord on several occasions while they were outside the tenant's apartment but in the apartment building. The landlord had also threatened to wring the children's necks and to cut the tenant's throat on other occasions. The decision of the trial judge, that this amounted to a breach of covenant for quiet enjoyment was reversed by the British Columbia Court of Appeal. Robertson J.A. held that physical interference with the enjoyment of the demised

<sup>8</sup> This doubt was shared by Cozens-Hardy L.J.; Collins M.R. did not comment on the *Tebb* case.

<sup>9</sup> [1911] 1 Ch. 219.

<sup>10</sup> In *Harmer v. Jumbil (Nigeria) Tin Areas Ltd.*, Court of Appeal [1921] 1 Ch. 200, Eve J. at trial, had said, ". . . apart from the particular nature of the interference, inasmuch as the act did not affect either title or possession, it could not properly have been treated as a breach of the covenant". This view was accepted by the Court of Appeal. See *ibid.*, p. 217. However, it was rejected in *Owen v. Gadd*, *supra*, footnote 2, at p. 106.

<sup>11</sup> In Ontario Wright J. in *Geary v. Clifton Co.*, [1928] 62 O.L.R. 257, gave effect to it. The manager and some employees of the lessor entered the tenant's premises and told her that if she did not discontinue selling certain goods sold by a competing tenant in adjoining premises, she would be evicted. It was held that there had been no breach of the implied covenant for quiet enjoyment because the element of physical interference with the enjoyment of the premises was lacking.

In *Franco v. Lechman* (1963), 36 D.L.R. (2d) 357 (Alta., App. D.), the landlord who wanted the tenant out of the premises leased for the operation of a coffee counter, told the tenant on several occasions that he wanted him to vacate, and created a scene before the tenant's customers by throwing the rent cheque on the floor and telling him rudely to get out. Kane J.A. referred to *Browne v. Flower* once again and found that "there was a physical and substantial interference by the landlord with the enjoyment by the tenant of the demised premises." See also *Kerr v. Marfield* (1956), 4 D.L.R. (2d), 294 (Alta., App. D.).

<sup>12</sup> [1946] 3 W.W.R. 668.

premises had not been established, none of the acts complained of having taken place on the demised premises. This decision illustrates that the range of situations in which relief could be given for breach of covenant for quiet enjoyment was narrow.

The meaning of the direct and physical interference requirement was examined by the English Court of Appeal in *Owen v. Gadd*.<sup>13</sup> There the landlord leased ground floor premises as a shop in which the tenant was to sell baby carriages, radios, and toys. Three days after the lease was granted, contractors under instructions from the landlord erected a scaffold in front of the shop windows and door in order to repair the upper floor of the building. The scaffold did not touch the demised premises but remained in position for about two weeks, during which time the fall budget was expected from Parliament. Other shops in the area had increased their business but the tenant had not. He brought action against the landlord for damages alleging breach of covenant for quiet enjoyment.

The court held that the enjoyment of the premises for the purpose for which they were let was substantially interfered with and that the interference was direct and physical.

Lord Evershed, M.R.<sup>14</sup> said:

I am prepared to assume that the disturbance, the interruption, must at least be of what is called a direct and physical character. . . . But we are here concerned with something that is not only physical—the placing of the scaffold poles, like hoardings, is certainly physical—but also direct; it was done at the direct requirement of the lessors.<sup>15</sup>

The court decided that there was no reason why Parker J.'s words in *Browne v. Flower* should be restricted to mean that there must be an irruption onto or into the premises in order that there be a direct and physical interference. The effect of this decision, it is submitted, is virtually to eliminate the direct and physical requirement. Proof of the activity of the landlord in either *Hormidge v. Magur*<sup>16</sup> or *Browne v. Flower*<sup>17</sup> would satisfy the requirement as defined by the court. Indeed, it also would be satisfied where the tenant of a dwelling house proved that the landlord made threats of physical eviction by telephone. Of course the question would remain in all of these situations whether the interference should be regarded as substantial.

The very existence of the requirement was questioned by Pearson J., in *Kenny v. Preen*. There, after the plaintiff, an elderly widow, had been in possession of a flat for about three years at a weekly rental, the defendant began a series of activities obviously aimed at discouraging his tenant from remaining as such. He sent her abusive letters and eviction notices, called at her rooms knocking on the

<sup>13</sup> *Supra*, footnote 2.

<sup>14</sup> *Ibid.*, at p. 106-7.

<sup>15</sup> *Supra*, footnote 10.

<sup>16</sup> *Supra*, footnote 12.

<sup>17</sup> *Supra*, footnote 9.

door demanding to have the flat, and threatening to put her furniture into the street. The plaintiff consulted her solicitors who advised her and the landlord that the eviction notices were invalid because of the Rent Restriction Acts which had the effect of turning her into a statutory tenant. The defendant proceeded to further intimidate the plaintiff with verbal threats of eviction, letters, and more pounding on the door to her flat. His efforts continued intermittently over a period of about a year and a half. The plaintiff sued *inter alia* for an injunction to restrain the defendant from continuing his activities and was granted relief at trial. The Court of Appeal affirmed the decision of the trial judge that there had been a breach of the covenant but for different reasons.

Pearson L.J. said:

I would decide on two grounds in favour of the tenant's contention that there was, in this case, a breach of the covenant for quiet enjoyment.

First, there was a deliberate and persistent attempt by the landlord to drive the tenant out of the premises by persecution and intimidation, and intimidation included threats of physical eviction of the tenant and removal of her belongings. In my view that course of conduct by the landlord seriously interfered with the tenant's proper freedom of action in exercising her right of possession, and tended to deprive her of the full benefit of it, and was an invasion of her rights as tenant to remain in possession undisturbed, and so would in itself constitute a breach of covenant, even if there were no direct physical interference with the tenant's possession and enjoyment. No case of this kind has even been considered by the courts before, and I do not think the dicta in the previous cases should be read as excluding a case of this kind where a landlord seeks, by a course of intimidation, to "annul his own deed", to contradict his own demise, by ousting the tenant from the possession which the landlord has conferred upon her.

Secondly, if direct physical interference is a necessary element in the breach of covenant that element can be found in this case to a substantial extent, as I have already stated.<sup>18</sup>

It is submitted that the effect of *Owen v. Gadd*<sup>19</sup> and *Kenny v. Preen*<sup>20</sup> is to restore the substantial interference test stripped of the "direct and physical" qualification. In England, at least, the range of situations in which relief can be given for breach of covenant for quiet enjoyment has been expanded considerably. The task of the courts will now be to determine whether there has been a substantial interference with the lessee's enjoyment of the demised premises, having regard to the purposes for which they were let, for which the lessor is responsible.<sup>21</sup>

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<sup>18</sup> Ormerod L.J. agreed with the decision of Pearson L.J. Donovan L.J. agreed in the result, holding that the direct and physical interference test was satisfied. He said: "I have no difficulty in concluding that landlord's conduct was direct physical interference with the enjoyment of the premises let, and more than the creation of a mere personal annoyance. If that view be justified, then on the authorities there has been a breach of the covenant for quiet enjoyment." *Supra*, footnote 3, at p. 1244.

<sup>19</sup> *Supra*, footnote 2.

<sup>20</sup> *Supra*, footnote 3.

<sup>21</sup> *Owen v. Gadd, supra*, footnote 2 at p. 108.

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