IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 98 (LC)
Case No: LRX/81/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – clause in lease required tenant to permit the landlord to enter on 48 hours notice for specified purposes – Notice given requiring access on a date 18 days ahead but also requiring the tenant to confirm within 7 days that access would be provided – in the absence of a response by the Tenant, the Landlord did not attend on specified date – whether a breach of covenant. – Held by the F-tT – No breach – Appeal dismissed.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

NEW CRANE WHARF FREEHOLD LIMITED	**Appellant**
- and -	
JONATHAN MARK DOVENER	**Respondent**

Re: Flat 114 New Crane Wharf,
11 New Crane Place,
London, E1W 3TU

His Honour John Behrens
Royal Courts of Justice, Strand, London, WC2A 2LL
on
21 March 2019

Robert Brown instructed by Northover Litigation for the appellant

Jonathan Dovener appeared in person

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The following cases are referred to in this decision:

Investors Compensation Scheme Ltd v West Bromwich Building Society (No. 1) [1998] 1 WLR 896

Arnold v Britton [2015] UKSC 36; [2015] AC 1619

DECISION

Introduction

1. This is principally an appeal against the decision of the First-tier Tribunal ("the F-tT") dated 12 June 2018. It raises a short point of construction in relation to the breach of a covenant in a lease. As the covenant is in common form and, as what happened on this occasion is by no means unusual, the point is of some practical importance.

2. Clause 3.08 of the lease is a covenant by the Tenant requiring him

> "To permit the Lessor and its agents and workmen at all reasonable times on giving not less than forty eight hours notice (except in case of emergency) to enter the Demised Premises for …"
>
> [A number of purposes are then set out. It is not in dispute that the Landlord requested access for a lawful purpose within the terms of the covenant.]

3. The Landlord's solicitor wrote to the Tenant on two occasions requiring access. A letter dated 11 September 2017 included:

> "… you are required to give our client access to inspect the Property on 29 September 2017 at 10.30 am.
>
> "We therefore await hearing from you by close of business on 18 September 2017 … with your confirmation that access will be given on 29 September 2017."

4. There was no reply to that letter. However, it was referred to in later correspondence. An email from the Tenant dated 17 January 2018 included:

> "Why does your client require access to my flat? That is an invasion of privacy and prevents my quiet enjoyment of my property.

5. On 18 January 2018 the Landlord's solicitor made the second request:

> "You should be aware that clause 3.08 of the Lease clearly entitles our client to access upon giving 48 hours' notice. Notice was given to you as far back as 11

> September 2017 but you have failed and refused to afford our client or its agent's access to inspect the Property.
>
> "In the circumstances, we will await hearing from you by close of business on Friday 19 January 2018 with a copy of the plans and/or your confirmation that access will be given to the Property by 5.00 pm on Tuesday 23 January 2018.
>
> "If we do not, by close of business on Friday 19 January 2018, receive the plans and/or your confirmation that access will be given by 5.00 pm on Tuesday 23 January 2018 then we will proceed with our client's application to the First-tier Tribunal."

6. There was no reply to that letter. There was no evidence before the F-tT that the Landlord or its agents or workman attended on either of the two dates specified in the letters. The inference is that there was no actual attempt to gain access on either occasion. The Landlord argued that the Tenant's failure to respond to the two letters amounted to a breach of covenant. However, the F-tT held that there was no breach of covenant.

7. Permission to appeal was granted by the F-tT on the ground there is at least a respectable argument in favour of the Landlord's reading of clause 3.08 and the point at issue is potentially of wide importance.

8. The subsidiary ground of appeal related to an application by the Landlord that the Tenant reimburse the application and hearing fees pursuant to rule 13(2) Tribunal Procedure (First-tier Tribunal) Rules 2013. The application was refused by the F-tT for the reasons set out in para 54 of its decision:

> Whilst there have been breaches of covenant, these are confined to matters which have already been admitted by the Respondent. Both of those breaches (the one relating to subletting and the one relating to alterations) are in the past. The one relating to alterations was in our view relatively minor and may possibly have been informally acquiesced to on behalf of the Applicant if not actively waived. The other one may have been the result of an honest mistake on the Respondent's part. In the circumstances we are not persuaded that the application was a necessary one, nor are we persuaded that it would be appropriate to penalise the Respondent by ordering him to reimburse these fees.

9. Permission to appeal was refused by the F-tT. However, when the application was renewed before this Tribunal the Deputy President adjourned the consideration of this ground of appeal until the hearing of the main ground of appeal.

10. In dealing with the application the Deputy President made the following comment:

> Although permission to appeal has been granted by the F-tT on issue 2, it is not obvious that any purpose is served by this appeal or what benefit will accrue to the Appellant if the appeal is successful. The covenant against alterations having been found by the F-tT to have been breached, no obvious purpose would now be served by a determination that there had or had not been a refusal of access at some time in the past. The parties should consider whether the more economical course for them both would not now be a settlement of the whole dispute on sensible terms.

11. This sensible advice has not been followed. The Landlord has been represented by Mr Robert Brown of Counsel. Mr Brown has prepared a detailed skeleton argument referring to a number of authorities for which I am grateful. Mr Dovener, the Tenant has represented himself. He has filed a Respondent's Notice which does not address the legal issues that arise. However, he has made a number of factual points. He denies that he has ever refused access. He points out that the Landlord's managers have a key to the flat which they have often used to gain access. They generally ask his permission to gain access but not always. He says that there are examples of occasions when the key has been used without permission. He says that as the managers have a key his presence is not required to enable access. However, he says he was present on both the dates the Landlord required access.

The reasoning of the F-tT

12. The Ft-T's reasoning on this part of the application is to be found in paras 32 to 40 of its decision. Paras 36 to 38 are central to the decision:

> 36. Clause 3.08 lists various purposes for which access can be sought by the landlord, and it is clear — and not disputed by the Applicant — that access can only be sought for something which constitutes what we will characterise for the sake of brevity as a proper purpose. Provided the purpose is a proper one then the Respondent must permit access on being given not less than 48 hours' notice. The letters from Northover clearly provide more than 48 hours' notice and we are satisfied on the facts that access was being sought for a proper purpose.
>
> 37. However, the fact that access was not then gained does not by itself demonstrate that the Respondent failed to permit entry in breach of covenant. There is nothing contained in or — in our view — implied by the wording of the covenant to indicate that the landlord may only gain access after first securing the tenant's confirmation that the chosen day and time is convenient. The landlord must give 48 hours' notice but then, having done so, it may exercise the right at the stipulated time provided that it is a reasonable time (not, for example, in the middle of the night). Clearly in

the context of a good landlord and tenant relationship there will often be communication as to how convenient or otherwise the chosen day/time is, and the landlord may well decide for the sake of good relations and practicality that it is prudent to obtain the tenant's express agreement to the precise time, but it does not follow that this is a pre-condition to the exercise of the right.

38. The evidence indicates that apart from his email of 17th January 2018, which is not in fact relied on in the Applicant's written submissions, the Respondent did not respond to Northover's statements that its client wished to gain access to the Property. The Applicant's case therefore seems to be that, through failing to respond positively to the Applicant's solicitors' statement that their client wished to gain access to the Property, the Respondent was in breach of the obligation to permit entry. We do not accept this analysis. Having given more than 48 hours' notice and having specified a reasonable time it was open to the Applicant then to exercise its right of entry. If on the Applicant attempting to gain entry such entry had either been refused or not been facilitated then it could at that point have been established that entry was not being permitted, but in our view this is not the case in the absence of either an attempt to enter or an express refusal of permission to enter in advance.

13. The F-tT went on in paras 39 and 40 to determine that there was nothing in the Tenant's email of 17 January 2018 that amounted to a refusal to grant access and that there was no breach of covenant.

Preliminary Matters

14. Before dealing with the arguments there are a number of preliminary matters that need to be addressed.

15. The obligation on the Tenant in cl 3.08 is to permit the Landlord to enter the premises on giving the appropriate notice. It is not a clause authorising entry in the absence of such permission. Whether or not the Landlord is entitled to enter if permission is refused is not a matter that falls for decision in this appeal. Mr Brown suggested that there were passages in the F-tT's decision which suggested that the Landlord was entitled to enter the premises if permission was refused. I do not read the decision in that way. In any event I was not referred to any authorities on self help and I make it clear that nothing in this decision is intended to address the remedies that may be available to the Landlord in the event of the refusal of permission.

16. It is plain from the Respondent's Notice that Mr Dovener did not understand fully the nature of the obligation under clause 3.08. He says he thought that the Landlord had a right of

entry whether or not he gave permission. His misunderstanding was excusable in the light of the letter sent by Ms Northover on 18 January 2018 which inaccurately set out cl 3.08 of the lease when she wrote "The Lease clearly entitles our client to access".

17. There is to my mind considerable doubt whether the letter of 18 January 2018 could be a valid notice under cl 3.08. It requires access to be given *by* 5 p.m on 23 January 2018. To my mind "by" means "before". If so, that is not notice when the Tenant is required to permit access. However, that is not a point I need to decide because I am satisfied that the letter of 17 September 2018 is a valid notice and thus the point raised in the decision of the F-tT does arise.

Mr Brown's submissions

18. Mr Brown referred me to well-known cases on the approach to interpretation including the well known passage from Lord Hoffmann's speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No. 1)* [1998] 1 WLR 896, HL, at 912H-913F and para 15 of Lord Neuberger's speech , in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. …

19. Mr Brown drew my attention to Woodfall Landlord & Tenant para 11.299. The landlord's right to enter the demised premises has to be read in the light of the covenant for quiet possession.

20. He submitted that on its true construction the word permit involved some positive assent by the Tenant. Mere silence or acquiescence was not enough. He points out that the Tenant was asked on two occasions to confirm that access would be granted and failed to do so. An approach that requires landlords to attend (unless the tenant has expressly declined in writing to

provide access) on the off-chance that they will be allowed access is likely to lead to a considerable waste of time and expense.

21. He submitted that it would not have been open to the Landlord to simply attend the premises at a certain point to see whether or not access would be granted because the terms of the 18 January 2018 request required the Respondent to identify a time (prior to 5pm on 23 January 2018) at which access would be granted.

22. He accordingly submitted that the Tenant was in breach of covenant.

Discussion

23. I accept the general principles enunciated by Lord Neuberger. I also accept that the granting of permission requires some positive act by the Tenant. The crucial question, as I see it, is to identify the time when the Tenant is required to grant permission. There is nothing in the wording of clause 3.08 which requires the Tenant to grant permission before the time and date specified in the notice. To my mind the natural and ordinary meaning of the clause is that permission will be granted at that date and time. Whilst I can see that it would be commercially convenient to require permission to be granted earlier that the time and date in the notice, I do not regard such a term as necessary to give business efficacy to the lease. In those circumstances I would not imply such a term. I am equally unimpressed by Mr Brown's point about the letter of 18 January 2018. For the reasons I have given earlier I am far from satisfied that the letter constituted a valid notice under clause 3.08. It was, at best, an invitation to the Tenant to propose a time in the light of cl 3.08.

24. Since sending out this judgment in draft Mr Brown has asked me to express a view on whether the Landlord need attend if the Tenant refuses permission in advance. There is no suggestion that Mr Dovener did in fact refuse so the question is hypothetical and my views would necessarily not be part of the decision. If the refusal was said to be oral this could give rise to disputed questions of fact. In the case where there is a clear refusal it would normally be reasonable for the Landlord to rely on the refusal. In those circumstances the Landlord would not need to attend. I can, however, conceive of circumstances where it would not be reasonable to rely on the refusal. The nature of the refusal may not be sufficiently clear. The Tenant may change his mind before the time when access is to be exercised. If, after a refusal he recants and informs the Landlord that he will allow access the Landlord will have to attend. The crucial time is the time when the access is to be exercised. There may be other circumstances where it would not be reasonable for the Landlord to rely on the refusal. I am not attempting to give an exhaustive list.

25. For these reasons which are, in effect, the same as those given by the F-tT I would dismiss the appeal. In summary there is no evidence that the Tenant failed to grant a right of entry at the date and time specified in the letter dated 17 September 2018.

Permission to appeal

26. Mr Brown criticised the reasoning of the F-tT in para 54 of the decision. Although the Tenant had admitted subletting and making alterations, he had not admitted that they were breaches of the terms of the lease. The fact that the breaches were in the past is not relevant. Unless the breaches are continuing they will have occurred in the past. The F-tT should not have assessed the breaches as "minor". The possibility that the breaches might have been waived should have been irrelevant. Equally the question of whether the Tenant made a mistake about subletting is irrelevant.

27. The starting point is that the decision whether to exercise its power under rule 13(2) is discretionary. Furthermore this Tribunal is slow to interfere with a discretion in relation to costs (and in my view the reimbursement of fees). The next important point is that the application failed in relation to breaches of clauses 3.08, and 4.11. Whilst it is true that there was no admission of breach there were admission of the facts constituting the breach. |In my view it was open to the F-tT to take into account its view of the seriousness of the breach and whether there were mitigating factors in the exercise of its discretion under rule 13(2). For these reasons I am satisfied that the decision to refuse the order was well within the ambit of the F-tT's wide discretion and I would refuse permission to appeal.

John Behrens

Judge John Behrens

2 April 2019