UPPER TRIBUNAL (LANDS CHAMBER)

Neutral citation number: [2022] UKUT 266 (LC)
UTLC No: LC-2022-83

Royal Courts of Justice, Strand,
London WC2A 2LL

10 October 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – BREACH OF COVENANT – tenant's covenant to permit landlord to enter and inspect a residential flat – flat sublet to protected tenants – landlord attending premises after giving notice but not being allowed access – whether breach of covenant by tenant – s.168(4), Commonhold and Leasehold Reform Act 2002 – appeal dismissed

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

BETWEEN:

DORRINGTON RESIDENTIAL LIMITED

Appellant

-and-

56 CLIFTON GARDENS LIMITED

Respondent

Re: 56 Clifton Gardens,
Maida Vale,
London W9

Martin Rodger KC, Deputy Chamber President

Hearing date: 30 September 2022

Jamal Demachkie and *Lina Mattsson*, instructed by DMH Stallard LLP, for the appellant
Carl Fain and *Katie Gray*, instructed by Axiom DWFM Solicitors LLP for the respondent

© CROWN COPYRIGHT 2022

The following cases are referred to in this decision:

Beaufort Park v Sabahipour [2011] UKUT 436 (LC)
Earl of Plymouth v Rees [2020] 4 WLR 105
New Crane Wharf Freehold Ltd v Dovener [2019] UKUT 98 (LC)

Introduction

1. The issue in this appeal is whether the First-tier Tribunal (Property Chamber) (FTT) correctly concluded that a tenant was in breach of a covenant in its lease requiring it to permit its landlord to enter the demised premises to examine their state and condition. The FTT issued its decision on 22 November 2021 and subsequently granted permission to appeal.

2. The appeal concerns 56 Clifton Gardens, a building in Maida Vale divided into four flats. The appellant, Dorrington Residential Ltd, owns the long lease of the ground floor flat which is sublet on a Rent Act protected tenancy to an elderly couple named Mr and Mrs Cohen. The other three flats in the building are also let on long leases and the freehold belongs to the respondent, 56 Clifton Gardens Ltd, which is owned by the lessees of the four flats.

3. The relationship between Mr and Mrs Cohen and the occupiers of other flats in the building has not been an easy one. They have complained in the past of the failure of their upstairs neighbour to carpet the floors of his flat, causing them disturbance. For their part the lessees of the other flats complain of various examples of unneighbourly behaviour and nuisance on the part of Mr and Mrs Cohen. Whether there is any substance in any of these complaints is not a matter for resolution in these proceedings but they form a relevant part of the background.

The facts

4. The lease of the ground floor flat was granted by the respondent to the Church Commissioners for England in 1987.

5. The lease includes a covenant at clause 2.8.1 requiring it:

> "to permit the Landlord or its agents or workmen at all reasonable times (Requisite Notice having been given) to enter into and upon the Demised Premises for any other purpose connected with the interest of the Landlord in the Building or the Demised Premises or its disposal charge or demise and in particular to examine the state and condition thereof and to ascertain that there has been and is no breach of or non-compliance by the Tenant with the covenants on the Tenant's part herein contained …"

   The covenant goes on to provide that the landlord may require the tenant to remedy any defects found on such an inspection and obliging the tenant then to make good the defects or, in default, to permit the landlord to enter the premises to carry out works of repair.

6. The expression "Requisite Notice" which is used in clause 2.8.1 is defined as "notice in writing to the Tenant 24 hours before any entry is made on the Demised Premises or any part thereof PROVIDED THAT in the case of emergency no notice shall be required."

7. Separately from the covenant in clause 2.8.1 the lease also reserved a right for the landlord on giving Requisite Notice to enter the demised premises for the purpose of carrying out its obligations.

8. Mr and Mrs Cohen may already have been in occupation of the flat by the time the lease was granted in 1987; if not, it was sub-let to them soon after that and before the commencement of the Housing Act 1988. No copy of any written tenancy agreement for the flat was provided to the appellant when it acquired the lease in 1998. As a statutory tenancy Mr and Mrs Cohen's tenancy will be subject to the condition provided by section 3(2), Rent Act 1977 that they should afford their landlord access to the flat and all reasonable facilities for executing any repairs which the landlord is entitled to execute.

9. Mr Ali Naini is a director of the respondent and the owner of the basement flat where he lives. Early in 2021 he became aware of noises which seemed to be coming from Mr and Mrs Cohen's flat. He suspected a rodent infestation and asked the appellant's managing agents, who at that time were Allsops, to investigate. On 26 February 2021 Ms Hunt of Allsops spoke to Mr and Mrs Cohen who said that they had not heard or seen anything suggesting the presence of rodents. In her note of her conversation Ms Hunt recorded that Mr and Mrs Cohen would like communication with their neighbours to be done through her, and that she had confirmed to them that that would be best for all parties. Ms Hunt informed Mr Naini that Mr Cohen was vulnerable to infection and that the couple had been shielding from the Covid pandemic but that she would ask them to allow access for an inspection on the basis that the persons carrying out the inspection would wear full PPE. At this time England was the subject of restrictions under the Health Protection (Coronavirus Restrictions) (Steps) (England) Regulations 2021 which limited social gatherings but did not otherwise interfere with the rights and obligations of property owners.

10. Allsops ceased to manage the flat on behalf of the appellant at the end of March 2021 and were replaced by new managing agents.

11. On 20 April 2021 the respondent gave notice under clause 2.8.1 of the lease that it wished to inspect the ground floor flat on 21 May 2021 at noon. The notice explained that it was given "following complaints of nuisance". A copy of the notice was delivered to the flat by hand addressed to "the Tenant"; a second copy was sent to the registered office of the appellant; a third copy was sent to Allsops, by now the appellant's former managing agent. It is accepted by the appellant that by reason of section 196 of the Law of Property Act 1925 both the first and the second methods of service of the notice were legally effective. In a witness statement prepared for the subsequent proceedings Mr Yeates, a director of the appellant, stated that he received a copy of the notice by email from the appellant's office services company on 21 April 2021. Despite the appellant being aware of the request for access it acknowledges that it took no steps at all to arrange for access to be made available.

12. On 21 May 2021 Mr Naini and Mr Birch of the respondent's agents attended the building at 12 noon and rang on the doorbell of Mr and Mrs Cohen's flat. There was no response. They returned twice in the next hour but each time obtained no response. It is not known

whether Mr and Mrs Cohen were in the flat at the time. No effort was then made by the respondent to rearrange the inspection or to take up the appellant's offer of assistance in gaining access. Instead, on 13 August 2021, the respondent issued an application under section 168(4) Commonhold and Leasehold Reform Act 2002 asking the FTT to determine that there had been a breach of covenant.

The FTT's decision and the grounds of appeal

13. It was common ground before the FTT that notice requesting access had been validly served on the appellant but that when the respondent's representatives attended they had been unable to gain entry. The appellant nevertheless argued that there had been no breach of covenant.

14. The FTT dismissed all three grounds on which the appellant resisted the application and which form the basis of this appeal. First it rejected the suggestion that the notice was defective because the reference to it having been given "following complaints of nuisance" would have confused a reasonable recipient as to what the giver of the notice required. It also rejected the suggestion that the notice did not seek access at a "reasonable time" because entry was requested during the coronavirus pandemic from which Mr and Mrs Cohen were shielding. Finally, the FTT determined that the appellant itself was in breach of its obligation to permit entry to the flat because "it had notice of the date of proposed entry for a whole month but there is no evidence that it took any meaningful steps to facilitate such entry".

15. The appellant sought and was granted permission to appeal on three grounds, as follows:

    (1) That the FTT had been wrong to find that "Requisite Notice" had been given because on a proper construction of the notice the reason for which access was said to be sought did not satisfy the conditions for entry stipulated in clause 2.8.1.

    (2) That the FTT had been wrong to find that the notice had requested access at a reasonable time.

    (3) That the FTT had been wrong to find that the failure of Mr and Mrs Cohen to open the door on a single occasion constituted a breach of clause 2.8.1 by the appellant.

Issue 1: Form of notice

16. Mr Jamal Demachkie presented the appeal on behalf of the appellant. As he pointed out, a landlord's right of entry may only be exercised for the purposes which have been agreed in the lease and only after any conditions have been satisfied. Mr Demachkie accepted that a request for access to inspect the flat for defects and for signs of the possible presence of rodents was a purpose which could fall within the terms of clause 2.8.1.which authorised entry for any purpose "connected with the interest of the landlord in the building or the

demised premises" and in particular to enable the landlord to "examine the state and condition" of the flat.

17. Mr Demachkie nevertheless argued that because the landlord had referred to "complaints of nuisance" in the notice, and because the only previous reference to "nuisance" had been in exchanges between the parties concerning notices pinned by Mr and Mrs Cohen to their neighbours' doors, the notice requesting entry would have been understood by a reasonable recipient as requesting entry in connection with the posting of those documents, which was not a purpose within the scope of the covenant.

18. I dismiss this ground of appeal. Clause 2.8.1 does not require any particular information to be contained in a notice given by the landlord. It must be a "Requisite Notice" which requires that it be given at least 24 hours in advance. It must also identify the time at which the landlord wishes to be permitted to inspect the premises. But it is not required to provide any explanation of the landlord's reasons for wanting access, and a notice which provided no reason other than that the landlord wished to rely on the covenant would be perfectly good. If the landlord included a reason which was not within the scope of the covenant then I would be inclined to think that the tenant could refuse access because the landlord would not be purporting to exercise its right, but that is not the way Mr Demachkie puts his ground of appeal. He argued that the notice was not a valid notice because the reference to complaints of nuisance would have caused confusion about what it meant. He suggested the notice might have been taken to refer to the accusation that Mr and Mrs Cohen had caused a nuisance the previous year by fixing notices to a neighbour's door, which would not have provided legitimate grounds for requesting entry. That suggestion is simply fanciful. The possibility that a nuisance was being caused would have been a legitimate reason for an inspection (and the evidence shows that a rodent problem was indeed detected when a pest controller visited the flat at the request of the appellant). There had been exchanges between the parties about the possible rodent problem in February and the need for access to the Cohen's flat had been discussed in that context. Needless to say, there is no suggestion that any confusion was in fact caused to any of those who considered the notice (which is usually a reliable indication that a reasonable recipient would not have been misled). In any event, none of this casts any doubt on the formal validity of the notice, which was not required to give any reason for the landlord's wish to inspect.

Issue 2: Did the notice request access at a "reasonable time"

19. Mr Demachkie submitted that the FTT failed to have regard to relevant considerations when deciding that the notice requesting access on 21 May at noon sought access at a reasonable time.

20. The matters which Mr Demachkie said had been overlooked by the FTT were the following. First, that there was no urgent need for an inspection of the flat and that there were other ways of investigating the suggested rodent nuisance without exposing Mr and Mrs Cohen to risk. Secondly, that at the time of the notice England was subject to a national lockdown as a result of the coronavirus pandemic. Thirdly, that the request was for access to the home of two elderly and vulnerable individuals during the pandemic.

Fourthly, that entry was sought by two individuals at a time when the relevant public health restrictions prohibited more than two households from meeting for social gatherings.

21. The suggestion that the FTT failed to take these matters into account when it decided that the notice had requested access at a reasonable time is plainly unsustainable. Exactly the same matters were relied on in argument before the FTT and in paragraph 22 of its decision it acknowledged the existence of the coronavirus restrictions, described the situation as "not an emergency", and concluded that "even taking the pandemic into account" access had been requested at a reasonable time. The FTT clearly took all the matters relied into account in reaching that conclusion.

22. In oral argument Mr Demachkie reformulated his submission and suggested that, for the reasons he had identified it was not possible for the right of access to be exercised during the continuance of the pandemic, and that in effect no time would have been a reasonable time for access to be required.

23. The relevant part of the covenant requires the appellant "to permit the Landlord or its agents or workmen at all reasonable times (Requisite Notice having been given) to enter" the demised premises. The reference to a reasonable time is clearly a restriction on the right of access which depends on the circumstances. The middle of the night would not usually be a reasonable time for the landlord to require access to inspect the condition of the premises, although if there was thought to be an emergency, such as a gas leak, a request for immediate entry might be reasonable whatever the time of day or night. I agree with Mr Demachkie that the restriction is not simply concerned with the time of day at which access is sought. A request for access on Christmas Day might be just as objectionable as a request for access outside normal working hours.

24. Mr Demachkie referred to the decision of the Court of Appeal in *Earl of Plymouth v Rees* [2020] 4 WLR 105 which concerned a landlord's contractual reservation of access to a farm "for all reasonable purposes". There was no issue about the time at which the right of entry could be exercised; the question was whether the purpose for which access was required was within the landlord's reservation. Nevertheless, Lewison LJ emphasised that a reservation of a right of entry, or a covenant requiring a tenant to permit entry (which he said were subject to the same principles of interpretation) should be interpreted so as to work in a sensible fashion. Whether something that the landlord wished to do on the land was permitted by the right was "a question of fact and degree in each case".

25. In this case no right of entry exists unless and until the landlord has given 24 hours' notice. It must also request access at a reasonable time. What amounts to a reasonable time includes the day itself and the time of day, but I would not interpret the restriction too narrowly so as to exclude other relevant considerations. It might well not be reasonable to expect the tenant always to be available at such short notice. If, for example, the landlord sought access on a day when the tenant was not at home and could not reasonably be expected either to change their plans (for example because they were abroad on holiday) or make alternative arrangements for access to be permitted, it would be possible to say that the time at which access had been requested was not a reasonable time. The period of

notice specified in the definition of Requisite Notice is a minimum period and the landlord is not prevented from offering longer notice, as happened in this case when a month's notice was given. The longer the period of notice given the more difficult it may be for the tenant to argue that consideration of its own convenience made the suggested time an unreasonable one.

26. The proposition that during the pandemic, no time would be a reasonable time for a landlord to seek to enter the home of a vulnerable tenant is an extreme one. Determining what is reasonable involves an assessment of the facts and a consideration of the purpose for which access was required. That purpose was to investigate a reported rodent infestation. The presence of rodents was subsequently confirmed by investigations carried out by the appellant itself. There is no suggestion that the landlord's concern was fanciful or unreasonable. On the contrary it was important for a proper investigation to be carried out. There was nothing unlawful about the proposed entry on the premises. Throughout the pandemic public health restrictions were imposed on social gatherings, but not on property management. It was perfectly lawful for a landlord or its managing agent to inspect premises. As the appellants themselves pointed out, Mr and Mrs Cohen were subsequently prepared to allow access for a pest control specialist and a gas safety inspection later in the summer of 2021.

27. Once it is recognised that it is a question of fact and degree whether the time at which access was sought was a reasonable time the conclusion reached by the FTT must be respected by this Tribunal unless it can be shown that its process of assessment was flawed, such as by failing to take account of some relevant consideration. In this case the FTT took account of all of the matters relied on by the appellant when it determined that access had been requested at a reasonable time. Its conclusion was obviously one which was open to a reasonable tribunal so this ground of appeal also fails.

Issue 3: Was the appellant in breach because its sub-tenants did not let the respondent in?

28. Mr Demachkie's final ground of appeal was that the FTT had been wrong to find that the appellant had been in breach of clause 2.8.1 simply because the occupants of the flat, Mr and Mrs Cohen had failed to open the door on one single occasion. The premise of that ground is not strictly correct (the evidence was that the respondent's director and agent had rung on the doorbell on three separate occasions although all within the same hour). As it was developed in oral submission Mr Demachkie's argument had two aspects. His first submission was that contrary to the approach taken by the FTT, an obligation to permit the landlord to enter did not require the tenant to take any positive steps to facilitate entry and simply obliged it to refrain from doing anything which would prevent or hinder access. His second submission was that on the facts of this case a denial of access on a single occasion did not amount to a breach.

29. Mr Demachkie was prepared to take his first argument to a quite remarkable extreme. He submitted that the tenant was entitled to adopt an entirely passive approach provided it did not obstruct access. If a landlord arrived at his tenants' locked door requesting entry Mr Demachkie suggested that it would not be a breach of a covenant to permit access if the tenants confirmed that they were happy for the landlord to come in but were not prepared

to open the door to enable him to do so. It was up to the landlord to ensure that it held a key for the premises so that it could give effect to the permission given by the tenant to enter. If the landlord did not have a key the solution, Mr Demachkie suggested, was for it to seek an injunction to enforce the right of entry reserved in the lease.

30. Mr Demachkie's construction of clause 2.8.1 seems to me to be wholly unrealistic and would be liable to defeat the object of its inclusion in the lease. Used in the context of residential premises, or other premises which would usually be expected to be kept locked, an obligation to "permit" access does not just require passive consent and plainly involves more than refraining from taking positive steps to obstruct access. The obligation must involve the tenant in doing what is reasonably required to facilitate access; in the case of premises which are locked, that is likely to require the tenant to be present at the notified time with the key required to unlock the door, and to make use of it to allow the landlord to enter. Unless the covenant is interpreted as requiring such reasonable level of cooperation and affirmative action by the tenant as is necessary to enable the landlord to achieve its objective of obtaining access, the covenant would be liable to be rendered worthless.

31. Mr Demachkie referred to the well-known case of *Berton v Alliance Economic Investment Co* [1922] 1 KB 742 in which the Court of Appeal considered the meaning of a covenant by the tenant of a house not to permit the premises to be used other than for the purpose of a private dwelling house. The tenant had sub-let the house to someone who had then let individual rooms in the house to weekly tenants. The tenant itself had not been involved in those lettings but it took no steps to bring them to an end once it became aware of them. The Court of Appeal held that the tenant was not in breach of its obligation. Atkin LJ put it in this way:

> "To my mind the word "permit" means one of two things, either to give leave for an Act which without that leave could not legally be done, or to abstain from taking reasonable steps to prevent the Act where it is within a man's power to prevent it.

The weekly tenants had the protection of the Rent Restrictions Act 1920 and there was a reasonable doubt whether legal proceedings to remove them would have been successful. There were therefore no reasonable steps which the tenant could have taken to rectify the situation created by its sub-tenant and it was not in breach.

32. Mr Demachkie suggested that the covenant in *Berton* was different from the covenant in this case, the former being negative while the latter is positive. I agree that the two covenants are different in that respect, but I do not accept that Atkin LJ's dictum is of no assistance. Just as a covenant not to permit premises to be used in a particular way will be breached if a tenant fails to take reasonable steps which are available to it to prevent the prohibited use, so in my judgment an obligation to permit access will be breached if the tenant fails to take steps reasonably available to it to facilitate access.

33. Where the premises in question either have been sublet already or which are intended to be sublet to someone else, the tenant cannot be said to have complied with its obligation if it simply does nothing when the landlord requests access. In this case there are some

obvious and straightforward steps which the appellant could have taken, by contacting Mr and Mrs Cohen and considering how any concerns that they may have had could be addressed. That was the sensible course proposed by Ms Hunt, of the previous managing agents, but it was not followed through by the appellant. If a tenant chooses to do nothing in the face of a request, it does so at its own risk. If its sub-tenant allows the landlord entry at the requested time obviously no breach of covenant will have been committed. If, on the other hand, the sub-tenant refuses the landlord access and the tenant has done nothing to avoid that refusal (particularly in circumstances where the sub-tenants were known to be nervous) the tenant will in my judgment be in breach of its obligation. The risk of the landlord not being permitted entry falls on the tenant in those circumstances.

34. I therefore agree with the FTT that the obligation to permit access required the appellant to take reasonable steps to facilitate access. Those steps might not have guaranteed success, and would not, initially at least, have required the appellant to take proceedings against its sub-tenants. But where no steps had been taken, as in this case, it is not possible in my judgment to suggest that the covenant has been complied with.

35. Finally, Mr Demachkie relied on the decision of this Tribunal (HHJ Walden-Smith) in *Beaufort Park v Sabahipour* [2011] UKUT 436 (LC) in support of his submission that on the facts of this case a failure to admit the landlord on a single occasion did not amount to a breach of covenant. On my reading of that case, it provides no such support. The Tribunal did not say that the tenant was not in breach although, curiously, it decided not to make a determination of breach until after the tenant had had an opportunity to comply with a renewed request for access. The Tribunal has ample powers under its rules to adjourn a hearing or to deal with an issue separately and the decision in *Beaufort Park* can best be explained as a sympathetic exercise of those powers where the Tribunal considered the landlord had behaved in a heavy handed way.

36. For these reasons I am satisfied that the FTT came to the right conclusion and I dismiss the appeal.

Martin Rodger KC,

Deputy Chamber President

10 October 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal

must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.