Property law & the COVID-19 pandemic (Pt 2)

The use and occupation of property and performance of property contracts



Phil Sissons

Introduction

eyond the obligations of a tenant to continue to pay rent and service charges (see Pt 1, 'Property law & the COVID-19 pandemic', *NLJ*, 10 July 2020, p20) the lockdown restrictions give rise to a second major group of loosely related issues around the use and occupation of property.

Keep open covenants

Some commercial leases (particularly, for example, leases of retail units in a shopping centre) contain clauses which oblige the tenant to open for business, usually during specified hours. Can those clauses be enforced when the tenant ceases trading due to the pandemic? In most cases the answer seems clear. If the 2020 Regulations have compelled the closure of the business this would provide a defence to a claim for non-compliance with the covenant (For more detailed treatment of the issue of keep open covenants see '(Still) open all hours? Tenants' covenants to keep business premises open and to pay rent during the COVID-19 Pandemic', Jonathan Karas QC and James Tipler (https:// bit.ly/3jg3wV1)). It has long been established if a person covenants to do a thing which is lawful, and an Act of Parliament comes in and makes it unlawful for them to do it, the covenant is discharged (*Doe d Anglesea (Lord) v Rugeley (Churchwardens)* (1844) 6 QB 107; *Brown v London (Mayor)* 13 CB (NS) 828; affirming (1861) 9 CB (NS) 726).

However, it is not difficult to imagine more nuanced cases, particularly as the restrictions are eased. What if, for example, a small retailer or restauranteur is no longer precluded from opening by the 2020 Regulations, but does not wish to expose their staff to any risk of infection? In those circumstances, the illegality defence may not come to the aid of the tenant. It is possible that businesses are so desperate to re-open their doors that such a case is unlikely to arise but, if it did, then the answer may well be that, while technically a breach, the landlord's usual remedies of forfeiture or an injunction would be ineffective because the court might readily exercise its discretion to grant relief in favour of the tenant or refuse to grant a mandatory injunction.

Can a landlord keep the tenant out?

Conversely, can a tenant insist that it is allowed access to property, even if the landlord, perhaps concerned about breaching government regulations, does not wish to take the chance? This seems unlikely to be an issue in the great majority of cases where the tenant has exclusive possession of the demised property and so can decide for itself when it is safe to resume operations. However, cases have arisen where the position is not quite so straightforward. In the serviced office sector, for example, where the landlord provides extensive administration, cleaning and maintenance services, can the landlord refuse to provide those services causing an effective (or actual) closure of the building or will this amount to derogation from grant or the covenant to provide the services? As always, the answer to that will lie in a proper construction of the terms of the lease/licence in issue, but given that the safe-working guidelines issued by the government are nonstatutory guidance only, the aggrieved tenant may well have a valid cause for complaint if they are prevented from accessing premises they wish to and are able to use. On the other hand, it is hard to conceive that a court would grant an injunction to compel the landlord to permit access, or to resume the provision of services, if this would be a breach of government guidance or if the landlord can demonstrate reasonably founded concerns for the safety of its staff.

A related practical question is whether (and if so how) commercial landlords and tenants should implement the detailed non-statutory guidance issued by the government regarding the use of workplaces ('Working safely during coronavirus (COVID-19): offices and contact centres', Department for Business, Energy & Industrial Strategy, first issued on 11 May 2020 and last updated on 10 July 2020 (*https://bit.ly/3h5A6qB*)). Can a landlord implement restrictions on the use of common parts and means of access to a building in an effort to give effect to this guidance? Or is a commercial tenant entitled to take its own view as to how best to protect its employees?

Where a lease grants a tenant a right of way over common parts, including, for example, the use of lifts, then any steps which the landlord takes to implement the safe-working guidelines and which have the effect of interfering with convenient access to the demised premises may well amount to a derogation from grant or even nuisance. An analogy can be drawn with cases in which the owner of a servient tenement erects gates or locks doors; difficult questions arise about the degree of interference and the relevance of the owners motives in restricting access (see the authorities collected and discussed in Gale on Easements, 20th Ed, para 13-04 et seq). If employees are forced to use lifts only one at a time or to queue for a long period of time to access their place of work, this may amount to substantial interference which will often be outside the scope of the landlord's management powers. It will be necessary to scrutinise the relevant provisions of the lease or deed of easement to assess whether the landlord/servient owner has the requisite powers to implement such measures. However, it is important to bear in mind that the safeworking guidance does not have the force of law and will not override the contractual terms (though it may, of course, be relevant to the proper exercise of any discretion conferred by such terms). Overzealous landlords who restrict a tenant's access to a building may well be susceptible to challenge and even to a claim in damages.

Occupation for purpose of 1954 Act; obligations to give vacant possession

Other issues have arisen relating to occupation. First, the security of tenure afforded to business tenants under the 1954 Act applies only where tenants are in occupation of property for the purposes of their business. Whether a party is in occupation is a question of fact and degree but if, at the crucial date, the tenant is effectively locked out of a building, does it lose protection? Here, at least, there appears to be a relatively clear answer. First, by analogy with cases addressing seasonal occupation, if there is evidence that the tenant would have

resumed occupation but for the pandemic so that there is a degree of continuity of business use, that will likely be sufficient to retain 1954 Act protection, even if the business is not in fact trading on the relevant date. Second, if the tenant is forced to vacate a property by matters beyond their control then they retain the protection of the 1954 Act, provided that they continue to assert a right to occupation (*Morrisons Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 1 WLR 533, [1976] 2 All ER 205).

However, another area which may lead to litigation is where a party is obliged to give vacant possession of property, either on the expiry of a lease or pursuant to an obligation in a sale agreement. What if a (former) tenant or vendor claims that it is unable to provide vacant possession because it cannot safely instruct its staff or contractors to empty a property? It seems unlikely that the 2020 Regulations would altogether prevent the clearance of a property, provided that any necessary safety measures are put in place. If it did, then there may be a defence to a claim for breach of the covenant on the grounds of supervening illegality, but in practice it is rather more likely that the performing party would not be relieved of liability. Relatedly, the suspension on possession proceedings might have an impact on the quantification of damages where a tenancy ends and a sub-tenant remains in occupation. In those cases, if the sub-tenant has security of tenure, the head landlord will 'inherit' the sub-tenant and may have a claim for damages for breach of covenant for the period during which they are kept out of possession. Where the sub-tenant has an AST this would usually be a relatively short term problem because a s 21 notice can be served and possession recovered under the summary procedure. However, if the sub-tenant has acquired a temporary status of irremovability due to the general stay on possession proceedings, is the departing tenant liable for damages to take account of that extended period? The test is whether the loss is a reasonably foreseeable consequence of the landlord's breach and while one might forcefully argue that this whole crisis is the definition of unexpected, the converse (and in the writer's view more persuasive) argument is that the intermediate tenant should bear the consequences of their breach just as they would if the sub-tenant dragged out possession proceedings by raising hopeless defences.

Contracts for sale and development agreements

Moving away from landlord and tenant issues, the pandemic has also caused acute difficulties for the completion of contracts for sale and the performance of development agreements. Again, the government has issued detailed guidance on the sale and purchase of properties during the pandemic ('Government advice on home moving during the coronavirus (COVID-19) outbreak', Ministry of Housing, Communities & Local Government, published on 26 March 2020 and last updated on 21 May 2020 (https://bit.ly/2OsHQXd), but important issues of law remain as yet unresolved. The question of frustration and *force majeure* have been touched upon above but there are many other issues, three of which, in particular, deserve a mention.

- ▶ First, queries have been raised about whether one can safely serve a contractual notice at a time when it is known that the premises at which the notice is to be served are closed at the time the notice can be expected to be delivered. Expect arguments to follow which will test the limits of deemed service provisions under s 196 of the Law of Property Act 1925 and s 7 of the Interpretation Act 1978. But beware; if there is no applicable deeming provision incorporated it will likely be necessary to prove receipt for the notice to be valid.
- Second, practical problems of witnessing signatures on transfers and other conveyancing documents appear largely to have been overcome by the use of technology, with electronic signature of documents now widespread. It has been settled law for some time that an electronic signature is valid, provided that there is sufficient evidence of an intention on the part of the signing party

to attest the document. A more difficult question, and one which may well be tested in the near future, is whether a deed can be validly witnessed by a person who is not physically present when it is signed.

- Pursuant to Law of Property (Miscellaneous Provisions) Act 1989, s 1(3) an instrument is validly executed as a deed by an individual if it is signed in the presence of a witness who attested his signature (see also s 44 (2) of the Companies Act 2006 in relation to documents executed by a company, which uses similar wording). In 2019, the Law Commission concluded that this wording requires the witness to be physically present, while noting that in Shah v Shah [2002] QB 35, [2001] 4 All ER 138 Lord Justice Pill said that he could 'detect no social policy which requires the person attesting the signature to be present when the document is signed'. It would seem, therefore, that where a transaction must be completed by the execution of a deed, a party cannot witness a signature via Zoom or Skype. However, in these extraordinary times, it seems eminently possible that the courts might be persuaded to accept that 'presence' can include a 'virtual presence'. The absence of obvious policy reasons to the contrary is even more apparent when complicated and high-value litigation is being fought via remote hearings.
- Third, while anecdotal evidence suggests that many pre-COVID-19 contracts did complete during the lockdown period, for those that did not, then expect disputes to reach the court regarding the retention of deposits paid to the vendor. The government guidance cited above urges parties to act fairly and reasonably in relation to deposits, but the standard contractual position (absent an extreme case where frustration can be prayed in aid) will be that if the buyer defaults the vendor can retain any deposit paid (standard conditions).

One anticipates, therefore, that at least in some instances buyers who could not (or did not want to) complete as a result of COVID-19 will look to the jurisdiction created by s 49(2) of the Law of Property Act 1925 to mitigate the rigours of that outcome. Pursuant to s 49 (2), the court may direct the return of a deposit to the buyer wherever it thinks fit, but the authorities indicate that exceptional circumstances are required to justify overriding the contractual result (Midill (97PL) Ltd v Park Lane Estates Ltd [2008] EWCA Civ 1227, [2008] All ER (D) 99 (Nov)). The pandemic has certainly created extraordinary circumstances, but it is dubious whether the mere fact that the contract was due to complete during lockdown will, of itself, be sufficient. The court is likely to require solid evidence that completion was prevented by practical difficulties and not merely because the buyer got cold feet, fearing a downturn in the market, before invoking the jurisdiction. The court has generally taken the view that market risks are thrown on the buyer, whether the pandemic will be a sufficiently exceptional market event to change that view remains to be seen.

Comment

The above discussion is, of necessity, no more than a flavour of the myriad issues which have already arisen directly from the COVID-19 pandemic. In truth, it is harder to think of aspects of property law which will remain untouched. Whether this discussion has succeeded in identifying the key disputes or not, it seems inevitable that over the coming months, the courts will be forced to grapple with hard cases which may well have the effect of shaping property law for years to come.



Phil Sissons

https://www.falcon-chambers.com/barristers/profile/philipsissons

'Property law & the COVID-19 pandemic', Pt 1 NLJ, 10 July 2020, p20.