Rees v Earl of Plymouth [2020] EWCA Civ 816.

Interpreting landlords' rights of entry in leases

On 1 July 2020, the Court of Appeal handed down its decision in *Rees v Earl of Plymouth* [2020] EWCA Civ 816. Lewison LJ gave the lead judgment, with which Carr and Popplewell LJJ agreed.

The facts

The case concerned a 240-acre, predominantly arable farm close to Cardiff. The landlord was the claimant and the respondent on appeal; the tenant and his son the defendant and appellants.

The tenant farmed the holding under two tenancy agreements, one granted in 1965 and one in 1968. Both were now protected by the Agricultural Holdings Act 1986.

The landlord obtained outline planning permission for housing on the land comprising the farm. The environmental conditions attached to the planning permission required the landlord to undertake various landscape, wildlife and habitat surveys on the farm. These surveys included, amongst other things, digging trial pits and boreholes; placing surveyors' reference pins on the land, and leaving 'remote bat detectors' on the land for several days at a time in order to study the bat population.

The landlord claimed that it was entitled to enter the farm under a right of entry:

- in the 1965 tenancy agreement, to "*enter on any part of the Farm lands and premises at all reasonable times and for all reasonable purposes*"; and
- in the 1968 tenancy agreement, to enter the premises, *inter alia*, "*for the purposes of inspecting the same…*".

The issues

The landlord obtained an interim injunction in 2016 restraining the tenant from interfering with these rights of entry. The landlord then carried out a number of surveys before a trial in 2019.

The issues before the first instance judge were, firstly, whether the rights of entry permitted the landlord to enter onto the farm and carry out the activities in question and, secondly, whether in light of that the landlord was entitled to a final injunction.

The first issue raised a point of principle on which the case law was, in the judge's view, in a state of tension:

- The landlord contended that a landlord's right of entry was, in cases of ambiguity, to be construed in favour of the landlord and against the tenant. The landlord said this was so because of the *contra proferentem* principle of interpretation, relying on a Court of Appeal case which held, *obiter*, that because a landlord's reservation of a right of way operated as a re-grant of an easement by the tenant, the tenant was the *proferens*, viz. the person against whom the right was construed: *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No. 2)* [1975] 1 WLR 468.

- The tenant contended that the rights were much narrower than the landlord contended. The "*reasonable purposes*" for which the landlord was entitled to enter the farm had to be related to the parties' landlord and tenant relationship. A right to "*enter on*" the farm did not permit digging boreholes or trenches or leaving anything on the land. But that aside, due to the landlord's obligation not to derogate from grant, if a right of entry had two or more possible

meanings, the meaning which was *least* restrictive of the tenant's enjoyment of the premises should be preferred. In other words, a right of entry should be construed in favour of the tenant, not the landlord.

The first instance decision

The first instance judge decided the issues predominantly in favour of the tenant, discharged the interim injunction and dismissed the landlord's claim for a final injunction: [2019] EWHC 1008 (Ch).

The judge held that the rights of entry did not entitle the landlord to dig excavations, sink boreholes or erect structures on the holding. But the judge also concluded that the landlord was entitled to install remote bat monitors and place "*discreet reference points*" on the land, as these were forms of "*extended inspection*".

More broadly, the judge held the "*reasonable purposes*" for which the first right of entry could be exercised had to be referable to the parties' landlord and tenant relationship. It followed that those purposes had to be achieved either by the *mere fact of entry and presence on the land* (i.e. inspection and/or observation) or by the *performance of the landlord's obligations under the tenancy agreement* (such as to repair).

The appeal

On appeal, the tenant challenged the trial judge's conclusion on the issue of surveyors' reference points and remote bat detectors. The tenant contended that the judge had applied the wrong principles of interpretation and had erred in concluding that either right of entry permitted the landlord to leave equipment on the farm once the person exercising the right of entry had left.

The tenant's argument relied on a long line of cases[1] in support of the principle that rights excepted or reserved by a landlord in a lease, other than those which could have been granted as proprietary rights by the tenant to third parties (such as easements and profits à prendre), were to be interpreted, when the court was asked to select between multiple plausible meanings, so as to interfere least restrictively with the tenant's right of exclusive possession.

The landlord contended that the trial judge's conclusions should be upheld for the reasons he gave.

Giving judgment, Lewison LJ affirmed the following principles, which largely mirrored those distilled by the trial judge at first instance:

1. Rights excepted or reserved by a landlord in a lease are to be interpreted by applying the usual principles of contractual interpretation: [30].

2. If possible, they should be construed so as to avoid a derogation from grant or a breach of the landlord's covenant for quiet enjoyment. But the derogation from grant principle is only engaged where an interpretation would result in a "*substantial or serious interference with the tenant's use and enjoyment of the leased property; or would frustrate the purpose of the letting*": [21]-[22]; [66].

3. Applying the usual principles, it is to be *expected* that substantial qualifications of the tenant's right to exclusive possession and quiet enjoyment, or an entitlement for the landlord to cause

[1] In the context of landlords' rights of entry, provisos in leases, partial resumption clauses, forfeiture clauses, user covenants and covenants against alienation.

"*material disturbance or damage*" to the tenant, will be expressly authorised: [50]. That is true whether the right is a right of entry for all reasonable purposes, or a right of entry for the purposes of inspection: [78].

4. Beyond there, there is no principle of "strict construction" that rights of entry are to be strictly construed in favour of either the landlord or the tenant. (Though the judgment hints that covenants restraining alienation of the premises may be an exception to this: [41]-[42].)

5. What is permitted by a right of entry will therefore be a question of fact and degree in each case. The clause must be interpreted in context. Part of the context will always be that the purpose of the lease is to confer on the tenant the right to exclusive possession, on the terms of the lease or tenancy, for the contractual term: [62], [65], [66].

6. As the trial judge had not applied the *contra proferentem* rule, there was no need for the Court of Appeal to decide in whose favour it should apply. That said, Lewison LJ found it "*hard to see why*" the approach taken in the *St Edmundsbury* case (above) was correct: [67].

7. Where a right of entry is exercisable for a "*reasonable purpose*", the landlord is entitled to do on the land what is "*reasonable necessary*", but not necessarily what is "*convenient*" or "*desirable*", to achieve that purpose: [70]. Beyond that, there is no rule preventing those exercising a right of entry from leaving things on the land: [75].

As a result, the Court of Appeal saw no error in the trial judge's approach and the appeal was dismissed.

Implications

As the landlord raised no cross-appeal to the trial judge's conclusions on the most intrusive activities (trial pits and boreholes), the first instance judgment remains a useful reference point for landlords, particularly agricultural landlords, who seek to rely upon broadly-worded rights of entry in order to conduct environmental, landscape or habitat surveys. Such rights will not be construed as permitting substantial or serious interferences with the tenant's use of the holding. Those drafting tenancy agreements should therefore make express provision for a landlord's right of entry to be exercisable in such cases. Those advising tenants should seek to insert robust compensation provisions if those rights are exercised.

Where vague or broadly-worded rights continue to be relied on, however, the Court of Appeal's decision makes it difficult to place hard-edged limits on what is permitted. Everything is considered on a case-by-case basis. Insofar as the Court of Appeal has set out guidelines, they are that one would *expect* "*material*" disturbance or damage to be expressly authorised by the terms of the lease. Obviously, what is material is ripe for debate. Further, even where the purpose of entry is reasonable, the *manner* in which the landlord proposes to achieve that purpose must be "*reasonably necessary*".

As an aside, the principle in *Wheeldon v Burrows* (1879) 12 ChD 31 that rights will not generally be implied in favour of a grantor or lessor is undisturbed by the judgment. It now sits clearly as a distinct principle and should not be carried over to the exercise of interpretation (see [32]-[36]). The *contra proferentem* principle, meanwhile, remains of obscure application and utility in the landlord and tenant context. Arguments based upon it are probably best avoided.

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