

LANDLORD'S WORKS – BALANCING THE TENANT'S INTERESTS

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Introduction

- 1.1 When a landlord proposes to undertake works to a building in which a tenant is in occupation, it is sometimes the case that the landlord and tenant can become rapidly engaged in a dispute at an early stage. The landlord can be determined to push through its proposed works and the tenant can be aggrieved by the fact that its occupation is to be detrimentally affected at a time and in a manner over which it will have no control, to the prejudice of its own amenity or business interests. The parties may become rapidly entrenched against each other with potentially unhelpful stances being taken on each side, possibly with the landlord wanting to keep information from the tenant and possibly with the tenant not wanting to confront the reality of there being a period of disruptive works ahead. Each party and its advisors may 'stand on their rights' and an impasse can frequently occur.

- 1.2 The theme of this talk is to emphasise that this partisan type of approach is now contrary to the ethos of the substantive legal principles governing this area of the law. Those legal principles are essentially to the effect that landlord's works are to be undertaken on a *collaborative* basis. The parties are, in essence, required to act jointly and co-operatively, by making the landlord's right or obligation to do works 'fit' with the tenant's right to quiet enjoyment.

- 1.3 As explained by Mr Justice Nugee in *Century Projects Ltd v Almacantar (Centre Point) & Ors* [2014] EWHC 394 (Ch) at 45(5):

“... where a landlord has let premises for a particular purpose and the lease contains both a covenant for quiet enjoyment and an obligation or right on the landlord to do repairs, neither provision trumps the other. On the contrary, ***they have to be made to fit together***. The landlord cannot say that as the tenant took the demise subject to his repairing obligation, the tenant has to put up with the landlord’s works, however unreasonably they are carried out. But equally, the tenant cannot say that having given the covenant for quiet enjoyment, the landlord cannot carry out any works unless it is shown to cause the least possible interference with the tenant’s business. Both positions are too extreme. The way the two provisions fit together is that the landlord can carry out work provided he acts reasonably in the exercise of his right.” [emphasis added]

- 1.4 In this talk I assess what this means in practice by reference to the roles of those who may be involved on behalf of the landlord and the tenant, namely their respective lawyers, their respective valuation surveyors, the landlord’s project manager and the tenant’s operational representative at the demised premises.

The role of the lawyers

- 2.1 The initial task for the lawyers is with respect to the analysis of the relevant rights upon which the right to enter and undertake works may be claimed, whether this involves consideration of expressly granted rights or the issue of whether terms are to be implied in this respect. The questions set out below are some of the questions which will need to be considered as part of that analysis:

- *Is there an express right of entry and does it apply in respect of the proposed works?*
- *Is the express right subject to express conditions?*
- *If there is an express condition as to notice, what is required for there to be compliance?*
- *If there is an express condition as to time, what is required in order for there to be compliance?*

- *If there is an express condition as to purpose, what is the effect of this?*
- *If there is an express condition as to the identity of the person who may exercise the right of entry, what is the effect of this?*
- *If, as a matter of construction, there are provisions as to timing and notice which cannot be construed as conditions applicable to the right of entry, what is the effect of these provisions?*
- *If the express right is not subject to conditions, are any conditions to be implied with respect to notice or timing?*
- *If there is no express right of entry, will a right of entry be implied?*

2.2 Even if the conditions for the exercise of the right of entry are established, the terms of the right of entry will need to be considered in relation to the question of how they are to be balanced with the right of quiet enjoyment. It is clear that there is no principle of law to the effect that such clauses must be strictly construed against the landlord on the basis that they are to be treated as reservations or by virtue of the principle against derogation from grant: see Lewison LJ in *Rees v Windsor-Clive* [2020] EWCA Civ 816. Instead, the standard principles of interpretation relevant to the construction of contracts will apply, including the requirement to have regard to all of the provisions of the lease and to the principal purpose and subject matter of the demise. This will tend to mean that any substantial qualification of the right to quiet enjoyment of the demised premises will only be permitted if this appears clearly from the lease.

2.3 In other words, when construing the terms of the right of entry by reference to the ordinary principles of construction, this must be done bearing in mind that the purpose of the lease is to confer upon the tenant the right to exclusive possession of the premises and the likely impact of the exercise of the right of entry on that purpose. In *Timothy Taylor Ltd v Mayfair House Corporation* [2016] EWHC 1075 (Ch) [2016] 2 P&CR 9, the Deputy Judge said at [24]:

“I deduce from these authorities the following propositions, most of which were common ground between the parties:

- (a) In a case like the present, the landlord's reservation of the right to build in way which, but for the reservation, would constitute either a breach of the covenant for quiet enjoyment or a breach of the implied covenant not to derogate from the grant should be construed as entitling the landlord to do the work contemplated by the reservation provided that in doing that work the landlord has taken all reasonable steps to minimise disturbance to the tenant case thereby;
- (b) In considering what can reasonably be carried out, it is relevant what knowledge or notice the tenant had of the works intended to be carried out by the landlord at the commencement of the lease;
- (c) An offer by a landlord of financial compensation to the tenant to compensate the tenant for the disturbance caused by the works is factor which the court is entitled to take into account in considering the overall reasonableness of the steps which the landlord has taken."

2.4 It is by reference to the principles stated here that the landlord must take all reasonable steps to minimise disturbance to the tenant.

The role of the valuation surveyors

3.1 It is clear law, as reflected in the principles stated above, that a landlord's offer of compensation can be a factor in assessing reasonableness. In other words, an offer by the landlord of financial compensation to the tenant to compensate the tenant for disturbance from the work is a factor which the Court is entitled to take into account in considering the overall reasonableness of the steps which the landlord has taken. The point was first suggested by Sedley LJ in *Goldmile Properties Ltd v Lechouritis* [2003] EWCA Civ 49 at [19] when he said:

“while there is no obligation or necessity to reflect the disturbance of quiet enjoyment by remitting rental service charges, an offer to do so may well help in establishing the overall reasonableness of the lessor's intervention.”

3.2 In *Timothy Taylor Ltd v Mayfair House Corporation & Anor* [2016] EWHC 1075 (Ch), Mr Alan Steinfeld QC at [24]:

“An offer by the landlord of financial compensation to the tenant to compensate the tenant for disturbance caused by the works is a factor which the Court is entitled to take into account in considering the overall reasonableness of the steps which the landlord has taken”

3.3 In *Jafari v Tareem Limited* [2019] EWHC 3119, the tenant sought to appeal the decision of His Honour Judge Johns QC on the basis that, as a matter of law, an offer of a rent waiver ought to be ignored. Mr Justice Nugee considered that no useful purpose would be served by considering the argument. He explained at [41]:

“Let it be supposed that Mr Francis is right and the Judge should have ignored the rent waiver when deciding whether Tareem had unreasonably interfered with Dr Jafari’s enjoyment of the premises. That would mean that he should have concluded that Tareem was in breach of covenant for quiet enjoyment. But it seems to that had he done so, he would inevitably have come to the same overall conclusion. As I have already said, it is necessarily implicit in his conclusion that he considered the rent waiver to be, at the very least, adequate compensation for the disturbance he had found, if not indeed overcompensation. If, therefore, he had been asked to assess damages for the breach, which, on this view, he should have found, I think he would have been bound to come to the view that no further damages were payable as the damage had already been adequately compensated for by the rent waiver.”

3.4 The fact that an offer of financial compensation to the tenant is something which can be taken into account when assessing reasonableness means that a landlord may well wish to consider this aspect of the matter at the very outset and procure appropriate valuation advice to decide upon the level of the offer to be made. The landlord’s valuation surveyor may therefore have an important role from the outset in helping to carry through an amicable works programme vis-à-vis the tenant.

3.5 The fact that a discount in rental value is the appropriate way of assessing damages for breach (and hence the right way of couching any rental discount offer) is clear from a number of cases. In *Jafari v Tareem Limited* reference was made by Mr Justice Nugee to the unreported Court of Appeal case of *Larksworth Investments Limited v Temple House Limited* (unreported, 18 January 1999). Mr Justice Nugee said of this case at [30]:

“... the Court of Appeal had to deal with solicitors offices where two rooms were largely unusable and the rest of the first floor, although usable, were “down at heel” causing inconvenience and discomfort. Robert Walker LJ, with whom Tuckey LJ agreed, allowed £10,000 for the two virtually unusable rooms, amounting to 100% of the rent or thereabouts, and a further £15,000 for the balance of the first floor, based on an allowance of £2.50 per square foot out of approximately £9.00 per square foot in rent. That equates to some 27% but, for

present purposes, what is significant is that the methodology was to award a percentage of the rent. In those circumstances, ***I do not think the Judge here can be said to have been wrong in principle to adopt a percentage of the rents as the basis for his calculation.***” [emphasis added]

3.6 In deciding upon the amount of the rental discount offer, the valuation surveyor will obviously need to consider the impact upon the demised premises of the proposed works. There is limited guidance to assist in this valuation exercise and it is clear from those cases in which damages for loss of amenity have been based upon a percentage of rental value that there can be no set ‘tariff’ in these situations. In *Jafari v Tareem Limited*, Mr Justice Nugee said at [31]:

“... there is and can be no set tariff for cases such as these. Such awards are, of course, as I have already referred to, awards of general damages for non-pecuniary loss and cannot, as the Judge said, be capable of precise mathematical calculation. On appeal, the question is not what the appellate court might think appropriate to award but whether the award made by the Judge is outside the range of permissible awards”

3.7 In relation to the part of the claim in that case which was based upon a continuing loss of amenity arising from such items as cracks to ceiling and walls, damage to ceiling tiles, water damage to floor coverings and damage to windows, Mr Justice Nugee observed at [31] that such matters would have made the premises less attractive but that it had not been suggested that they came anywhere close to rendering them unusable. In those circumstances, he observed:

“I find it impossible to say that an award based on 15 per cent of the rent is outside the range of possible awards.”

3.8 In the *Timothy Taylor* case, the landlord undertook substantial works to rebuild the interior from the first floor upwards in order to create new apartments. The claimant was the lessee of ground floor and basement premises which were occupied for its business of a modern high class art gallery and were affected principally by scaffolding and noise from the works. It was held that the landlord had acted in breach of the covenant for quiet enjoyment. In circumstances where the works had been continuing for some time and the tenant sought not only damages for past breaches but injunctions

in relation to the scaffolding and the noise, the judge awarded damages for the past breaches and damages in lieu of an injunction assessed at 20% of the rent from the date when scaffolding commenced to be erected for the duration of the works. Thus, this meant an assessment of damages at 20% of the rent *up to the date of the judgment* and also an assessment of damages in lieu of an injunction in relation to future works at 20% *from the date of judgment until the work was completed*. In relation to the damages awarded in lieu of an injunction, the Deputy Judge observed at [130]:

“I should perhaps add that by directing damages to be assessed on the basis which I have mentioned, I am not to be taken as giving a *carte blanche* to the Landlord to finish the works in any way it thinks fit without any regard whatsoever to the Tenant’s rights. I have assessed the damages in lieu of the injunction sought on the basis that the breaches of covenant which will be carried out in the future will not be any more serious in terms of their disruption of the Tenant and its business than those that have occurred in the past”

Permission was given for the tenant to return to Court in order to revisit the basis upon which the damages in lieu were to be assessed if this assumption proved not to be the case.

The roles of the landlord’s project manager and the tenant’s operational representative

4.1 It is clear from the authorities that the question of what is ‘reasonable’ will vary from case to case. In *Century Projects v Almacantar (Centre Point)* [2014] EWHC 394 (Ch) Mr Justice Nugee said that this “*has to be decided on a case by case basis*”.

4.2 One particular theme of the recent case law in this respect relates to the need for the tenant’s representatives and the landlord’s representatives to liaise together. An example of case where there seems to have been clear approval of the liaison which had taken place between landlord and tenant is provided by the case of *Goldmile Properties v Lechouritis* [2016] EWHC 1075. At [18] Lord Justice Sedley referred to the following illustration of what may make the difference between the reasonable and unreasonable execution of repairs which are going to disturb a tenant’s quiet enjoyment:

“In brief, before embarking on the works the lessors had sent the lessee a copy of the full estimate which they proposed to accept, prices included. The lessee wrote back, strongly querying the price but also pointing out that the proposed start date would interfere with the restaurant’s busiest period over Christmas.

The lessors, having considered these representations, postponed the start of the works until March 1997 and agreed to spread the first instalment of the consequent service charge over a year. It can readily be seen why the district judge's view that the lessor had taken all reasonable steps to respect the lessee's contractual interests was not contested on appeal"

4.3 By contrast, an example of a case where the Court considered that there was a breach is the *Timothy Taylor* case in which the Deputy Judge made the following comments in relation to the inadequacy of the liaison on the part of the landlord:

"[98] ... What, however, it seems to me is strikingly missing here... is any real liaison with the Tenant from the start of the works, indeed from before the start of the works, to inform the Tenant as to the likely duration of the works, the noise levels likely to be experienced and to discuss with the Tenant the means of being able to mitigate the impact of the noise ..."

"[104] ... in planning an operation of this magnitude it seems to me that it was incumbent upon the Landlord, via its Project Manager and other professionals employed, to 'sit down with the Tenant' and to explain to the Tenant carefully what was proposed and... agree the method whereby the work could be carried out with the minimum of disturbance..."

4.4 By way of example of the types of co-operative steps which a tenant might take by way of a response to a period of noisy works, the observation of the Deputy Judge at [105] is also to be noted:

"[105][the Tenant] might have found it less disturbing if... noisy works were planned in a way that enabled the Tenant to plan in advance the activities which it could carry out on the premises. For example, when there were particularly noisy works going to be carried out, it would have the ability to arrange that staff should stay at home to do their work. It could further arrange for customers not to come to the Gallery during the time when the noisiest of the works were being carried out"

4.5 It will be apparent that the personnel with responsibility for the day to day carrying out of the works and the personnel with responsibility for the day to day occupation of the tenant's demise should, ideally, liaise and co-operate on a regular basis. The effect of the legal principles referred to above is that such personnel might wish to consider establishing clear and regular lines of communications. They might co-operate upon

the date of commencement of the works, the period of the works and the daily timings for such works. Ideally, they will, in particular, establish a co-operative form of notification with respect to any changes to the landlord's works or any complaints from the tenant along the way. They may need to consider such matters as the design of scaffolding and the periods for which scaffolding should be in place. They may need to consider what signage should be installed if scaffolding is to be used. They may need to consider parking arrangements. They may also need to consider whether testing equipment to measure noise levels should be installed or what steps could be taken to ensure that dust levels or the levels of light in the demise are not adversely affected to any significant degree.

- 4.6 The relevant representatives on each side may also be assisted by keeping full records in relation to their communications, the works and the impact of the works. The important point is that all of these communications may be the subject of detailed evidence in due course if matters lead to litigation. The overall reasonableness and co-operation displayed in those communications may lie at the heart of the forensic analysis of the case and it is these communications to which the legal principles referred to above will be applied.

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