"DIY for the landlord"

How useful are *Jervis v Harris* clauses?

By Thomas Jefferies

In the last few months the courts have had to consider two claims to enforce *Jervis v Harris* clauses, and a similar claim to enforce a right of entry against a freehold neighbour to enable works to be carried out. The purpose of this talk is to tell you about those cases, and see what lessons can be learnt.

What is a Jervis v Harris clause?

Typically the following covenants by the tenant are found

- to repair the demised premises
- to permit the landlord to enter to inspect the state of repair
- to carry out any work required in a notice by the landlord identifying defects discovered on inspection within a specified time
- to permit the landlord to enter to carry out work which the tenant has failed to carry out pursuant to such a notice
- to pay the cost of the landlord carrying out such work.

The advantages to the landlord include the following

- it avoids the need to forfeit
- there is no need for a s146 notice
- the Leasehold Property (Repairs) Act 1938 does not apply;
- the landlord controls the work
- the work get done without having to wait to the end of the term.

Problems and disadvantages include the following

- there is a risk of a claim for trespass if the conditions of entry have not been complied with
- the landlord has to spend the money first, and risks dispute about the costs and extent of the work
- there may be litigation over enforcement of the right of access.

The difficulties of enforcing such a right of entry were highlighted in **Hammersmith v Creska** [2000] L&TR 288. In the first round of the litigation the Court of Appeal had determined that the tenant (the Council) could only comply with its repairing covenant by repairing the existing underfloor heating. The Council failed to carry out the work to the ground floor, where it kept its mainframe computer, and the landlord Creska threatened to enter to carry out the work. The Council applied for an injunction to restrain the entry. Its evidence was that the heating was not currently required anyway, as the computer generated so much heat, that the computer would have to be housed elsewhere for the duration of the work in special air conditioned premises, and the cost would be some £100,000. The Council offered to carry out the work at the end of the lease, in some four years time, and to secure the cost of carrying out the work. The only reason the landlord could advance for why the work needed to be carried out was that the value of its reversion would be diminished if it wanted to sell.

The Court approached the case on the basis that it was in substance an application by the landlord to enforce its right of entry by way of injunction. It refused to grant an injunction on the ground that it had jurisdiction to award damages in lieu of an injunction, and that to grant an injunction in favour of the landlord would be oppressive and wholly disproportionate.

Possfund Custodial Trustee Ltd v Kwik Fit Properties Ltd

[2009] 12 EG 100; [2008] CSIH 65

A case in the Inner House of the Court of Session.

The premises had previously been used as a garage and contained underground fuel storage tanks. That use had come to an end, and the premises had been demised to Kwik Fit (KF) for its usual business for 25 years from 1993.

In 2007 the LL gave notice of its intention to exercise its right of entry to view the state of repair and carry out environmental investigations to establish potential environmental liability for soil and groundwater contamination. It wanted to carry out

- a survey with radar to locate services, and the exact location of the tanks (2 days);
- drilling for 4 days
    - 5 shallow boreholes 6m deep
    - one 30 m deep to take groundwater samples from sandstone aquifer
    - installing monitoring wells to allow samples to be taken

Part of the forecourt would have to be cordoned off during the work. KF objected and PF applied for a declaration that KF was obliged to permit entry. It appears to have been a claim for final relief, not a claim for interim relief or for an injunction.

The lease contained the following commonly found provisions:

LL had the right to

> "to enter and remain upon the Premises with all necessary tools, appliances and materials for the purposes of repairing, altering or rebuilding any adjoining or contiguous premises belonging to the Landlord... Provided always that the Landlord shall ensure that the exercise of such rights... shall be carried out in such a manner as to cause the least practicable disturbance to the Tenant... and the Landlord shall make good any damage caused to the Premises or to the Tenant's, any permitted sub–tenant's and/or any permitted occupier's fixtures, fittings, stock or equipment.

Clause 3.6 requires the tenant:

> to repair, maintain, renew, rebuild and reinstate whenever necessary and generally in all respects put and keep in good and substantial condition the Premises and every part thereof with all necessary maintenance, cleansing and rebuilding and renewal works and amendments whatsoever… .

Clause 3.11 requires the tenant:

> "To permit the Landlord and its agents at all reasonable times with or without workmen on giving forty eight hours' written notice (except in emergency) to the Tenant to enter upon the Premises generally to inspect and examine the same to view the state of repair and condition thereof and to take a schedule of the Landlord's fixtures and of any wants of compliance by the Tenant with its obligations hereunder."

Clause 3.12 requires the tenant:

> to make good all wants of compliance by the Tenant with its obligations hereunder of which notice in writing is given to the Tenant by the Landlord... .
>
> In the event of non–compliance with such a notice, the landlord is entitled to enter onto the premises and to make good the non–compliance at the cost of the tenant:
>
> "Provided always that the Landlord shall exercise the rights conferred on it by this clause in a fair and reasonable manner in so far as possible causing the least practicable disturbance to the Tenant and making good any damage caused to the Premises or the Tenant's or any sub–tenant's or any other permitted occupier's fixtures, fittings, stock or equipment."

Clause 3.26.1 requires the tenant:

> to execute all works as are or may be under or in pursuance of any Act of Parliament... already or hereafter to be passed be directed or required to be done or executed upon or in respect of the Premises... whether by the owner and/or the Landlord and/or the Tenant thereof and to comply with all the requirements of any Act of Parliament already or hereafter to be passed and all notices which may be served by the Public, Local or Statutory Authority... .

On appeal the Court refused the Landlord's claim for the following reasons:

1 The absence of words present in relation to other rights of entry that the work

> "shall be carried out in such a manner as to cause the least practicable disturbance to the Tenant... and the Landlord shall make good any damage caused to the Premises or to the Tenant's, any permitted sub–tenant's and/or any permitted occupier's fixtures, fittings, stock or equipment."

suggest that it was not envisaged that the inspection under clause 3.11 would cause any disturbance or damage.

2 The words in 3.11 "to enter...to view the state of repair" suggest that clause 3.11 was concerned with matters observable rather than requiring investigation and testing.

Would the position have been different if a remediation notice had been served under the Environmental Protection Act 1990? On the face of it, yes, under clause 3.26 which imposes liability on the tenant. The court did however comment that it appeared unlikely that remediation of contamination caused by the previous tenant for a different use fell within the repairing covenant, and that accordingly it was questionable whether the tenant could be obliged under clause 3.26 to allow entry under 3.11. That did not, however, have to be decided.

Heronslea (Mill Hill) Limited v Kwik Fit Properties Limited

[2009] EWHC 295 20.2.2009

The background facts and issues were very similar, although no reference was made to the Scottish case. This time the Landlord wanted to drill 13 boreholes, taking 2 days, and using a compression rig which would occupy some 5 m2.

This time the relevant lease provisions were as follows

It contained a standard tenant's repairing obligation and *Jervis v Harris* clause, but there was specific reference to liability for environmental liability, including an obligation to

> "indemnify and hold harmless the Landlord against any Environmental Liability incurred by the Landlord" and

deliver up the premises in good repair and condition

> "having first carried out to the reasonable satisfaction of the Landlord such investigation and /or remedial works as a prudent owner or operator of the Premises would carry out to avoid the issue service or imposition of any notice order requirement or obligation by any competent authority or court of competent jurisdiction under Environmental Law or to secure compliance with any such notice order requirement or obligation served or made prior to Determination."

The relevant power of entry in paragraph 13 of schedule 4 was

> "Upon reasonable prior written notice (except in an emergency when no notice need be given) the Tenant shall permit the Landlord and those authorized by it at all times to enter (and remain unobstructed on) the Premises for the purpose of:
>
> 13.1.1 inspecting the Premises for any purpose, or
>
> 13.1.2 making surveys or drawings of the Premises or
>
> 13.1.3 complying with the Landlord's obligations under this Lease or with any other Legal Obligations of the Landlord
>
> Provided that the Landlord shall cause as little interference and disturbance as is practicable and shall make good any damage caused forthwith and to the reasonable satisfaction of the Tenant"

The landlord claimed a declaration that it was entitled to enter and an order that the tenant permit it to enter.

If the absence of this proviso in *Possfund* meant suggested that mo damage or disturbance was to be caused by an inspection, surely the presence of such words meant that a wider meaning could be given to the right to enter in this case.

But the battleground was relocated in this case to the issue of whether what was proposed was a "survey". The judge (Mrs Justice Sharp) held it was not for the following reasons:

- the word "on" suggests that the survey was to be carried out on the land not under it;
- the scheme of the lease appeared to require environmental matters to be dealt with only on termination of the lease
- notwithstanding the proviso, the work was sufficiently intrusive that express works would be expected to permit it
- the word survey did not extend to what was proposed, which was more of an investigation.

Risegold Limited v Escala Limited

[2008] EWCA Civ 1180 [2009] 02 EG 82

The Claimant (RG) had the benefit of a right under a transfer of land to

> "enter (without vehicles) upon such part of the yard at the rear of [the adjoining property] as is necessary for the purpose of carrying out any maintenance repair rebuilding or renewal to the Property subject to the minimum disturbance and inconvenience being caused to the owners and occupiers of the Adjoining Property, and to the making good forthwith of all damage caused to the Adjoining Property in the exercise of such right."

Risegold bought the property on 17 November 2005 with the benefit of a planning permission for the demolition of the existing single–storey brick or blockwork warehouse/industrial structures at the property and for the building of a five/six–storey block containing commercial units on the ground floor and some 24 flats on the upper floors. The total area of the proposed building would be 22,055 sq ft, compared with an existing area of 3,382 sq ft for the warehouse/industrial units 5 and 6.

What Risegold wanted to do was

- erect a 1,500mm–wide fence around the redevelopment site, including over the yard;
- erect scaffolding within the fencing zone;
- oversail a tower crane to be erected on the property with an arm that would extend over the roof of the adjoining property and the yard;
- extended loading bays overhanging the scaffolding for loading plasterboards, etc, on each floor level.

The intrusion of the various works items was expected to last for various periods up to 45 weeks of the total period of construction of the new premises, which was expected to last for 65 weeks in all.

The adjoining owner, Escala, objected on the ground that what was proposed was not "rebuilding or renewal to the Property", but was replacement with something completely different. It contended that only something similar was permitted.

The Court of Appeal allowed the appeal. It began with three general points on the nature, object and exercise of the right:

1. The right was to be construed in context. There was no restrictive covenant against particular types of development of the adjoining land;
2. Regard must be had to the purpose of the covenant, which was to allow redevelopment not only of the buildings but the land on which they stood;
3. The exercise of the right was subject to important safeguards, minimising disturbance and making good damage caused. This reinforces the point made previously about the importance of such a provision.

It was held that the right must be given a broad meaning, so as to permit, for example the demolition of the buildings without rebuilding, or the repair of replacement buildings. It would extend to demolition and

- No new buildings to allow, eg a car park use
- To erect similar buildings or
- To put up different buildings.

The clause had a crescendo effect, allowing maintenance repair rebuilding or renewal. Each word was wider than the last.

Lessons for the future.

1 It is not sufficient for the landlord to assert that it has the right to enter. There is always a balancing exercise to be carried out between the rights of the landlord and the right of the tenant to quiet enjoyment. This balancing exercise is to be seen whether the issue is one of construction, as in these cases, or whether an injunction should be granted, as in *Creska*.

2 The presence or absence of a proviso limiting disturbance and requiring the making good of damage is of significance. Its absence was central to a narrow reading of the right in *Possfund*, and to a wide reading in *Risegold*

3 The landlord needs to have some good reason for wanting to exercise the right to enter. No reason was advanced in *Creska* or either of the *Kwik Fit* cases, and this is bound to affect the courts approach to the balancing exercise. There was good reason in *Risegold*, and a narrow construction would prevent work sensibly and reasonably required.

4 The standard wording of a *Jervis v Harris* clause is unlikely to be wide enough to allow invasive testing and investigations.

5 How useful are *Jervis v Harris* clauses? They are useful if there is some good commercial reason for seeking to exercise them, but they are no quick fix.

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