EXERCISING RIGHTS OF ENTRY

- A QUICK FIX OR A RECIPE FOR LITIGATION?

Thomas Jefferies
Landmark Chambers

Tom Jefferies spent the first few years of his career at Freshfields, dealing with commercial property litigation and planning matters. He began practice at the Bar in 1990, where he has specialised in property litigation. The nature of his work has fluctuated with the property cycles. During the last recession he developed expertise in mortgage enforcement and professional negligence, and during the recent boom years he has been heavily involved in high value leasehold enfranchisement work, including an appearance for the tenants in *Cadogan v Sportelli* all the way to the House of Lords. He regularly handles disputes with a planning aspect, most recently obtaining a mandatory injunction for a local authority to enforce an obligation to carry out building works in a s106 agreement.(LB Waltham Forest v Oakmesh). In the current recession he is busy enforcing contracts, or helping clients get out of them. He is recommended for property litigation in the Chambers, Legal 500 and Legal Expert directories. He is a CEDR accredited mediator. He is the contributor of the section on Mortgages in Halsbury's Laws of England (2005) and is co-author with John Male QC of the RICS Rent Review casebook.

1. Rights of entry are commonly reserved in leases and other deeds. Some are exercisable in the event of default by the tenant in performing a covenant. Others are reserved to enable some development to be undertaken. They appear to provide a valuable DIY remedy, and are understandably taken at face value by lay clients. But they are subject to limitations and risks which the client is unlikely to be aware of, as demonstrate by several claims in the last year. The purpose of this talk is to examine the hidden pitfalls and limitations, and to identify the arguments which can be used.

Hammersmith v Creska [2000] L&TR 288.

2. This case concerned an attempt to enforce a right of entry in a *Jervis v Harris* clause. The covenants by the tenant were in the standard form:

    - 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.

3. As you will all no doubt be well aware, the advantages a *Jervis v Harris* clause 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, as the claim is for debt not damages;
    - the landlord controls the work

180 Fleet Street, London, EC4A 2HG | DX:1042 (LDE) | t.020 7430 1221 | f.020 7421 6060 | e.clerks@landmarkchambers.co.uk

- the work gets done without having to wait to the end of the term.

4. 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.

5. In *Creska v Hammersmith*, the Council were tenants of a building owned by Creska. The tenants kept their IT equipment and staff in the building and occupied four floors, ground to third. The floors had underfloor electric heating. Various elements in that heating system had failed. The lease included a covenant by the tenant "*to repair and maintain and in all respects keep in good and substantial repair and condition the interior of the premises and every part thereof including … the pipes and all electrical heating mechanical and ventilation installations*". Round one of the dispute concerned whether this clause could only be complied with by mending that heating or by providing an alternative source of heating such as wall-mounted heaters. The Court of Appeal held only the former would suffice.

6. After the Court of Appeal decision, the landlord indicated that the tenant having failed to make any of the repairs it would come in and do the job. The tenant indicated that it would not permit the landlord to do that. The matter initially proceeded by way of an application by the tenant to restrain the landlord from coming in. The Judge indicated that the right or otherwise of the landlord ought to be determined by the court and that the landlord should bring a cross-claim, which it did. It applied for an injunction preventing the tenant from "obstructing or otherwise interfering with and entering premises comprising the ground, first, second and third

floors, pursuant to the rights set out in clause 3(11) for the purpose of carrying out the works of repair".

7. The Council opposed the application on the ground that its mainframe computer was housed on the ground floor. It was housed in air conditioned units, and the heating was not currently required anyway, as the computer generated so much heat. If the repair work had to be carried out 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. It would also be necessary to relocate 13 data lines, which would be time consuming and expensive. 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.

8. 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. There was no evidence or any present intention to sell. The landlord argued that it sought to enforce what was in effect a negative covenant, and the court had no discretion to refuse to enforce such a covenant.

9. 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. In any event, the court had a discretion whether or not to grant an injunction, whether in negative or positive form. The normal rules established by *Shelfer v City of London* and *Jaggard v Sawyer* applied. The question was whether damages were an adequate remedy, and whether it would be oppressive to order an injunction. The judge refused to grant an injunction on the ground that it would be oppressive and wholly disproportionate.

10. What lessons are to be learnt for the enforcement of *Jervis v Harris* clauses? In *Jervis v Harris* the tenant also sought an injunction preventing entry by the landlord. There was a preliminary issue as to whether the right of entry could be exercised without complying with the Leasehold Property Repairs Act 1938. It was held that it could. One of the tenant's arguments was that the purpose of the 1938 Act was to prevent tenants being harassed by claims to enforce repairing covenants where there was no injury to the reversion, and that would be frustrated if the landlord could sidestep the Act by carrying out the work itself. The court considered that it was no part of the purpose of the Act to prevent the landlord spending his own money on repairs, and then recovering the cost from the tenant. It might then have been assumed that if the landlord wanted to spend its own money up front, that was sufficient. *Creska* suggests otherwise. If the landlord cannot prove some immediate injury, it will find it difficult to persuade a court that an injunction should be granted to allow entry on premises in the possession of the tenant, at least where that would cause disruption and inconvenience to the tenant.

Possfund Custodial Trustee Ltd v Kwik Fit Properties Ltd [2009] 12 EG 100; [2008] CSIH 65

11. This was 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.

12. In 2007 the landlord 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. drilling for 4 days

    i. 5 shallow boreholes 6m deep

    ii. one 30 m deep to take groundwater samples from sandstone aquifer

b. installing monitoring wells to allow samples to be taken

c. a survey with radar to locate services, and the exact location of the tanks (2 days).

13. Part of the forecourt would have to be cordoned off during the work. KF objected and Possfund 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.

14. The lease contained the following commonly found provisions:

The landlord 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... .

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

a. 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.

b. 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.

16. 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 QBD, Sharp J

17. The background facts and issues were very similar to the Scottish case, although no reference was made to it. The premises had formerly been used as a filling station. They had then been demised to KF for a term of 30 years from 28 December 2000. The landlord acquired the freehold on 28 March 2008 and within a month gave notice that it wished to carry out an environmental survey. This time the Landlord wanted to drill 13 boreholes, taking 2 days, and using a compression rig which would occupy some 5 m^2.

18. 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

180 Fleet Street, London, EC4A 2HG | DX:1042 (LDE) | t.020 7430 1221 | f.020 7421 6060 | e.clerks@landmarkchambers.co.uk

> "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"

19. The landlord claimed a declaration that it was entitled to enter and an order that the tenant permit it to enter. On the face of it, the landlord's claim appears more promising. The right of entry included a proviso in the terms absent in Possfund, suggesting that the parties did contemplate that some damage or disturbance might be caused.

20. Furthermore, the right of entry was exercisable not just to "view" the premises, but also to make surveys. It was contended that "survey" must mean more than "inspect" or making plans and drawings, both of which were expressly provided for, and should be construed as including an environmental survey, even if intrusive.

21. Those arguments were rejected by Sharp J, who held that the proposed environmental survey was not permitted for the following reasons:

    a. the OED dictionary definition of survey did not extend to what was proposed;

    b. the word "on" (" *to enter (and remain unobstructed on) the Premises*") suggests that the survey was to be carried out on the land not under it;

    c. the scheme of the lease appeared to require environmental matters to be dealt with only on termination of the lease

    d. notwithstanding the proviso, the work was sufficiently intrusive that express words would be expected to permit what could be a breach of the covenant for quiet enjoyment, and allow, in theory, the demolition of part of the premises or prospecting for oil;

    e. the word "survey" did not extend to what was proposed, which was more of an investigation, provided for expressly only at the end of the lease.

22. The landlord may be regarded as unfortunate not to have succeeded in this case. It does however demonstrate a reluctance of the court to allow the landlord to interfere with the tenant's right to possession without good reason, and suggests a very narrow reading of landlord's right of entry.

Risegold Limited v Escala Limited [2008] EWCA Civ 1180 [2009] 02 EG 82.

23. 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."

24. 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, in order to comply with health and safety regulations, was

    a. erect a 1,500mm–wide fence around the redevelopment site, including over the yard;
    b. erect scaffolding within the fencing zone;
    c. 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;
    d. extended loading bays overhanging the scaffolding for loading plasterboards, etc, on each floor level.

25. 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.

26. The adjoining owner, Escala, objected. It did not object on the ground that the entry on the land was not required, or that it would take too long, or that the work could be carried out in some other way. Rather it 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 judge at first instance agreed, holding that the right of entry was to be narrowly construed, relying on the provision that disturbance was to be kept to a minimum.

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

    a. the right was to be construed in context. There was no restrictive covenant against particular types of development of the adjoining land;

    b. 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;

    c. 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.

28. 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

    a. no new buildings to allow, e.g. a car park use

    b. to erect similar buildings or

    c. to put up different buildings.

29. 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 court's 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.

180 Fleet Street, London, EC4A 2HG | DX:1042 (LDE) | t.020 7430 1221 | f.020 7421 6060 | e.clerks@landmarkchambers.co.uk