Neutral Citation Number: [2018] EWHC 3120 (Ch)

Case No: CH-2018-000108

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London, EC4A 1NL

16th November 2018

Before :

MR JUSTICE HENRY CARR

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Between :

NETWORK HOMES LIMITED	**Claimant/ Appellant**
- and –	
MAURICE HARLOW	**Defendant/ Respondent**

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- -

ALEXANDER BASTIN (instructed by **Lewis Silkin LLP**) for the **Claimant/Appellant**
MAURICE HARLOW appeared in person

Hearing date: 9 November 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HENRY CARR

Mr Justice Henry Carr:

Introduction

1. This is an appeal from the Order of HHJ Luba QC made on 9 April 2018. The Appellant ("Network Homes") is a charity and registered mutual society pursuant to the Co-operative & Community Benefit Societies Act 2014. Network Homes provides social housing and is the owner of certain residential premises at Rydal Court, Oxenpark Avenue, Wembley HA9 9TA ("Rydal Court"). Rydal Court is used as a sheltered housing scheme providing support for resident older people to maintain their independence. It consists of 52 one-bedroom flats located over three floors. The Respondent ("Mr Harlow") is an assured tenant of Flat 25 Rydal Court, which was let to him pursuant to a tenancy agreement made in writing, signed on 1 July 2013, and commencing on 8 July 2013 ("the Tenancy Agreement").

2. As a result of concerns about fire safety of the front entrance doors of the flats in Rydal Court, Network Homes wished to replace such doors. Mr Harlow was not prepared to allow access to Flat 25 to permit Network Homes to install the proposed new front door unless certain conditions were complied with. The parties were unable to reach an agreement. Having replaced the front doors to the other flats in Rydal Court, on 24 November 2017 Network Homes issued a claim for (amongst other things) an injunction requiring Mr Harlow to provide access to Network Homes and its contractors to enable replacement of the front door to Flat 25.

3. This appeal raises the question of whether Network Homes is entitled to access to Flat 25 for this purpose. This question turns on the correct interpretation of the Tenancy Agreement. The judge dismissed the claim, on the basis that Network Homes was not entitled to access the property to replace the front door and gave a detailed oral judgment explaining the reasons for his conclusion ("the Judgment"). Permission to appeal was granted by Fancourt J in respect of certain grounds of appeal on 17 July 2018.

4. Network Homes concedes that it cannot rely upon its repairing covenants, nor upon Mr Harlow's corresponding access covenant to replace the front door. It also concedes, as the judge found, that replacing the front door of Flat 25 with certified fire rated doors would constitute an improvement. The key question raised on this appeal is whether the Tenancy Agreement gives a right of access to Network Homes for the purpose of carrying out improvement work to Flat 25. HHJ Luba QC concluded that no such right of access was provided for in the Tenancy Agreement.

Relevant terms of the Tenancy Agreement

5. At the start of the Tenancy Agreement, "the Property" to which the tenancy applies is identified as Flat 25 Rydal Court. The clauses in section 2 set out the landlord's obligations and those in section 3 set out the tenant's obligations.

6. Clause 2.1 is headed "Tenant's right to occupy" and provides that:

> "We will give you possession of the Property from commencement of the tenancy. We will not interfere with your right to occupy the Property unless we need to gain access in circumstances set out in

> clause 3.18 or legal action is commenced to demote or terminate your tenancy."

7. The reference to clause 3.18 is an obvious error in the drafting of the Tenancy Agreement. As the judge noted at [44], the Tenancy Agreement is replete with cross-references to clause 3.18, which are in fact cross-references to clause 3.19. In the clauses which follow, I have made this correction. The Tenancy Agreement is drafted in simple language, apparently with the intention that it should be comprehensible to tenants. In fact, it is a very poorly drafted document as the judge noted at [39], [44] and [51] of the Judgment.

8. Clause 2.2 is headed "Repair of structure and exterior" and provides that the landlord will keep in good repair the structure and exterior of the Property (Flat 25). This includes various specified repairs and checks which are not relevant to this appeal.

9. Clause 2.2 further provides that:

> "We retain the right to carry out any repair, maintenance or improvement works which are not required by this clause but which we decide to carry out to improve the Property or the building or estate in which the Property is situated."

10. Clauses 3.1-3.23 set out the tenant's obligations. Clause 3.2 is entitled "Possession". The material part of this clause states that:

> "You have the right to occupy the Property without interruption or interference from us for the duration of the tenancy (except for the obligation contained in clause [3.19] to give access to us, our agents or contractors) so long as you comply with this agreement…"

11. Clause 3.19 is headed "Access". Material parts of the clause provide that:

> "You must give all authorised employees and agents of Willow Housing and Care Ltd [Network Homes' predecessor in title] reasonable access to the Property to inspect or carry out essential maintenance, inspection and repair to the Property or to the building or estate in which the Property is situated. This includes treatment programs for pest eradication, improvement work and access to repossess your home if it is to be redeveloped or disposed of."

The Judgment

Benefit/burden attaches to land and is not personal

12. The judge rejected a submission, made on behalf of Mr Harlow, that the benefit/burden of the covenant contained in clause 3.19 had not passed with the land to the current landlord, Network Homes Limited, and had instead remained with Willow Housing and Care Limited (the previous landlord) ("Willow Housing"). He concluded that clause 3.19 of the tenancy agreement was not a personal covenant between the Respondent and Willow Housing and that Network Homes could rely upon the clause as landlord

for the time being. Furthermore, he concluded that the access sought by Network Homes was for improvement works.

Interpretation of clauses 2.2 and 3.19 of the Tenancy Agreement

13. The judge considered the interpretation of clauses 2.2 and 3.19 of the Tenancy Agreement separately in the Judgment.

14. As to clause 2.2, he considered at [27] and [29] whether this gave the landlord the right to access the property to carry out improvement works and whether it also contained a matching obligation on the tenant to provide access to the landlord for the carrying out of improvement works. The judge considered that clause 2.2 was primarily concerned with repairs, including safety checks and that, whilst it did give the landlord the right to carry out improvement works, it did not contain a concurrent obligation on the tenant to permit such access. The judge found that as "access" was expressly provided for elsewhere in the Tenancy Agreement, it was not appropriate for him to imply a right for the landlord to access the property to undertake improvements into clause 2.2. At [30] he said: "*It is trite law that a provision should not be implied into a contract as a matter of generality when there is an express term of some specificity dealing with precisely the same proposition.*"

15. The judge then considered clause 3.19 at [49] – [54] of the Judgment. He concluded that it did not give a right of access to the landlord for the purpose of carrying out improvements to the property. At [50] he said:

> "The central question, therefore, is whether the first paragraph of clause 3.19 does permit access for improvement works. The premise is that it should <u>not</u> because, from the earlier clauses I have already read, the landlord has made it clear that the tenant enjoys exclusive possession, without disturbance on access or other grounds, unless the terms of clause 3.19 are applicable."

16. He then considered the scope of clause 3.19 at [51] he said:

> "The first sentence of the first paragraph of clause 3.19 limits the reach of access. It does not provide that the landlord must always be given reasonable access, full stop. Instead, it identifies the purpose for which the tenant must give the landlord reasonable access, and those purposes are limited. They are "to inspect, to carry out essential maintenance, to inspect or to repair." The double use of "inspect" is just another example of poor or perhaps torrential drafting."

17. The judge then identified at [52] the three objects of the tenant's covenant to give access; firstly, to give access in response to a landlord's notification of intention to inspect; secondly to give access in response to a landlord's notification of intention to repair; and thirdly to give access in response to the landlord's request to "carry out essential maintenance". He observed that this gave rise to an obvious mismatch between clause 3.19 and the last paragraph of clause 2.2, which permits the landlord to enter for repair, maintenance or improvement works.

18. At [53], the judge recorded the submission made on behalf of Network Homes that, read as a whole, the first paragraph of clause 3.19 was sufficient to justify the landlord's claim for an injunction in the instant case. That submission was the foundation of the

landlord's claim for an injunction in the instant case. That submission was made, apparently, on the basis that the second sentence of the clause expressly referred to improvement work, and therefore, improvement work was inherently included in the subjects which may be embraced by the requests for access in the first sentence of clause 3.19.

19. The judge rejected that submission at [54]. He considered that there were only three permitted objects of access shown in the first sentence of clause 3.19, and the second sentence only identified the things that may be included within those first three objects. He decided that the landlord has a right of access, or more properly, the tenant must give access if what is required is essential maintenance which it is proposed to be carried out by way of improvement. He stated that:

> "The clause does not work the other way round. It does not provide for admission for improvement work which may include essential maintenance. Therefore, in my judgment, as a matter of proper construction of the words in clause 3.19, this is an express covenant granting access only for improvement work which is for the carrying out of essential maintenance."

An implied right of access

20. The judge then considered at [55] whether, in the light of his interpretation of clauses 2.2 and 3.19, a right of access should be implied to give effect to that part of clause 2.2 which would otherwise fall away; namely, the landlord's reservation of the right to carry out improvement work. He rejected that argument and said:

> "But in addition to the earlier difficulties with that proposition – i.e. implication versus express provision – we now have the reminder in both clauses 2.1 and 3.2 that there will only be interference with the tenant's rights to the extent contained in clause [3.19]. Those pronouncements are not accompanied with any reservation of any right of access under any right to improve. Had that been the intention, one would have seen it spelt out. Moreover, although Mr Brewin was able to take me to passages in Woodfall supporting the proposition that a positive covenant to repair must be accompanied by a positive covenant on the tenant's part to give access for repair, there is no authority to which he could take me to suggest that a landlord's right to improve carried with it a concomitant obligation on the tenant to give access when and for whatever reason the landlord chose to exercise that right."

21. The Judge determined that the tenant's right to quiet enjoyment under clauses 2.1 and 3.2 could only be interfered with to the extent that it was expressly provided for under clause 3.19 and not by way of implication in relation to clause 2.2. As he found that the right the Landlord was seeking was not expressly provided for by clause 3.19, he also refused to imply such a term.

The grounds of appeal

22. The grounds of appeal in respect of which permission to appeal has been granted are as follows:

i) that clause 3.19 ought to be construed as obliging tenants to grant access so that the landlord can improve (i.e. replace) the front door;

ii) alternatively that the implied licence to repair ought to extend to covenants relating to improvements; and

iii) implying a licence to enter into clause 2.2 (to enable the landlord to carry out improvement works) is consistent with a tenant's right to quiet enjoyment.

First ground of appeal – interpretation of clause 3.19

Legal principles

23. The relevant principles are not in dispute, and are identified in *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619; and in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] A.C. 1173; The judge referred to *Wood v Capita Insurance* at [38] of the Judgment.

24. In *Arnold v Britton*, Lord Neuberger explained at [15] - [19] that:

i) When interpreting a written contract, the court should identify the parties' intentions by reference to what a reasonable person having all the relevant background knowledge which would have been available to the parties would understand the term to mean.

ii) The focus is on the meaning of the words in their documentary, factual and commercial context and in light of the natural and ordinary meaning of the clause, any other relevant provisions, the overall purposes of the clause and the contract as a whole, the facts and circumstances known by the parties at the time and commercial common sense.

iii) Subjective evidence of the parties' intentions should be disregarded.

iv) The less clear the words, the more ready the court would be to depart from their natural meaning but that did not mean that the court should look for drafting infelicities to facilitate a departure from the natural meaning.

v) Commercial sense should not be invoked retrospectively just because, for example, the contractual arrangement had worked out badly or even disastrously for one of the parties.

25. In *Wood v Capita Insurance* Lord Hodge explained at [10]-[13] that:

i) The court's task is to ascertain the objective meaning of the language with which the parties had chosen to express their agreement. This is not a literalist exercise focused solely on a parsing of the wording of the particular clause. The court has to consider the contract as a whole and, depending on its nature, formality and quality of drafting give more or less weight to elements of the wider context.

ii) Where two rival meanings exist, the court can come to a view about which construction is more consistent with business common sense.

iii) However, in striking a balance between indications given by the language and the implications of competing constructions, the court had to consider the quality of the drafting of a clause.

iv) The court also had to be alive to the possibility that one side might have agreed to something which might, in hindsight not have served its interests.

v) Textualism and contextualism are not conflicting paradigms in the field of contractual interpretation. When interpreting any contract, the lawyer and the judge can use them as tools to ascertain the objective meaning of the language. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement.

Assessment of the first ground of appeal

26. Mr Bastin on behalf of Network Homes contended that in the light of the second sentence of clause 3.19, which elucidates the first sentence, the clause must have a broader scope than that given to it by HHJ Luba QC. He submitted that:

i) The first sentence of clause 3.19 gives the substance of the covenant, with "reasonable access" to be given for various purposes. The second sentence elucidates the first sentence, as made plain by: (a) the location of the text; (b) use of the phrase "This includes"; and (c) the fact that the second sentence is not a stand-alone provision.

ii) If the judge's interpretation was correct, and the clause was limited to access for inspection, repair or essential maintenance as those words are normally understood, then pest eradication and repossession of the property would not be included. However, they are expressly included within the scope of clause 3.19.

iii) It was necessary to consider other relevant provisions of the Tenancy Agreement, including clause 2.2 which reserves the right to the landlord to carry out improvement works. Clause 3.19, properly construed, enables this right to be enforced. Clause 2.2 was concerned with repair and maintenance and improvement and clause 3.19 was concerned with access for repair and maintenance and improvement plus inspection, pest eradication and repossession.

iv) Part of the context in the present case is the standard of drafting of the Tenancy Agreement, which the judge had described as very poor.

v) It was necessary to consider what a reasonable person would have understood the parties to the contract to be using the language in the contract to mean. Given the landlord's reservation of a right to improve, which HHJ Luba QC acknowledged at [27], a reasonable person would have thought that an access clause containing the words "improvement work" required the tenant to give access for improvement work.

27. When assessing these submissions, it is necessary to consider the judge's starting point at [51] where he set out his premise that clause 3.19 should <u>not</u> give access for improvement work because, from the earlier clauses that he had considered, the

landlord had made it clear that the tenant enjoyed exclusive possession, without disturbance on access or other grounds, unless the terms of clause 3.19 are applicable. I do not agree. Exclusive possession is made subject to the terms of clause 3.19. There is no premise or assumption that clause 3.19 should not give access for improvement work as that depends upon the scope of clause 3.19. On the contrary, since clause 2.2 reserves the right to the landlord to carry out improvement works, one would expect that clause 3.19 would enable this right to be enforced, by requiring access to be given for that purpose.

28. In my view, it is necessary to bear in mind, when considering clause 3.19, that the Tenancy Agreement is poorly drafted. It follows that language may have been chosen infelicitously, and the court should be more willing to depart from the natural meaning of the words chosen than when considering a carefully drafted document. Furthermore, it is important to construe the document as a whole, in context, to give it commercial coherence.

29. There is no doubt that clause 3.19 must include a right of access for the purposes specified in the second sentence, namely pest eradication, improvement work and access to repossess the tenant's home if it is to be redeveloped or disposed of. The clause expressly states that these purposes are included.

30. As to pest eradication, Mr Bastin submitted that this is not within the scope of essential maintenance, as those words are normally understood. A tenant who wished to compel a landlord to eradicate pests would need to rely upon the law of nuisance. Whilst, in my view, there is considerable force in this submission, Mr Bastin's second argument, which relied on the reference to repossession in clause 3.19 is much more compelling. It is obvious that repossession of a property does not fall within the scope of inspection repair or essential maintenance, as those words are normally understood. For example, if a landlord wishes to repossess the property in order to develop or dispose of it, access is granted pursuant to clause 3.19 without any inspection, repair or essential maintenance being required.

31. Therefore, in my judgment, the scope of clause 3.19 is not limited to inspection, repair or essential maintenance, as those words are normally understood. It also includes pest eradication, improvement work and repossession. Once improvement work is considered in the light of the other purposes which are expressly included, it is not limited to improvement for the purpose of essential maintenance. Accordingly, in my view, the judge was incorrect in his limited interpretation of clause 3.19.

32. This interpretation makes sense of the entire agreement. It avoids the obvious problem that, on the judge's interpretation, the right to carry out improvement work becomes unenforceable. Clause 3.19 includes improvement work within its scope, and therefore gives substance to the right reserved to the landlord in clause 2.2.

33. In addition to the context (by which I mean other parts of the Tenancy Agreement) the background is of relevance. The Tenancy was granted by a social housing landlord for one unit in a building with multiple occupancy. A reasonable person would expect the landlord to be able to ensure the safety of all residents of the building, and to be able to require access to individual units for that purpose. As the judge concluded, certain types of safety measures, such as the installation of fire doors in the individual properties

constitute improvement works. A reasonable person would expect that a right of access to perform such improvement works would be granted to the landlord for that purpose.

34. The problem raised by this case also occurs in the interpretation of a variety of different legal documents to which the same rules of construction are applied. Very similar issues have arisen in relation to the interpretation of patents. As Lord Hoffman stated in *Kirin-Amgen Inc and Others v Hoechst Marion Roussel Limited and Others* [2004] UKHL 46; [2005] 1 All E.R. 667 at [27] – [32] certain principles are common to the interpretation of patents and to other commercial documents, such as contracts. He stated at [30] that:

> "…the author of a document such as a contract or patent specification is using language to make a communication for a practical *purpose* and that a rule of construction which gives his language a meaning different from the way it would have been understood by the people to whom it was actually addressed is liable to defeat his intentions." (Emphasis added)

35. Construction of legal documents is not a literalist exercise focused solely on a parsing of the wording of the particular clause, as emphasised in *Wood v Capita Insurance*. For a compelling analysis of this subject, see Leonard Hoffman's article *Language and Lawyers* [2018] LQR 553. It is an objective, rather than subjective, assessment, as Lord Hoffman explained at [32] of *Kirin-Amgen*:

> "Construction, whether of a patent or any other document, is of course not directly concerned with what the author meant to say. There is no window into the mind of the patentee or the author of any other document. Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean. Notice, however, that it is not, as is sometimes said, "the meaning of the words the author used", but rather what the notional addressee would have understood the *author* to mean by using those words. The meaning of words is a matter of convention, governed by rules, which can be found in dictionaries and grammars. What the author would have been understood to mean by using those words is not simply a matter of rules. It is highly sensitive to the context of and background to the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to that audience."

36. It is well established in European patent law that terms used in a patent should be given their normal meaning in the relevant art (ie. the relevant technical field) unless the description gives them a special meaning. If it was intended to use a word which is known in the art to define a specific subject matter, then the description of the patent may give this word a special, overriding meaning by explicit definition. In those circumstances, the patent may provide its own dictionary; see Case Law of the Boards of Appeal of the EPO, 8th Edition (2016) Section II.A.6.3.3.

37. The same principle can be applied to the contract in the present case. The normal meaning of inspection, repair and essential maintenance does not include pest control, improvement work or repossession. However, clause 3.19 expressly includes those

matters within scope. Therefore, the language of the first sentence of clause 3.19, has been given a special overriding meaning by explicit definition, which is wider than its normal meaning, and the clause provides its own dictionary. The language of the first sentence has been poorly chosen, but having regard to the second sentence, it is clear that a reasonable person to whom the utterance was addressed would have understood the author to be using the words to include pest control, repossession and improvement works, none of which are confined to essential maintenance.

38. For these reasons, I conclude that the Tenancy Agreement gives a right of access to Network Homes for the purpose of performing improvement works (including replacement of the front door of Flat 25) and therefore this appeal should be allowed.

39. I should add that I have attached great weight to a decision of a very experienced judge, with particular expertise in the field of social housing. However, the task that I have faced on this appeal was very different to that faced by the judge at first instance. The judge was required to make multiple decisions, in circumstances where, as he noted, the pleadings were chaotic. By contrast, this appeal has been concisely presented, with an intense focus on the scope of clause 3.19, and it may well be that the specific arguments advanced by Mr Bastin (who did not appear at first instance) were not put to the judge.

Second and third grounds of appeal – an implied right of access

40. Mr Bastin dealt with these two grounds of appeal together, as two sides of the same coin. The question of an implied right of access only arises if the judge was correct in his construction of clause 3.19 and there is no express right of access in relation to improvement works.

41. In those circumstances, there is a powerful argument that, where the parties have expressly addressed the question of access in the Tenancy Agreement, and have not provided for access for improvement works, the court should not supplement their bargain by implication of a wider right. On the other hand, there is a powerful argument that the implication of a landlord's right of access to carry out improvements is necessary to give business efficacy to the Tenancy Agreement because without such an implied term, the last paragraph of clause 2.2 is redundant. There is no point in retaining a right which cannot be exercised.

42. In the light of my interpretation of clause 3.19, it is unnecessary for me to decide this question. However, the arguments in relation to an implied right of access emphasise that the conclusion that the Tenancy Agreement provides for an express right of access for improvements, is commercially sensible. It gives full effect to the agreement without the need to imply an additional term.

Mr Harlow's position

43. Mr Harlow was represented at first instance but was unrepresented on this appeal due to lack of funds. This was regrettable. However, the judgment of HHJ Luba QC set out his case in the best way that it could be advanced, and I was satisfied that all arguments in support of his case had been considered.

44. Mr Harlow submitted that the replacement fire door was not an improvement as it was unnecessary. If I were to accept this submission, which I do not, it would not advance his case. The reason why Mr Harlow succeeded at first instance was because the judge considered that the fire door was an improvement. A finding to the contrary would not support the judgment.

45. Mr Harlow was concerned to explain why he objected to installation of the new fire door. Whilst this was legally irrelevant, it was very important to Mr Harlow, and I listened carefully to his explanation. In summary, Mr Harlow has impaired vision, and he has particular difficulty with his near distance sight. He is concerned that the locks on the fire doors which have been installed in the other flats at Rydal Court would be difficult for him to open and close. He would need an additional key and he is worried that, particularly if he falls ill, he will be unable to get out of his flat, or others will be unable to get in to help him. He has offered to accept Network Homes' fire door provided that he is allowed to remove the lock and install his own lock. Mr Harlow's son attended the hearing and supported his concerns.

46. In response, it was explained on behalf of Network Homes that the fire door that it proposed to install was supplied as a unit which had been selected by Savills. If the lock was removed and replaced, it would no longer be regarded as fire safe. However, having regard to Mr Harlow's condition and concerns, Network Homes was prepared to fit an additional thumb lock, which is simple to open and close, so that Mr Harlow would not need to use lock to which he objected if he did not wish to. Furthermore, Network Homes had offered to place colours on the lock to make it more visible and to install a key safe outside the flat to enable others to gain access in the case of emergency.

47. Network Homes' stance is entirely reasonable. In light of this decision, which means that Network Homes has the right to gain access to replace the fire door, I hope that Mr Harlow, with the assistance of his son, will become accustomed to these arrangements.

Lessons for the future

48. It is most unfortunate that this case has now required three hearings, at considerable cost to a charity. Costs were also incurred on behalf of Mr Harlow in the County Court, whose case was publicly funded. Such resources are scarce. For future tenancy agreements, it should be straightforward to correct mistakes and lack of clarity in the current Tenancy Agreement. Once this is done, it is to be hoped that similar disputes will be avoided in the future.

49. This case would have been eminently suitable for mediation. I do not know whether mediation was proposed by the court or contemplated by the parties. In future, I hope that mediation will be considered at a very early stage of proceedings in similar cases.