Neutral Citation Number: [2020] EWCA Civ 816

Case No: A3/2019/2008

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS IN WALES
HHJ KEYSER QC
C30CF095

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE POPPLEWELL
and
LADY JUSTICE CARR

- -

Between:

(1) JENKIN THOMAS REES **Appellants**
(2) PHILLIP REES
- and -
(1) THE HONOURABLE IVOR EDWARD WINDSOR-CLIVE EARL OF PLYMOUTH
(2) LADY EMMA WINDSOR-CLIVE
(2) THE HONOURABLE DAVID JUSTIN WINDSOR-CLIVE
(AS TRUSTEES OF THE ST FAGAN'S NO 1 AND NO 2 TRUSTS)
Respondents

- -
- -

Stephen Jourdan QC and Gavin Bennison (instructed by **Ebery Williams Limited**) for the **Appellants**
Katharine Holland QC and Christopher McNall (instructed by **Burges Salmon LLP**) for the **Respondents**

Hearing dates: 23 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Wednesday 1st July 2020.

Lord Justice Lewison:

Introduction

1. Maesllech Farm, Radyr ("the farm") lies on the outskirts of Cardiff. It consists of 240 acres of mostly arable land. In the local development plan it is identified as a strategic site for development. Outline planning permission has been granted to the freeholders for large scale housing development and other facilities. In order to comply with conditions attached to the planning permission, the freeholders have undertaken certain activities (in particular a habitat survey) on the farm. But the farm is let to Mr Jenkin Rees. The issue on this appeal is whether the landlords' rights of entry under the tenancy agreements under which Mr Rees holds the farm were wide enough to permit them to carry out the activities that they wish to undertake. HHJ Keyser QC decided that some activities that the landlord proposed to carry out were permitted under the terms of the tenancy agreements; but that others were not. His judgment is at [2019] EWHC 1008 (Ch), [2019] 4 WLR 74.

The facts

2. There are two relevant tenancy agreements: one made in 1965 and the other in 1968. The land comprised in the 1965 agreement consists of about 187 acres; and the land comprised in the 1968 agreement comprises about 51 acres. Part of the land comprised in the 1965 agreement is wood or copse. A number of clauses in the 1965 agreement come after the heading "RESERVATIONS BY THE LANDLORD". Clause 4 is:

> "All timber and other trees pollards heirs saplings underwoods and woodlands with right of entry for himself and others authorised by him to plant mark fell cut and carry away the same over any part of the holding or lands hereby demised making the Tenant reasonable compensation for any loss or damage sustained thereby any claim for loss or damage to be rendered within two calendar months of the date of the occurrence of such damage."

3. Clause 7 is:

> "Right for the Landlord and his Consultant and others authorised by him with or without horses, carriages and other vehicles to enter on any part of the Farm lands and premises at all reasonable times for all reasonable purposes"

4. The 1968 tenancy agreement contained a proviso that:

> "the Landlord may at any time and at all times during the said tenancy enter upon the said premises with Agents Servants Workmen and others for the purpose of inspecting the same or for making roads sewers or drains or for any other purpose connected with his estate"

5. The 1968 agreement contained an express agreement for quiet enjoyment. The 1965 agreement did not; but it is common ground that a similar agreement is to be implied. Neither side suggested that there was any material difference between the two.

6. We are concerned only with these contractual rights of entry. Neither side relied on any statutory rights of entry (e.g. under Agricultural Holdings Act 1986 section 23 or the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973 Sched 1 para 4(2), which still applies in Wales).

7. In order to comply with planning requirements, the landlords wish to undertake further surveys of the farm. They have, by agreement with the tenant, dug trial pits for which they paid the tenant compensation. At other times, the landlords have also carried out a survey of a high-pressure gas main which required staking out the pipeline and taking GPS readings. It is not entirely clear what actual or proposed activities are now in issue. The landlords proposed to carry out an ecological survey in September 2016. The tenant initially refused access. That is what appears to have triggered the current dispute. The main focus of the ecological survey appears to be bats (although previous surveys have focussed on great crested newts). The bat survey, as I understand it, is carried out partly by surveyors physically present on site, counting bats into the night; and partly by remote bat detectors which are left on the farm for four or five days at a time. There is very little evidence before us about the nature of the remote bat detectors. In the trial bundle there were plans showing the location of 3 bat detectors called "Anabat". We were also told in the landlords' skeleton argument that these are boxes about 7 x 4 x 2 inches which are strapped to trees.

8. The tenant objects to the landlords leaving the bat detectors on the farm. He also complains that surveyors' marking pins have been left in a field. We have photographs of those pins. They are about 1 inch across and 3 inches long. We do not know how many there were or where they were left. In his evidence Mr Jenkin Rees said that these were nails from the surveyors' equipment; and were "extremely dangerous for humans, livestock and machinery".

The judge's judgment

9. The judge considered a number of authorities on the interpretation of both exceptions and reservations in leases. He noted that there were cases that had held that a reservation of rights to the landlord under a lease should be narrowly interpreted; and cases that had held that a reservation of rights took effect as a regrant with the result that the tenant was the grantor. That led to the principle that a grant is construed against the grantor. He said at [55] that if it were the case that the court must construe a reservation restrictively against the landlord unless it cannot decide between alternative constructions, in which case it must choose on the basis of an expansive interpretation in favour of the landlord, the law would be incoherent. He continued at [56]:

> "In my judgment, the correct position is not that there is a rule of interpretation, as such, that a reservation is construed restrictively against the landlord. Rather, as part of the normal method of construing written instruments, the court will have regard to the entirety of the text and to the main subject matter

> of the agreement and, in the normal course of things, is likely to suppose that the intention of the parties is to advance the main purpose of the agreement as shown by its subject matter. Thus in the case of a lease, which necessarily grants exclusive possession and the right to quiet enjoyment, the court will naturally be inclined to suppose that qualifications on these rights will emerge clearly from the lease. This is not a matter of applying a special rule that a certain kind of provision must be construed against a particular party. It is simply a matter of applying the normal approach to construction. Accordingly, if, having regard to all relevant matters, the court finds that the normal approach to construction results in ambiguity, there is nothing irrational in resorting to the *contra proferentem* rule."

10. He summarised the principles that he drew from the cases at [60] as follows:

> "(1) An exception or reservation will, if possible, be construed in such a manner as to preserve its validity.
>
> (2) Therefore the court will, where it is possible to do so, construe an exception or reservation as restrictively as is required to avoid a derogation from grant or a conflict with the covenant for quiet enjoyment. In the words of Neuberger J in *Platt v London Underground Ltd* (supra): "An express term should, if possible, be construed so as to be consistent with what Hart J called "the irreducible minimum", implicit in the grant itself."
>
> (3) There is no further rule that a reservation is to be construed restrictively against a landlord.
>
> (4) However, the application of the standard principles of construction, including the requirement to have regard to all of the provisions of the instrument and to the principal purpose and subject matter of the instrument, will tend to lead the court to expect that substantial qualifications of the rights to exclusive possession and quiet enjoyment of the demised premises will appear clearly from the lease. Further, apparently broad and unqualified words in reservations may, on closer examination, be found to have a more restricted meaning when read in their immediate or wider textual context.
>
> (5) If it is not possible to construe an exception or reservation in a manner consistent with the "the irreducible minimum" implicit in the grant itself, it will be struck down as being repugnant to the lease.
>
> (6) The *contra proferentem* rule operates only if the exception or reservation is ambiguous, in the sense that the court is unable to decide on its meaning by the use of the materials usually available for interpretation.

> (7) By reason of the principles of construction set out above, the *contra proferentem* rule can only apply if the court cannot otherwise decide among two or more constructions, all of which are consistent with the irreducible minimum consistent with the grant itself. This is because: (a) if any possible construction of the reservation would be inconsistent with the irreducible minimum implicit in the grant itself, the reservation will have been struck down as repugnant to the grant; and (b) if, of two possible constructions of the reservation, one would be consistent with the irreducible minimum implicit in the grant itself and one would not, the court will have chosen the former in accordance with the principles set out above.
>
> (8) Once the court is forced to have recourse to the rule, the correct position is that the reservation operates as a re-grant by the tenant and therefore the reservation falls to be construed against the tenant, who is considered to be the *proferens*."

11. He then applied those principles to the two clauses in issue, starting with clause 7 of the 1965 agreement. He said at [62] the "reasonable purposes" referred to in clause 7 were reasonable purposes concerned with the parties' rights and obligations under the 1965 agreement, including purposes concerned with the landlords' reversionary interest in the farm. At [63] he said:

> "The right is expressly a right of entry. The fact that entry is to be for a (reasonable) purpose shows that entry is not an end in itself but is to be in order to achieve something beyond the simple fact of entry. However, clause 7 does not mention any particular acts that may be performed once entry has been gained and to which the right of entry is ancillary. In this respect it differs from other express or implied rights of entry…This suggests that under clause 7 the reasonable purposes are to be achieved by either the mere fact of entry and presence on the land (notably, inspection and observation) or the performance of specific obligations under the tenancy agreement (such as repair of buildings). As the right of entry in clause 7 is not tied to a specific right or obligation (such as, the obligation to repair and the right to enter for the purpose of effecting repairs), it is reasonably construed as being wide enough to cover both instances."

12. The judge was clearly trying to be helpful; and to avoid, so far as possible, future disputes between the parties. He thus considered a variety of activities which the landlords either had carried out, or were proposing to carry out. He concluded at [64]:

> "The present case is concerned with the exercise of the right of entry for purposes other than the discharge of duties or exercise of rights specifically mentioned in the 1965 Tenancy Agreement. It follows from what I have said already that such purposes ought to be construed as relating to inspection and observation. The extent of the activities thus permitted cannot

> be properly considered in the abstract and without regard to particular cases. However, in my judgment, the permissible activities do not extend to those which cause damage to the land or involve cordoning off parts of the land or significant interference with the operation of the working farm. First, the right is stated to be a right to enter; no other right is mentioned. Second, if the intention were to permit specific activities, not otherwise mentioned in the tenancy agreement, such as would tend to interfere with possession or quiet enjoyment, one would have expected that to have been stated rather than left for inference. Third, if intrusive activities were envisaged, the tenancy agreement would probably have mentioned the need to minimise disruption (see for example clause 3). Fourth, if the permitted activities were liable to cause damage, the tenancy agreement would probably have provided for the possibility of compensation (see for example clauses 3 and 4) or for the exclusion of compensation (see clause 3). I consider, accordingly, that the digging of excavations, the sinking of boreholes and the erection of structures all fall outside the limited rights in clause 7. The installation of monitoring devices, being a form of extended inspection, would I think be capable of falling within the scope of the rights in clause 7; much would depend on the position, nature and effect of the devices. I should consider that, absent special circumstances that I cannot now envisage, the installation of remote bat detectors would be permitted. I do not know enough about other kinds of device to speculate. Similarly, I consider that it would be permissible under the terms of clause 7 for a surveyor to place discreet reference points on the land in order to assist in conducting a visual survey and inspection; on the other hand, anything that involved significant interference with use of areas of the land or intrusion below its surface, or activities such as trial pegging out of intended development sites, would not be within the scope of the reserved rights."

13. He concluded at [70] that the 1968 agreement permitted the landlord to do no more and no less than the 1965 agreement "save that the second purpose may permit some additional activity near the boundary, ancillary to the making of roads, sewers and drains on adjacent land."

The tenant's argument

14. In *Investors' Compensation Scheme Ltd v West Bromwich BS* [1998] 1 WLR 896 Lord Hoffmann famously declared that:

> "Almost all the old intellectual baggage of "legal" interpretation has been discarded."

15. At times I thought that we were being asked to carry that baggage again.

16. At the forefront of Mr Jourdan QC's argument for the tenant was the statement in Hill & Redman on Landlord and Tenant (loose-leaf edition) para 3581 in which it is said:

> "Clauses which expressly reserve rights of entry to the landlord for particular purposes will be strictly construed and the court will be reluctant to imply additional rights in the landlord's favour."

17. Mr Jourdan's essential proposition is that:

    i) In the case of a right which is an interest in the demised premises that could have been granted by the tenant to anyone, whether or not the landlord, the tenant is the grantor and the principle against derogation from grant operates in the landlord's favour.

    ii) In the case of any other right conferred on the landlord which cuts down the enjoyment of the premises by the tenant inherent in the grant of exclusive possession, the landlord is the grantor and the derogation principle operates in the tenant's favour.

    iii) In the case of other provisions in the lease which are simply contractual provisions e.g. a rent review clause, the derogation principle has no part to play.

18. The derogation principle entails the proposition that the language of any reservation of rights that take away part of what has been granted must be interpreted strictly against the grantor. That is why rights of entry conferred on a landlord by a lease are strictly construed. Where the derogation principle applies, then if the provision in question is clear, derogation from grant will not be relevant, unless the provision purports to deprive the tenant of exclusive possession in which case it will be repugnant to the grant and void. But if the language of the clause could reasonably be read as having two sensible meanings, one of which interferes more extensively with the tenant's enjoyment of the right of exclusive possession than the other, the meaning should be selected which leads to a lesser interference.

Derogation from grant

19. I begin by considering the "derogation from grant" principle. What this concept tries to capture is taking something away from what has been granted. As it has been more simply described: you cannot take away with one hand what you have given with the other: *Molton Builders Ltd v Westminster City Council* (1975) 30 P & CR 182, 186; *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264, 267; *Platt v London Underground Ltd* [2001] 2 EGLR 121, 122.

20. The principle is not confined to the relationship of landlord and tenant. It applies as between seller and buyer of freehold land (*Wheeldon v Burrows* (1879) 12 Ch D 31); and as between car manufacturer and buyer of a motor car (*British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] AC 577). It is clear from *Johnston* that in the context of the relation of landlord and tenant, the principle works both ways.

21. To some extent, the argument based on derogation from grant is a circular argument; because before one can embark upon the question whether there has been a derogation from grant, it is first necessary to identify what has been granted. In the case of a lease or tenancy agreement what has been granted is the right to exclusive possession of the land, for the term of the lease or tenancy, on the terms of the lease or tenancy. If a landlord exercises rights in accordance with the terms of the lease or tenancy that cannot amount to a derogation from grant, because those rights are part of the grant itself. (There may be cases in which a right reserved by a lease is repugnant to the lease; but that is not suggested in this case). In our case the 1965 agreement consists of a letting of the land "subject to" the reservations.

22. It is next necessary to consider what might amount to a derogation which the law will recognise. In *Lyttleton Times Co Ltd v Warners Ltd* [1907] AC 476 Lord Loreburn said that:

> "If A lets a plot to B, he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. So also if B takes a plot from A, he may not act so as to frustrate the purpose for which in the contemplation of both parties the adjoining plot remaining in A's hands was destined."

23. In *Browne v Flower* [1911] Ch 219 Parker J said that the principle was that the grantor comes under an obligation not to use his retained land in such a way as to render the leased land "unfit or materially less fit" for the particular purpose for which the grant was made. So the landlord was entitled to erect an external staircase outside the demised property, even though it compromised the tenant's privacy. In *Molton Builders* Lord Denning MR expressed the principle thus:

> "… if one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit…"

24. All these formulations were quoted with approval in *Johnston*. Clearly, they all contemplate a serious interference before the principle is engaged. That is consonant with what Lord Millett said in *Southwark LBC v Mills* [2001] 1 AC 1, 23. Having said that there was little difference between derogation from grant and breach of the covenant for quiet enjoyment he said:

> "The obligation undertaken by the grantor and covenantor alike is not to do anything after the date of the grant which will derogate from the grant or substantially interfere with the grantee's enjoyment of the subject matter of the grant."

25. In *Johnston* the principle was applied to a reservation in the landlord's favour. In that case, the use of a flank wall for advertising purposes had been reserved to an intermediate landlord. It was held that the lessee could not frustrate that use by erecting his own hoarding on neighbouring land so as to obscure any advertisement placed on the flank wall. As Nicholls LJ put it:

> "To my mind it was necessarily implicit in the terms of the 1960 lease and the reservation of the advertising rights that Mr Wade would not himself frustrate the purpose of that reservation by taking either of the steps I have just mentioned."

26. Again, as Nicholls LJ explained:

> "That being the general principle, the next step must be to apply it to a particular factual situation. In a case such as the present, that exercise involves identifying what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit, having regard to the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time the transaction was entered into."

27. It is also to be noted that Nicholls LJ did not rest his decision on any arcane principle of landlord and tenant law. He said:

> "I add a footnote on this part of the appeal. Although, in strict law, the reservation in the 1960 lease took effect as a regrant by Mr Wade of the advertisement rights, the conclusion I have reached on the application of the derogation from grant principle is, I should emphasise, not dependent on that highly technical conveyancing notion. I have sought to indicate the broad, commonsense rationale of the principle which bears the title of "derogation from grant"."

28. It is the common-sense rationale of the principle which is to be applied.

Strict construction?

29. Lord Hodge explained in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85 at [33]:

> "There is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words. In particular, there has been a harmonisation of the interpretation of contracts, unilateral notices, patents and also testamentary documents".

30. It has also been said on high authority that the ordinary principles governing the true construction of a contract apply to tenancy agreements and leases: see, for example *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52, [2012] 1 AC 955 at [17] (Lord Neuberger); [107] (Lord Clarke); [113] (Lord Dyson). In the light of that, we should in my judgment be wary of interpreting documents such as the tenancy agreements in our case by reference to strict rules applicable to particular classes of document.

31. *Wheeldon v Burrows* is a case about the implied grant and the implied reservation of easements in a freehold conveyance. It is authority for the proposition that:

> "that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land."

32. Although the statement of principle is preceded by a discussion of many cases referring to derogation from grant, the actual decision in the case is little more than the application of ordinary principles under which terms are implied into contracts (although I note that in *Molton Builders* Lord Denning MR said that it was an independent principle of law rather than the implication of a term). As Jonathan Parker J (sitting in this court) explained in *Chaffe v Kingsley* (2000) 79 P & CR 404, 417:

> "It is not hard to see why the scope for implication is more restricted in the case of a reservation than it is in the case of a grant. In the case of an implied reservation, by definition the term which is sought to be implied will to some extent run counter to the express terms of the instrument in question; whereas in the case of an implied grant, by definition the term which is sought to be implied will be designed to enable what is expressly granted to be the better enjoyed by the grantee."

33. Indeed, in that case this court approved the approach of the judge below who simply treated the question as one of the implication of terms in accordance with well-settled principles.

34. Mr Jourdan placed some reliance on the decision of this court in *Yeung v Potel* [2014] EWCA Civ 481, [2014] HLR 35. That was a case in which the lessee of one flat was arguing for the implication of a right to install a new gas pipe outside that part of the building that was demised to him. This court refused to make that implication. As Jackson LJ stated at [46]:

> "Save in exceptional situations, such as necessity, reservations will not be implied."

35. That is not this case. We are not asked to imply any right of entry. We are asked to interpret an express right of entry.

36. Returning to the proposition stated in Hill & Redman, so far as concerns the implication of additional rights, I agree. The interpretation of an express right, however, may be different. In *Platt* Neuberger J said at 123 that a reservation:

> "… has to be interpreted both in a common-sense way and relatively strictly, albeit not unreasonably so. Common sense applies because the lease is a practical document, while the

> clause indicates that the interests and requirements and duties of [the landlord] have to be given maximum flexibility, this has to be consistent with the interests of the tenant, who was granted rights under the lease. A relatively strict approach to interpretation is appropriate because the clause's purpose is to cut down a right granted."

37. Exemption and exclusion clauses in contracts have traditionally been regarded as candidates for "strict construction". The question of strict construction as applied to exemption clauses was considered by this court in *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 CLC 573. At [18] Briggs LJ said:

> "Ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law such as (in the present case) an obligation to give effect to a contractual warranty by paying compensation for breach of it. The parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect."

38. Importantly, however, he went on to say at [19]:

> "This approach to exclusion clauses is not now regarded as a presumption, still less as a special rule justifying the giving of a strained meaning to a provision merely because it is an exclusion clause. Commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose. Nor is it simply to be mechanistically applied wherever an ambiguity is identified in an exclusion clause. The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means."

39. In *William Hill (Southern) Ltd v Cabras Ltd* (1987) 54 P & CR 42 the tenants of a betting shop renewed their lease. At the date of the renewal they had in place two illuminated signs above the shop which advertised their business. The grant included "the appurtenances" which were held to include the signs and the right to display them. They were, therefore, included in the express grant. Clause 3 of the lease provided that the demise could not be deemed to confer any easement except such as were specifically granted. Tenants' covenant (xv) provided that no sign was to be attached to the premises without the lessor's consent which, in respect of a sign stating the lessee's name or business, should not be unreasonably withheld. This court held that clause 3 had no application because it did not refer to appurtenances; and clause (xv) did not apply because the landlords had consented to the display of the signs. Nourse LJ referred to *Wheeldon v Burrows* and said:

> "Mr Sparrow submits that that shows that the court will as a general rule construe provisions such as clause 3 of the lease in

> the present case so as not to derogate from the grant made by the lease, that is to say, in this case, the grant made for the purpose of using the premises as a licensed betting office and for that purpose only. In other words, Mr Sparrow submits that the court will not construe a general provision in a lease, particularly an exception and most of all an exception couched in very general terms such as those in clause 3, so as to take away with the other hand that which has already been granted by the one hand in the dispositive provisions of the lease. Although *Wheeldon v Burrows* was a case on implied rights, I accept Mr Sparrow's proposition in regard to the construction of express rights, it being, as Thesiger LJ said, consonant to reason and common sense and also, I would add, to the commercial realities of a case such as this. I think that there is enough latitude in the language of clause 3 to enable the proposition to be applied in the present case."

40. Having (on the interpretation adopted by the court) expressly granted the tenant the right to display the signs, a clause which applied only to easements except such as were specifically granted did not remove that expressly granted right. I would regard that case as being one of a commercial and common-sense approach to the interpretation of a specific grant as against a more general reservation. Moreover, what was in issue in that case was whether the tenants were entitled to have their illuminated signs at all. Had they not been permitted to retain their signs, that would have been a serious interference with their existing business operation.

Restraints on alienation

41. Mr Jourdan referred us to a number of cases on restraints on alienation contained in leases or tenancy agreements. In each case the court held that it was a well-established principle, laid down by Lord Eldon in 1808, that restraints on alienation were to be strictly construed. In *Esdaile v Lewis* [1956] 1 WLR 709 the term in question was "no subletting allowed" without consent. The question was whether sub-letting part of the property was prohibited. Both Jenkins and Hodson LJJ held that in the absence of authority they would have concluded that it was; but felt bound by authority to hold the contrary. Danckwerts J dissented, holding that the words were perfectly clear.

42. It is also to be noted that restraints on alienation of all kinds have been regarded with disfavour in English and Welsh law: see Megarry & Wade The Law of Real Property 9th ed para 3-039.

Rights of entry

43. I must next consider some of the authorities cited by Hill & Redman in support of the proposition that rights of entry are strictly construed. In *Heronslea (Mill Hill) Ltd v Kwik-Fit Properties Ltd* [2009] EWHC 295 (QB), [2009] Env LR 28 Sharp J had to interpret rights of entry reserved by a lease of a former petrol filling station. The landlord wished to carry out what it described as an environmental survey. The precise details do not matter. The important point is that in interpreting the scope of the reserved rights, Sharp J applied the principles of contractual interpretation in

Investors' Compensation Scheme; and explicitly adopted a "commercial" approach. In my judgment she was right to do so. As she put it at [19]:

> "It is also clear that words are to be interpreted in the way in which a reasonable commercial person would construe them; and the standard of the reasonable commercial person is hostile to technical interpretations, undue emphasis on niceties of language or literalism, as explained above."

44. She concluded that the carrying out of the proposed survey would "significantly" undermine the covenant for quiet enjoyment; and said at [42]:

> "Such significant inroads into the tenant's right to enjoy the premises free from interference is not a result it seems to me that the parties would have contemplated when executing the lease. If such had been the intention of the parties to a commercial lease, one would expect to find much clearer words or indication to that effect within it."

45. Whether something "significantly" undermines the covenant for quiet enjoyment is a question of fact and degree. I note also that Sharp J considered that the right of entry to inspect would have permitted the landlord to leave things on the land after the inspection had taken place. One example she gave at [44] was the attaching of tell-tales to a crack in a wall to detect movement.

46. *Possfund Custodial Trustee Ltd v Kwik-Fit Properties Ltd* [2008] CSIH 65, 2009 SLT 133 was another case of rights of entry in a lease of a former petrol filling station. Clause 3.11 of the lease contained the tenant's covenant to permit entry by the landlord to inspect; and clause 4.1 contained the Scottish equivalent of a covenant for quiet enjoyment. Giving the judgment of the Inner House, Lord Reed said at [12]:

> "A lease, like any other contract, must be construed as a whole, and so as to give proper effect if possible to all of its provisions. In the present case, it is necessary in particular to achieve a fit, if possible, between the landlord's right to inspect and examine, by virtue of cl 3.11, and the tenant's right to be maintained in possession, reflected in cl 4.1."

47. He went on to say that it was implicit in the grant of a lease that:

> "… the landlord is precluded from any action which encroaches materially upon the tenant's possession of those subjects during that period. The landlord's obligation to maintain the tenant in exclusive possession may however be qualified by the terms of the lease."

48. At [14] he noted the absence of any obligation to exercise the right of entry so as to cause the least practicable disturbance to the tenant, as well as the lack of any obligation to pay compensation. From that he reasoned:

> "In a professionally drafted lease, the omission of such obligations, when they are specified in several other provisions, is unlikely to have been unintended. While not necessarily conclusive in itself, it strongly suggests that it was not envisaged or intended that the exercise of the landlord's right of inspection under cl 3.11 would cause any material disturbance to the tenant, or would result in any material damage to the premises."

49. Having considered other detailed points of interpretation in the lease he said at [16]:

> "More generally, it appears to us that if it had been the intention of the parties to the lease that the landlord should be entitled under cl 3.11 to interfere with the tenant's possession of the premises to the extent contended for by the pursuers (which, as we have explained, would involve intrusive investigations lasting several days and the cordoning off of parts of the forecourt of the premises), one would expect to find a much clearer indication to that effect in the lease."

50. What is notable about this decision is that it does not approach the interpretation of the rights of entry on the basis of a "strict construction". Moreover, the principle put forward is not that clear words are necessary before *any* disturbance of the tenant's possession is authorised; but that such words would be "expected" to justify intrusive investigations of the kind described at [16], amounting to "material" disturbance or damage to the tenant. Whether something is "material" disturbance or damage is clearly a matter of fact and degree.

51. Likewise in *Century Projects Ltd v Almacantar (Centre Point) Ltd* [2014] EWHC 394 (Ch) Nugee J held that where a lease contained a covenant for quiet enjoyment and a reservation entitling the landlord to build on adjoining property neither clause trumped the other. The two clauses had 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 work 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."

52. That observation was quoted with approval by Mr Alan Steinfeld QC in *Timothy Taylor Ltd v Mayfair House Corpn* [2016] EWHC 1075 (Ch), [2016] 4 WLR 100 at [19].

53. *Timothy Taylor* was a case in which the tenant of a ground floor and basement art gallery held a lease which reserved a number of rights to the landlord. They included a right to erect scaffolding "provided that it does not materially restrict access to or

the use and enjoyment" of the leased property; and a right to alter or rebuild the building even if the works did materially affect the use and enjoyment of the leased property. Mr Steinfeld held at [24]:

> "In a case like the present, the landlord's reservation of a right to build in a way which, but for that 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 the disturbance to the tenant caused thereby."

54. He rejected the argument that the landlord was obliged to take all *possible* steps to minimise disturbance to the tenant. In so doing, he applied the decision of this court in *Goldmile Properties Ltd v Lechouritis* [2003] EWCA Civ 49; [2003] 2 P & CR 1 in which Sedley LJ had said:

> "… the obligation to keep the building in repair has to coexist with the tenant's entitlement to quiet enjoyment of the premises he is paying rent for. This by itself points towards a threshold, for disturbance by repairs, of all reasonable precautions rather than all possible precautions."

55. It is to be noted that what was in issue in *Goldmile* was an implied right of entry rather than an express one; but even in the case of an implied right the court adopted the touchstone of reasonableness. Thus what had to be ascertained was the "overall reasonableness of the lessor's intervention" *Goldmile* at [19].

56. One of the cases cited by Hill & Redman in support of its proposition is *Risegold Ltd v Escala Ltd*. The reference given is to the decision at first instance: [2008] EWHC 21 (Ch). But the decision at first instance was reversed on appeal: [2008] EWCA Civ 1180, [2009] 2 P & CR 1. The right in issue was the right 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"

57. At [19] Mummery LJ said:

> "A literal construction of the right of entry produces consequences that are not sensible and are unlikely to have been within the reasonable contemplation of the parties at the time of the creation of the right."

58. He continued at [24]:

> "I fully recognise that the Deputy Judge's conclusion on the scope of the right of entry for the purpose of "rebuilding" is a possible construction of the language of para.5. With respect,

> however, it is not the only possible construction. It produces consequences which I think would have surprised the parties if they had been drawn to their attention at the time when the right was created. Some flexibility of meaning and some certainty of operation is required to make the right of entry work in a sensible fashion."

59. I do not regard this case as supporting the stark proposition that a right of entry is to be strictly construed; or even that where there are two possible interpretations the narrower one must be preferred. Rather, the right must be interpreted so as to work in a sensible fashion.

60. Another of the cases cited by Hill & Redman is *Yeoman's Row Management Ltd v Bodentien-Meyrick* [2002] EWCA Civ 860, [2003] L & TR 10. That was a case in which the landlord of a flat had the right:

> "to execute any repairs or work to the inside or outside of the said flat and also for the purpose of executing any repairs or work to or in connection with any flats above or below or adjoining the said flat to enter upon the said flat or any part thereof with or without any necessary tools or appliances "

61. The landlord claimed that that right entitled it to carry out extensive works to the flat which would have required dispossessing the tenant entirely for the duration of the works. This court rejected that argument. Longmore LJ said:

> "(1) As HH Judge Cowell pointed out, subclause (20) of clause 2 must be construed with the covenant of quiet enjoyment granted in clause 3(1). It would be an invasion of that covenant of quiet enjoyment of the flat if the tenant could be required to submit to works of improvement being done and, still more, if she can, or has to, be dispossessed while that work is done. There is no suggestion that there should be any particular restriction on the length of time such works would take.
>
> (2) It is not an express part of the bargain contained in the tenancy agreement that the landlords can do any improvement that they choose. If it was the intention that the landlord should be able to deprive the tenants of quiet enjoyment to that extent, one would expect a much clearer indication to that effect in the lease."

62. Once again, the court approached the question of what was permitted by a right of entry as a question of fact and degree.

63. There are, in addition, cases in which a right reserved to a landlord has been held to entitle him to carry out works which cause serious inconvenience to the tenant. *Price v Esso Petroleum Co Ltd* [1980] 2 EGLR 58 was yet another case about a petrol filling station. The lease in that case contained a clause which provided:

> "…but Esso reserves the right to enter the Service Station at any time with workmen and others for the purpose of carrying out such improvements, additions and alterations to the Service Station as Esso may consider reasonable, after consultation with the Dealer"

64. This court held, after hearing argument from very experienced leading counsel for both sides, that under the terms of that reservation the landlord was entitled to demolish all the existing buildings on the site; rearrange the layout of the petrol pumps; erect a new canopy and office on a different part of the site; and relocate pipes, cables, conduits and drainage ducts. All that would be left of the original filling station would be the underground storage tanks. The work would take 16 weeks during which the filling station would have to close. Having pointed out that the scope of the right was a question of the construction, essentially, of a few words in the tenancy agreement, Megaw LJ said:

> "For myself, apart from any help which one may gain from the context of the vital words and from the agreement as a whole, I find it impossible to regard the planned works as not falling within the ordinary, commonsense meaning of "improvements to the Service Station.""

65. The landlords had offered an alternative (and to my mind plausible) interpretation which would have given the clause a narrower meaning; but the court rejected that. In his concurring judgment Sir Patrick Browne said that the intended works were improvements "in the ordinary meaning of words;" and acknowledged that the effect of the court's judgment was to give "a wide meaning to the words in the reservation clause". That decision sits ill with Mr Jourdan's approach. All this goes to show, in my judgment, that in each case it is a question of the interpretation of the particular right reserved to the landlord and a question of fact and degree.

66. None of the cases on which Mr Jourdan relies establishes the sharp differentiation between a case where the derogation principle applies and a case where it does not. But even where the derogation principle does apply, all it does is to militate against an interpretation which would result in a substantial or serious interference with the tenant's use and enjoyment of the leased property; or frustrate the purpose of the letting. It does not require the court to give a right of entry the narrowest possible interpretation. In my judgment it is in every case a question of interpreting the clause in question in its context. Part of that context will be the fact that the purpose of the contract is to confer on the tenant the right to exclusive possession of the subject matter of the letting on the terms of the lease or tenancy for the contractual term.

67. In short, I agree with the judge's approach at [56] of his judgment (which I have quoted above). In broad terms I agree with most of his summary at [60]. I would not, however, necessarily wish to be taken to have endorsed his propositions (5), (7) or (8). So far as repugnancy is concerned, which features in both proposition (5) and proposition (7), it may be the case that if, properly interpreted, a reservation nullifies the apparent grant of exclusive possession the instrument has simply been wrongly labelled; and does not create a lease or tenancy at all. Proposition (8) is based on *obiter* observations of this court in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468 (disagreeing with Megarry J on this point)

on the interpretation of section 65 (1) of the Law of Property Act 1925. I find it hard to see why different principles of interpretation should apply to a landlord's right of entry depending on whether it arose as a result of a reservation of the right, or as a result of a covenant by the tenant to permit entry. But since the judge did not get as far as having to apply any of these propositions, they do not arise for decision in in this appeal; and I say no more about them.

What does the right mean?

68. That leads to the next question: what does the right of entry mean? In the present case the only thing that the 1965 agreement permits the landlords to do is "to enter on any part of the Farm lands." They may do so "at all reasonable times for all reasonable purposes".

69. In interpreting a right that gives A the right to do something on B's land, Mr Jourdan submits that there are four questions that arise:

    i) What may A do?

    ii) When may he do it?

    iii) For what purpose may he do it?

    iv) In what manner may he do it?

70. I agree with this up to a point. But just as a contract must be interpreted as a whole, so must an individual clause. I do not consider that it is right to divide up the clause into watertight compartments. The right of entry is not a right to enter for entry's sake. It is a right to enter for a particular purpose. So if a purpose is a reasonable purpose for which the landlords wish to enter the land, the proper interpretation of the right must surely enable them to do what is *reasonably necessary* to achieve that purpose. "Reasonably necessary" is not the same as "convenient" or "desirable". But conversely, if what they want to do (or what is reasonably necessary to do) in order to achieve a particular purpose is highly intrusive, then the purpose itself may be held not to be a reasonable one. By the same token, the time at which the landlords wish to do something may or may not be reasonable, depending on what it is that they wish to do. Something that might be reasonable to do in the daytime might be unreasonable if done at night. Conversely, something that cannot be properly done in the daytime (like counting bats) might be reasonable to do at night.

71. I also agree with the judge's approach at [64]: namely that the interpretation of the right cannot be considered in the abstract. Whether something that the landlords want to do on the land is permitted by the right is a question of fact and degree in each case.

72. Mr Jourdan does not challenge the judge's conclusion that carrying out ecological surveys in order to fulfil planning obligations is a reasonable purpose. He accepts also that the landlords are not restricted merely to setting foot over the boundary. Having entered, they may continue to travel over the farm with or without vehicles. He also accepts that, having entered, the landlord may inspect the farm; and may place things on the ground if that is ancillary to inspection. But, he says, once the humans carrying out the inspection leave the farm they must take everything away with them.

73. Suppose that for the purposes of inspection a surveyor arrives in a motor vehicle which he parks off-site. He brings with him a surveying instrument, such as a theodolite. As Mr Jourdan accepts, he is permitted to place it on the ground. If by mistake he had left some other instrument in his car, he would surely be entitled to leave the theodolite in place while he went to retrieve that other instrument. Or he may wish to measure distances between points. Let us assume that he does so in an old-fashioned way by means of a measuring tape or measuring rod. He is entitled to place a marker in the ground at one end of what he wishes to measure. If the survey was not complete by the time the surveyor went home in the evening, it would surely be reasonable for him to leave his marker in place so as to avoid having to do the first day's work all over again.

74. Or suppose that the landlords wish to demand arbitration on the rent under section 12 of the Agricultural Holdings Act 1986. They do this by serving notice in writing. Section 93 of the Act permits service by leaving the notice at the tenant's proper address. The giving of such notice is without question a reasonable purpose for entering the farm. It would be a futile right if, having entered the farm with the notice in hand, the landlord then had to leave again, carrying the notice with him.

75. I do not, therefore, accept Mr Jourdan's stark proposition that all that the right of entry permits the landlords to do is to enter, inspect and then leave again; and cannot leave anything on the land even for a short time. In all these cases the question what is permitted is, in my judgment, to be determined by what is reasonable. As Mummery LJ said in *Risegold*, the right of entry must work sensibly; and a literal interpretation does not produce sensible results.

76. If the landlord wishes to carry out more intrusive works, such as widespread CCTV or time lapse cameras for ecological or habitat monitoring, the degree of intrusion would have to be balanced against the reasonableness of the purpose. As the judge said, much would depend on the position, nature and effect of the devices. But that is not this case.

77. There is one additional point so far as the bat detectors are concerned. If it is the case (as we were told in the landlords' skeleton argument) that they are strapped to trees, it seems to me that, at least in the case of the land comprised in the 1965 agreement, they are not left on the farm at all. The reason for that is that trees are excepted from the grant as a result of clause 4. The trees have at all times remained the landlords' property.

78. So far as the 1968 agreement is concerned, the relevant purpose for which the landlord is entitled to enter the farm is "for the purpose of inspecting the same". In *Possfund* the Inner House held that a right to inspect must not cause "any material disturbance" to the tenant or result in "material damage" to the premises. I agree. They also held that a right to inspect would not permit "intrusive investigations lasting several days". That was, of course, a lease of a petrol filling station; and what might be intrusive in that context might not be intrusive in the case of a 51 acre farm. It is, as I have said, a question of fact and degree.

Evidence

79. The final ground of appeal is that there was no evidence to support the judge's view that the installation of remote bat detectors and the placing of discreet reference points on the land in order to assist in conducting a visual survey and inspection would be permitted under the terms of each right of entry.

80. This seems to me, with all respect, to be a dispiriting ground of appeal, although it is one for which permission has been given. If the judge's observation (and it is no more than that) had an insufficient evidential foundation, it must equally be the case that there was insufficient evidence to enable him to decide that the installation of the bat detectors and the placing of the reference points was prohibited. The consequence will be that the question whether the installation of bat detectors and the placing of surveyors' marks are permitted by the tenancy agreements will not have been answered. Given the hostility that now exists between these parties, a failure to answer that question is likely to do no more than store up trouble for the future. In giving an answer to that question the judge was trying to be helpful and to avoid further dispute; and must have considered that he had sufficient material on which to base his observations.

81. The question, then, is whether the judge was entitled to form the view that there was sufficient material upon which he could base his observations. Because of the rather extreme position that both sides took at trial, the nuances of the evidence were not explored as well as they could have been. But there was material before the judge that showed that the bat detectors were a proprietary product called Anabat, and even a cursory search of the internet will find the proprietor's website with a product description and picture. A judge may take judicial notice of matters which are capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy: *Scott v The Attorney General* [2017] UKPC 15 at [40] – [41]. He also had photographs of the surveyors' marking pins.

82. The evidential basis for the judge's conclusion was undoubtedly slender. But in my judgment it was enough. But even if that is wrong, what we can say is that if the Anabats are as described in the landlords' skeleton argument, their installation on trees for a few days at a time is within the scope of the right to enter and inspect.

Result

83. I would dismiss the appeal.

Lord Justice Popplewell:

84. I agree.

Lady Justice Carr:

85. I also agree.