MACFARLANES

THE PRACTICAL LIMITATIONS OF A LANDLORD'S RIGHT TO CARRY OUT WORKS

INTRODUCTION

Under a lease, when a landlord reserves for itself the right to carry out works, is this right limited by the tenant's rights under the lease?

The High Court has recently considered this question and decided that there are practical limitations on the landlord exercising such a right.

THE CASE

In *Timothy Taylor Ltd v Mayfair House Corporation & Anr* [2016] EWHC 1075 (Ch), the tenant had a 20 year lease of the basement and ground floor of a building in Mayfair. The tenant used the property for its high-end art gallery.

The lease stated that the landlord had the right:

> *"to alter, raise the height of, or rebuild the Building or any other building…in such manner as the landlord thinks fit even if doing so may obstruct, affect, or interfere with the amenity of or access to the [tenant's] Premises…and even if they materially affect the [tenant's] Premises or their use and enjoyment…"*

However, the lease also contained the usual provision that the landlord was required to:

> *"permit the tenant peaceably and quietly to hold and enjoy the [tenant's] Premises without any interruption or disturbance from or by the landlord".*

What could possibly go wrong?

THE WORKS

The landlord commenced substantial development works in 2013, in order to convert the upper floors of the building (although not the basement and ground floor occupied by the tenant) into new residential apartments.

The tenant accepted that, under the lease, the landlord was entitled to undertake such works.

However, the tenant argued that the manner in which the works were being conducted substantially interfered with the tenant's use and enjoyment of the premises and, therefore, was a breach of the landlord's covenant to give the tenant quiet enjoyment of the premises.

In particular, the tenant complained that the noise generated by the landlord's works and the erection of scaffolding all around the building (including across the front of the tenant's gallery) was excessive and unnecessary. The landlord had failed to consult with the tenant about the nature and potential impact of the works and had, in some cases, deliberately misled the tenant about the landlord's specific plans for the works.

As a result, the tenant brought a claim, seeking an injunction to regulate the ongoing works and damages.

THE BALANCING ACT

The court decided that the landlord's right under the lease to undertake works to the building was limited by the tenant's right to quiet enjoyment of the premises.

That did not necessarily prevent the landlord from undertaking works – even extensive works – but it did mean that the landlord had to take "all reasonable steps" to minimise any disturbance to the tenant caused by those works.

In this case, the court held that the landlord had failed to do so and was, therefore, breaching the tenant's rights under the lease.

RELEVANT FACTORS

The court helpfully summarised a number of factors that might be taken into account when undertaking such a balancing exercise between the potentially conflicting rights of the landlord and the tenant.

The court considered the following:

1. **The use of the tenant's premises**. The landlord's right to undertake works might have to be exercised having regard to how the tenant uses the premises.

   In this case, the landlord had failed to plan and undertake the works having sufficient regard to the fact that the tenant ran a high-end art gallery or to take into account the potential impact of the works on the tenant's clients and employees.

2. **The tenant's knowledge at the commencement of the lease.** If the tenant had been fully apprised of the landlord's plans when the parties entered into the lease, the burden on the landlord to take "all reasonable steps" to minimise disturbance when undertaking the works might be significantly reduced.

   In this case, however, at the start of the lease the tenant only knew that there was a possibility that the landlord might carry out some unspecified works to the building in the future. That basic knowledge was not enough to render the landlord's subsequent conduct, including how it was carrying out the works, reasonable.

3. **Offers to compensate the tenant**. The court said that an offer by the landlord to discount the rent – or to pay some other compensation to the tenant – to reflect the likely disruption of the landlord's works might operate to reduce the steps that the landlord would then have to take to minimise that disruption.

   In this case, however, the landlord had simply refused to discuss any rent discount with the tenant. The court also noted that a recent rent review had taken no account of the planned works.

4. **Who benefits from the works?** The burden on the landlord to take "all reasonable steps" to minimise the disruption of the works is greater where the affected tenant will not ultimately benefit from those works.

   In this case, the works being undertaken by the landlord were entirely for its own benefit – so that it could let the upper floors of the building as residential apartments for its own profit – and there was obviously no benefit for the tenant.

5. **Consulting the tenant about the duration and likely impact of the works.** The court said that a landlord is reasonably expected to liaise with its tenant before works commence, to discuss important matters such as: (a) the duration of the works; (b) the likely impact of the works on the tenant; and (c) the means by which one or both parties might mitigate any inconvenience to the tenant.

   Such discussions were "strikingly missing" in this case. The landlord had made no attempt to speak to the tenant until the works were well under way and only then following repeated complaints about the works from the tenant.

6. **What practical steps could the landlord take to minimise disturbance?** The court said that it should consider what practical steps, if any, a landlord could take in order to minimise disturbance to a tenant.

   Here, several options were open to the landlord, none of which would have caused material additional expense or difficulty - but all of which were apparently not considered, ignored or disregarded. For example: (a) the landlord failed to make any provision for scheduling or limiting noisy works to only certain periods of the day; (b) the landlord failed to design the scaffolding so that it did not wholly enclose the building (including across the front of the tenant's gallery); and (c) the landlord failed to locate the main hoist for building materials away from the entrance to the tenant's gallery.

PRACTICAL CONSIDERATIONS FOR LANDLORDS

This case is a helpful reminder to all landlords that even the broadest rights in a lease to carry out works may still be subject to the tenant's rights.

In this case, whilst the tenant did not succeed in obtaining an injunction, the court proceedings did delay and disrupt the works and the tenant was awarded damages (equivalent to 20 per cent of the rent for the duration of the works) even though the tenant was unable to prove that it had actually suffered any loss.

So in order to avoid this, any landlords seeking to carry out works – even when exercising an express right under a lease – should aim to:

1. liaise with tenants when the works are being planned, in order to discuss the nature and extent of the works and to develop an appropriate strategy for minimising the impact of those works on tenants;

2. design and procure the works so as not to negatively impact on the tenant's use of the property, where practicable;

3. where the works may cause more than minor disruption to tenants, consider offering a reduced rent for the duration of the works (or some other form of compensation);

4. ensure that the project manager/contractor/site team responsible for supervising the works comply with any agreement reached with tenants aimed at minimising disruption; and

5. provide tenants with regular updates about the progress of the works and give them an opportunity to discuss any practical problems arising from the works.

CONTACT DETAILS
If you would like further information or specific advice please contact:

CLARE BREEZE
PARTNER
REAL ESTATE
DD +44 (0)20 7849 2404
clare.breeze@macfarlanes.com

MARK LAWRENCE
SENIOR COUNSEL
LITIGATION AND DISPUTE RESOLUTION
DD +44 (0)20 7849 2846
mark.lawrence@macfarlanes.com

FRED SNOWBALL
SOLICITOR
LITIGATION AND DISPUTE RESOLUTION
DD +44 (0)20 7849 2414
fred.snowball@macfarlanes.com

JUNE 2016

MACFARLANES LLP
20 CURSITOR STREET LONDON EC4A 1LT
T +44 (0)20 7831 9222 F +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com

This note is intended to provide general information about some recent and anticipated developments which may be of interest.
It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT.
The firm is not authorised under the Financial Services and Markets Act 2000, but is able in certain circumstances to offer a limited range of investment services to clients because it is authorised and regulated by the Solicitors Regulation Authority.
It can provide these investment services if they are an incidental part of the professional services it has been engaged to provide. © Macfarlanes June 2016