Retention of Keys to Residential Premises

Mark Pawlowski asks whether a landlord has a legal right to hold keys to the demised premises

The following is probably not an unfamiliar scenario in the residential letting context. The tenant has changed the locks to their flat without the landlord's knowledge or permission. The tenant maintains that they are entitled to exclusive possession of their flat and that the landlord has no right to retain a set of keys. The tenancy is an assured shorthold tenancy for a fixed term of 12 months which does not contain any reservation to the landlord of a right to retain keys for the premises. What is the landlord's legal position regarding the keys to the flat?

Retention of keys not conclusive of legal status

It is not a requirement of a tenancy that the tenant should have exclusive possession of the keys. An occupier will be classified, as a matter of law, as a tenant despite the fact that the landlord retains keys if the retention of keys is not inconsistent with a tenancy, for example, if they are required by the landlord to gain entry quickly in the event of an emergency (i.e., in case of fire, burst pipes, etc.) or to read the electricity or gas meters or do repairs which are his responsibility. If, on the other hand, a key is retained by the landlord in order to perform services (i.e., attendance) which he has contracted to carry out under the terms of the tenancy, such as regular cleaning, daily bed-making or the provision of clean linen, the occupier will be characterised as a lodger rather than a tenant. The retention of keys by the landlord is, therefore, not conclusive of the legal status of the occupier: *Aslan v Murphy (No 1)/Aslan v Murphy (No 2)/Duke v Wynne* [1990] 1 WLR 766 and *Family Housing Association v Jones* [1990] 1 WLR 779. In the former case, Lord Donaldson MR stated, at 773:

> "Provisions as to keys . . . do not have any magic in themselves . . . It is not a requirement of a tenancy that the occupier shall have exclusive possession of the keys to the property. What matters is what underlies the provisions as to keys. Why does the owner want a key, want to prevent keys being issued to the friends of the occupier or want to prevent the lock being changed?"

Similarly, in *Jones*, Balcombe LJ expressly recognised that the retention of a key by itself was not decisive because "a landlord under an undoubted tenancy may retain a key to enable him to exercise a right reserved to him by the tenancy to enter the demised premises to inspect the state of repair." In *Jones* itself, the housing association had retained the key to the flat for use by its emergency housing worker for the purposes of inspecting the state of repair and offering support and discussion of housing problems to the occupant of the

accommodation (intended as temporary housing for homeless people). The retention of a key for these limited purposes, therefore, was held not to be inconsistent with the granting of exclusive possession of the flat.

Express or implied term allowing retention of keys?

Many residential tenancy agreements will contain a provision expressly allowing the landlord to retain a key to the premises and requiring the tenant not to interfere with or change the locks or give the key to any person other than an authorised occupier of the premises. In the absence, however, of any such express provision (as in the scenario mentioned above), it is pertinent to consider whether the court would imply a term permitting the landlord to retain a set of keys in case of emergency (or to carry out essential inspection or repairs) as a matter of business efficacy or necessity (*Liverpool City Council v Irwin* [1977] AC 239) or as something so obvious that it goes without saying (*Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, affirmed by the House of Lords, [1940] AC 701).

In order to satisfy the test of business efficacy, the term must be necessary in a business sense to give effect to the parties' agreement. The difficulty here, however, is establishing that the tenancy would not work (or not make sense) without the imposition of a term relating to the landlord's retention of a key. Despite the obvious practical benefits of retaining a key, it is, perhaps, unrealistic to suppose that the tenancy (as a whole) would be unworkable without the landlord's ability to gain access to the premises.

Under the so-called "officious bystander" test, however, the court will imply a term into a contractual agreement if it can be established, as a matter of fact, that both parties regarded the term as obvious and would have accepted it, had it been put to them at the time of contracting. Most residential landlords do, of course, retain keys to rented accommodation despite the fact that the tenancy agreement may not specifically authorise such practice. In many cases, therefore, a term that the landlord should retain a key for use in emergency may be one which the parties would obviously have intended at the time of the letting had they thought about it. On this basis, therefore, the court may be inclined to imply the term in order to give proper effect to the parties' intentions, especially if a key had in fact been retained by the landlord at the commencement of the letting and this was known (and tacitly accepted) by the tenant as a useful safeguard in cases of emergency or misadventure (for example, if the tenant was unable to gain entry to the premises because he had locked himself out or lost his keys). The landlord's remedy, assuming such a term could be implied, would be a mandatory injunction requiring the tenant to restore the original lock or (if this was no longer possible) the handing over of a spare key for the new lock.

Does changing the lock constitute an unauthorised alteration to the premises?

Another approach may be to characterise the tenant's change of lock as an "alteration" to the premises in breach of an express covenant in the tenancy agreement. Most standard assured

shorthold tenancy agreements do contain an absolute (or qualified) prohibition against making alterations to the demised property. An alteration, however, is characterised as a change in the form and constitution of a building (for example, the making of two rooms into one or the insertion of a window into a wall), but not just a change in the appearance of the building unless the covenant expressly so provides. In other words, the alteration must change the appearance of the *fabric* of the property: *Joseph v London County Council* (1914) 111 LT 276 and *Bickmore v Dimmer* [1903] 1 Ch 158. Since the changing of a lock is unlikely to involve any structural (as opposed to cosmetic) change to the flat, the mere replacement of a lock to the front door (even with some noticeable and permanent damage to the door) will not give rise to a breach of any express covenant against alteration unless the covenant extends to changes in the actual appearance of the premises. Even so, the change may be characterised as so trivial as not to warrant any remedy. By analogy with covenants to repair, such covenants will be construed reasonably so that the landlord is not entitled to claim for slight or insignificant damage: *Perry v Chotzner* (1893) 9 TLR 488, where it was held that, under a covenant to repair and paint, the tenant was not bound to fill up small cracks in the plaster and holes made by nails within the period of decorating.

An act of waste or breach of the implied term of tenant-like user?

Assuming, however, that the change of lock has involved some damage to the door, this may also constitute an act of voluntary waste or a breach of the implied obligation to use the premises in a tenant-like manner. A tenant commits waste if he causes, by an act or omission, any lasting alteration to the premises to the prejudice of the landlord by way of damage, destruction, addition, improvement or neglect: *Cole v Green* (1672) 1 Lev 309. The obligation not to commit waste is founded in tort and is independent of any express or implied contractual obligation. More specifically, voluntary waste is committed by any deliberate (or negligent) act causing permanent damage or altering or converting the demised premises. Both fixed term and periodic tenants may be liable for voluntary waste: *Yellowly v Gower* (1855) 11 Exch 274 and *Torriano v Young* (1833) 6 C & P 8. It is, at least, arguable that the tenant's act of changing the lock to the demised premises (assuming there is evidence of some permanent damage) constitutes an act of voluntary waste. In addition, there may be a breach of the implied obligation of tenant-like user which prohibits the tenant, inter alia, from damaging the premises and requires him to deliver up possession to the landlord at the termination of the tenancy in the same condition as when the tenant took them (fair wear and tear excepted): *Warren v Keen* [1954] 1 QB 15.

In either case, the landlord's remedy would be a mandatory injunction requiring the tenant to restore the original lock and damages for the cost of making good any damage to the door: *Manchester Developments Ltd v Garmanson Ltd* [1896] QB 1212, (landlord awarded full cost of making good the damage when the tenant cut holes in an outside wall to make room for his manufacturing plant).

Mark Pawlowski is a barrister and professor emeritus of property law, School of Law, University of Greenwich