Neutral Citation Number: [2020] EWHC 1169 (Ch)

Case No: PT-2019-000450

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

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

Date: 12/05/2020

Before:

MR JUSTICE MILES

- -

Between:

DREAMS LIMITED **Claimant**

- and –

(1) PAVILION PROPERTY TRUSTEES LIMITED

(2) PAVILION TRUSTEES LIMITED **Defendants**

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Anthony Tanney (instructed by **Knights plc**) for the **Claimant**
Stephanie Tozer Q.C. (instructed by **Pinsent Masons LLP**) for the **Defendants**

Hearing dates: 1 May 2020

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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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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 12 May 2020.

Mr Justice Miles:

Introduction

1. This case is about an agreement for the surrender of a lease. I have heard the trial of two preliminary issues about it.

2. The Defendants are owners of a retail building in Margate, Kent, forming part of a retail estate. Under a lease dated 11 August 2006 the Defendants let the premises ("the Premises") to a company called Dreams plc for a term ending in 2031 at a market rent. The lease contained full tenant's repairing covenants and a covenant by the tenant to remove its belongings and fixtures at the end of the term.

3. Dreams plc went into administration in 2013. On 25 April 2014, with the Defendants' consent, Dreams plc assigned the lease to the Claimant. On the same day the Claimant and the Defendants made a deed which shortened the term to 2024. This took effect in law as a surrender and re-grant of the lease on otherwise unchanged terms (the re-granted lease is referred to below as "the Lease"). The parties also entered a side agreement granting the Claimant rent and other concessions. They also entered on the same day into an Agreement for Surrender ("the AFS").

4. The two preliminary issues are:

   (1) Whether, on the true construction of the AFS, it was a condition of completion of the surrender that the tenant shall pay to the landlord a sum in damages (if any) in respect of dilapidations (if any) that were the responsibility of the tenant under the Lease; and

   (2) Whether, on the true construction of the AFS, the tenant was obliged to give vacant possession before the landlord could be obliged to accept a surrender.

The Lease

5. The Lease included the following terms and covenants.

6. By clauses 2.3.1 and 3, the tenant agreed to pay the rent quarterly in advance. Schedule 2 provided for periodic rent reviews.

7. By cl. 2.3.2, the tenant agreed to pay as additional rent sums payable under schedules 3 and 4, interest under the terms of the Lease, and VAT. Schedule 3 covered insurance. By para 4.1 of it the landlord was obliged to insure and reinstate. Para 2.1 provided for the tenant to pay to the landlord on demand the due proportion of the insurance premiums incurred by the landlord. Schedule 4 provided for the payment of service charges. By para 1 of it the tenant was obliged to pay a due proportion of the service charge. The due proportion was calculated by reference to the lettable area of the Premises as a proportion of various units let by the landlord. By para 3.3 the due proportion of the service charge was to be discharged by payment in advance on the quarterly rent payment dates; the amounts being notified by the landlord.

8. By cl. 3.3 of the Lease, the tenant agreed to pay "Outgoings" on the property and to refund to the landlord on demand a fair and proper proportion of Outgoings paid by

the landlord attributable to the Premises; and to the extent not included in the service charge to contribute to the expenses of cleaning, lighting and other expenses.

9. By cl. 3.4, the tenant covenanted to repair, maintain and clean the Premises.

10. By cl. 3.6, the landlord had the right to enter the Premises and carry out repairs not carried out by the tenant when notified of the requirement to do so; and by cl. 3.6.4, the tenant was obliged to pay on demand all expenses of the landlord in doing so, such expenses to be recoverable as rent.

11. By cl. 3.7.2, the tenant agreed, if requested by the landlord to do so, to remove its belongings at the end of the term, including its trade fixtures and fittings and notices, notice boards and signs.

12. By cl. 3.9, the tenant covenanted not to make alternations without consent and at the end of the term, on being required to do so by the landlord, to reinstate the Premises to the condition they were in at the start of the Lease.

13. By cl. 3.21, the tenant covenanted to reimburse the landlord for expenses incurred by the landlord in a variety of contexts, including the costs of preparing a schedule of dilapidations or the recovery or attempted recovery of rent, or in connection with any applications for consent or approval made under the Lease.

The AFS

14. The AFS was between the Defendants as the "Landlord" and the Claimant as the "Tenant". It gave each party the right, on 6 months' written notice, to require the surrender of the Lease on a "Surrender Date". For the Defendants, the Surrender Date was 25 April 2017. For the Claimant, the Surrender Dates were 25 April 2017 and 25 April 2019.

15. The AFS incorporated the Standard Commercial Property Conditions (2nd Ed.). Completion of the surrender on a Surrender Date was to take place by execution of a Transfer and Counterpart ("the Transfer") in the form of a draft attached to the AFS. The agreement was therefore a contract (conditional on the giving of notice) for the transfer by the Claimant to the Defendants of an interest in land, with the Defendants being treated as buyers and the Claimant as seller.

16. The parties' respective obligations to make and accept a surrender of the Lease were contained in cl. 2.1 of the AFS.

17. By cl. 2.2, the surrender excluded tenant's trade fixtures, fittings, and equipment, but included all landlord's fixtures, fittings, and equipment.

18. Clause 6 concerned the arrangements for completion. Cl. 6.1 said that "Completion is to take place on the Completion Date". That was defined to mean the relevant Surrender Date.

19. Cl. 6.2 provided that "[i]t is a condition of completion that the Tenant is to pay any money due on completion by direct credit" from its bank account to an account nominated by the Landlords' solicitors. Cl. 6.4 provided for completion to take place by express surrender when the Tenant was to deliver the executed Transfer, the Lease

and keys of the Property, and required the Landlord to deliver an executed counterpart Transfer.

20. Cl. 8 stated: "The surrender is with vacant possession."

21. Cl. 12.1 provided that "Up to and including Actual Completion all rents and other monies due under the Lease remain payable." Cl. 12.2 required the tenant to pay on completion the apportioned part of such rents and monies attributable to any period up to and including Actual Completion. Cl.12.3 dealt with any necessary reimbursement of any overpaid proportion of advance payments made under the Lease. Cl.12.7 stated that in making any apportionment under cl. 12 it is to be assumed that the Tenant is tenant of the Property (and is therefore under an obligation to pay the rents and other monies due under the Lease) until the end of the effective date of apportionment.

22. Cl. 13 acknowledged that the obligations, covenants and conditions of the Lease were to remain in full force and effect until Actual Completion.

23. The draft Transfer annexed to the AFS provided, at cl. 11.1.8, for the release of the Claimant absolutely from its liabilities, covenants and obligations, past present and future, under the Lease (subject only to some immaterial provisions relating to service charges). Cl. 11.1.9 of the draft Transfer contained a reciprocal release in favour of the Defendants, but it was wider than cl. 11.1.8 in that it released the Defendants from all liabilities (whether or not under the Lease).

Service by the Claimant of notice under the AFS

24. On 16 October 2018 the Claimant notified the Defendants of its wish to surrender the Lease on 25 April 2019.

25. On 30 January 2019 the Defendants' surveyor inspected the Premises.

26. On 18 February 2019 the Defendants' solicitors wrote to the Claimant enclosing a priced schedule of dilapidations prepared by their surveyors, dated 30 January 2019. The Defendants reserved their rights in respect of any other disrepairs not identified in the schedule. The schedule put the amount that the Claimant would be liable for if the listed items were not rectified at £173,227 odd.

27. On 8 April 2019 the Defendants' solicitors wrote again saying that on termination of the Lease the Defendants required the Claimant to hand back the property in accordance with the schedule of dilapidations. It also required the removal of all tenant's belongings, trade fixtures and fittings, in accordance with cl. 3.7.2 of the Lease, and to make good any damage caused, in accordance with cl. 3.7.3. The letter reserved the Defendants' rights to claim for further disrepair not identified in the schedule of dilapidations.

28. On 10 April 2019 the Claimant's solicitors wrote saying that the claim by the Defendants as set out in the schedule of dilapidations would be covered by the release contained in the Transfer, to be executed on completion of the AFS.

29. On 11 April 2019 the Defendants' solicitors emailed stating that the requirement of the AFS that the tenant pay any money due on completion included the monies

claimed in the schedule of dilapidations and saying that if that amount was not paid in full and on time, completion would not occur, so that the Lease would continue.

30. On 18 April 2019 the Defendants' solicitors again stated in an email that payment of the full amount set out in the Schedule of Dilapidations was required if the surrender was to take effect.

31. On 23 April 2019, in response to a request for an exact figure, the Defendants' solicitors said: "… the figure can easily be calculated by your client, being the sum of the apportioned rent, service charge and insurance, together with the final figure set out in the dilapidations schedule. To the extent that your client has carried out any of the works listed in the schedule, it is better placed than ours to make an appropriate deduction in respect of the works, and the associated loss of rent claim. No doubt your client's surveyor can assist."

32. On 25 April 2019, the completion date under the Claimant's notice, the Defendants' solicitors said that the Defendants' agent had inspected the Premises and whilst some of the works identified in the Schedule of Dilapidations had been carried out, not all of them had been. They said that the mezzanine, the lift and the flues remained in situ, and it appeared that no external cleaning/decoration or repair works had been done, except signage removal; and that "[i]n the absence of any input from you / your client, our client has calculated the cost of the outstanding works is £102,699 plus VAT. … our client now requires payment of £102,699 plus VAT in advance of completion."

33. Later that day the Defendants refused to complete the transfer because the dilapidations issue had not been resolved. That remained their position.

34. The Claimant started the proceedings on 3 June 2019, seeking specific performance of the AFS, damages and declarations.

35. On 18 September 2019 Deputy Master Bartlett ordered a trial of the two preliminary issues. They are questions of interpretation or law and the trial took place with no live evidence.

Principles of interpretation

36. The principles of interpretation of commercial contracts are well-known and were not in dispute. They have most recently been set out in the Supreme Court in Rainy Sky v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900; Arnold v Britton [2015] UKSC 36, [2015] AC 1619; and Wood v Capita Insurance Services Limited [2017] UKSC 24, [2017] AC 1173.

37. Lord Neuberger said this at paragraphs 15, 19 and 20 of Arnold v Britton, which concerned a lease:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the

> contract to mean", to quote Lord Hoffmann. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.
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> 19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.
>
> 20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. … Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

The first preliminary issue

38. For convenience I will set out the issue again:

> "Whether, on the true construction of the Agreement for Surrender, it was a condition of completion of the surrender that the tenant should pay to the landlord a sum in respect of damages (if any) in respect of dilapidations (if any) that were the responsibility of the tenant under the Lease?"

39. The issue turns on the interpretation of cl. 6.2 of the AFS, which made the obligations of the Defendants to complete conditional on the Claimant paying "any money due on completion."

40. The Claimant submits, in summary, that the claim for dilapidations is a claim for unliquidated damages, over which there has been no adjudication or agreement. No sum of money can be said to be "due". This is to be contrasted with outstanding rent or the other sums required to be apportioned and paid as at the completion date under

the terms of cl. 12 of the AFS. Cl. 6.2 is to be read with cl. 12 which refers to "monies due under the Lease," and a claim for damages is not such a claim. The AFS contains no mechanism for the identification or resolution of any dispute over dilapidations before completion and the Defendants were indeed unable, at the time of completion, to specify the exact sum said to be due. A schedule of dilapidations is no more than a claim and even this is only part of the process, as s.18 of the Landlord and Tenant Act 1927 limits damages to the diminution in value of the reversion (not something that has been calculated here). Claims for damages for dilapidations are time consuming and nobody could have supposed that they would be resolved in the six-month notice period. The Claimant also says that, if the Defendants were correct, there would seem to be nothing for the draft Transfer to bite on, since all liabilities under existing covenants would have been covered by the payment of damages in advance of completion.

41. The Defendants submit, in summary, that the words used in cl 6.2 are apt to include damages for breach of the repairing covenants in the Lease. The phrase "money due" is ambiguous and is capable of including a claim for damages for breach of contract (though they accept that in certain contexts the notion of amounts "due" might be more restrictive than that). The qualifier "any" attaching to "monies" is broad. The AFS requires six months' notice and the parties could reasonably have supposed that they could, in that period, agree the figure or obtain a judgment about the amount of the damages payable. In any case it is the Claimant as tenant which has the obligation to repair and it could reasonably assess the amount of its obligations and tender that amount. The parties were aware at the time the AFS was entered into that there may be questions over the creditworthiness of the Claimant and therefore the Defendants could reasonably wish to avoid disputes over the payment of money after the end of the Lease. The agreed scheme was that the parties would have a clean break on Completion and would release one another from all liabilities. The Defendants note that there was no inspection of the Premises and its state of repair at the time the various contracts, including the AFS, were entered into and they seek to infer from this that the parties cannot have intended that there would be a waiver of any damages for breach of the tenant's repairing obligations in the event of a surrender. The Defendants also say that the Claimant's reading leads to an uncommercial and surprising result: if the Claimant were to surrender under the AFS it would be released from liability under its repairing covenants whereas if the Lease were to run its full term the Claimant would have to repair and reinstate the property at the end of the Lease.

42. The parties referred to various authorities to seek to map out the legal landscape against which the contract falls to be read. The cases (to which I shall return) do assist in throwing some light on how Courts have construed similar (but not identical) phrases in certain contexts. But language always takes its colour from the situation in which it is used and in the end the question is one of interpretation of the particular words used by the parties in their contractual setting and context.

43. Starting with the language of the contract, in my view the phrase "any money due on completion" as used in cl. 6.2 most naturally connotes a debt or payment obligation, such as rent or service charges, and not an unresolved claim for unliquidated damages for breach of a repairing covenant. It may be possible in some contexts for the concept of "monies due" to be broad enough to include damages, but to my mind, as

used here, the obligation to pay the "money due" naturally connotes that there is a crystallised liability to pay a given sum on the relevant date (here the date of completion). I do not think it naturally includes the undertaking to do something other than pay money, such as keeping the Premises in repair. And a potential, but unresolved, liability under the general law to pay damages for breach of such an obligation would not naturally or ordinarily be called "monies due."

44. It is also to be noted that under cl. 6.2 the "monies due" must be paid by completion. This is not therefore one of those cases where there may be a practical distinction between an obligation accruing due and it being payable. In the AFS it is a precondition to completion that the sums due are actually paid.

45. The Claimant says that cl. 6.2 of the AFS falls to be read with cl.12.1 which provided that up to and including completion "all rents and other monies due under the Lease remain payable" and the further provisions of cl. 12, which provide for apportionment. I agree with the Claimant that this is a further pointer in favour of its interpretation. The words "monies due" appear in cl. 12 and there is no reason to think that the parties were addressing different subjects in the two clauses. On a natural reading both clauses are concerned with contractual payment obligations.

46. The Claimant relies on President of India v Lips Maritime Corporation [1988] AC 395 at 424H to 425A where Lord Brandon said that damages payable for a breach of contract (in that case demurrage) did not fall due under the contract unless a court had made an award to that effect. Lord Mackay made the point at 429F-G that, in general, contracts do not contain provisions regulating the amount or the manner or due date of payment of damages for their breach. There is always a risk in drawing parallels from one case to another. The words used in a contract need to be construed in their own broader linguistic and commercial setting. But with this allowance I think the case does provide some support for the submission that in a commercial context an unresolved claim for damages for breach of contract is unlikely to be regarded as an amount or sum "due" from one party to another.

47. The Claimant also relies on Re Collbran [1956] 1 Ch 250. That involved an underlying claim for unliquidated damages for disrepair under a tenancy. The landlord sought to enforce the claim against the Administrator of what was called German Enemy Property under the Distribution of German Enemy Property Act 1949. S.8 of the Act defined the term "German enemy debt" as a "sum due". Upjohn J decided that the claim did not fall under that description. He held that no sum was due until two things had happened: first, that it was established that there was a breach of covenant and, second, that the amount due in respect of the breach had been quantified by judgment. He went on to say that "[u]ntil that had happened, or until the parties have agreed on the payment of a liquidated sum, it cannot be said that any sum is due". One needs again to recognise that this was said in a different legal context and that in the end the question for this Court is the interpretation of the contract made by the parties. Moreover, Upjohn J specially drew attention to the draftsman's use of the term "German enemy debt" as part the defined term, suggesting that the draftsman had in mind something like a debt. Nonetheless, and even with these caveats, I consider that Upjohn J's reasoning provides some support for the Claimant's position that an unresolved, unliquidated claim for breach of covenant to repair does not naturally fall under the description of sums, or amounts, "due" for payment.

48. The Defendants rely on Scottish & Newcastle v Raguz [2008] UKHL 65, [2008] 1 WLR 2494. That concerned the interpretation of s.17 of the Landlord and Tenant (Covenants) Act 1995. The Defendants rely on it for the broad proposition that the meaning of when a sum becomes "due" depends on the context of its use. It is difficult to disagree with that as a general proposition, but I do not think that the case, which turned on the details of the statute, provides any real assistance in construing the present contract. There is nothing in it to support the view that "sums due" or like phrases are usually broad enough to include claims for damages.

49. The Defendants also referred to Stein v Blake [1996] AC 243. The case concerns insolvency set off. The plaintiff had taken proceedings for damages for breach of contract and the defendant had counterclaimed for damages for misrepresentation. Before trial the plaintiff was made bankrupt. His trustee in bankruptcy assigned to the plaintiff the damages claim against the defendant. The judge stayed the claim on the basis that there had been an automatic set off on the bankruptcy and the trustee had not determined the amount left after set off; the Court of Appeal allowed the appeal on the basis that the trustee was able to assign the net balance; and the House of Lords agreed. The Defendants rely on para 5 where Lord Hoffmann said that when the statutory bankruptcy rules speak of taking an account of what is "due" from each party that does not mean that the sums must have been due and payable at the date of the bankruptcy or even when the calculation falls to be made. I do not consider that the Court can derive any assistance from this: the relevant set off rule defined "bankruptcy debts" very broadly, to include all liabilities, whether present or future, certain or contingent, and whether or not fixed or liquidated or capable of being ascertained or not, or even arising as a matter of opinion. It deems liabilities which would not otherwise be regarded as debts at all as "bankruptcy debts". It throws no light on the usual or natural meaning of the concept of a debt or amount payable. I derive no assistance from the case.

50. Nor do I think there is any real force in the Defendants' reliance on the word "any" in cl. 6.2. That is just a way of saying that all monies due must be paid. It does not extend the natural meaning of what money is "due".

51. The next factor is the workability of the contract under the rival interpretations. Under the AFS the payment of any monies due is expressed to be a condition of completion. For the contract to work properly the amount of money due to the Defendants must be identifiable on the completion date. A claim for damages for breach of the tenant's repairing covenants lacks this feature. Such claims regularly involve the service of schedules and counter schedules. There is also the statutory cap on damages under s.18 of the 1927 Act, which usually requires valuation evidence. The resolution of such claims is often drawn-out, and I do not accept the Defendants' submission that the parties would reasonably have expected to obtain a court ruling, absent agreement, within the six-month notice period. In my judgment it is very unlikely that the parties would have made completion conditional on payment of a sum which could not be ascertained other than by agreement or adjudication by a court. The contract to my mind contemplates a simple process of determining how much is due, applying, if necessary, an apportionment down to the completion date.

52. Moreover, on the Defendants' reading, it would be necessary to determine whether there was liability for any breaches of the repairing covenant during the six month period from service of the notice to completion (and the amount of the diminution in

the value of the reversion). The process of determining the amount of damages payable as at that date could only take place afterwards. That would mean that the Claimant might never be able to satisfy the requirements for completion by the completion date.

53. I also give some weight to the Claimant's argument about the lack of provision in the contract for the identification of any alleged failure to keep the Premises in repair, or any requirement for the service of any notices specifying the amounts said to be due by way of damages. While I accept that the onus is on the Claimant to comply with its repairing obligations, it does not follow that the contract should be read as requiring it to estimate and pay the amount that might be payable by it for breach of those obligations. That would put the Claimant at risk of under-paying and would undermine certainty. I read the AFS as a more straightforward exercise, involving the satisfaction by the Claimant on completion of its contractual payment obligations.

54. These considerations about the practical working of the contract under the rival interpretations, coupled with the natural meaning of the language used in cl. 6.2 (and cl. 12) of the AFS, are, to my mind, clear and firm pointers towards the Claimant's interpretation.

55. The Defendants say that their interpretation makes more commercial sense. They say there is no reason for thinking they were intending to free the Claimant from its repairing obligations; and that it is particularly odd for the Claimant to be relieved of its repairing obligations if it surrenders, while having to comply with them if the Lease continues for its full term. One can see that it might be thought surprising. On the other hand, the Claimant may say that the whole purpose of the surrender was to give it a chance to bring the Lease to an end early with a clean break and that the release was in deliberately wide terms. Arnold v Britton shows that it is not the function of the court, through interpretation, to re-make bargains which may later appear unwise or surprising for one or other party. The Court's task is not to construct a reasonable contract for the parties; it is to construe the contract they have reached. A result said, in a forensic setting some years after the contract was made, to be odd or uncommercial, may just arise from what the parties hammered out on the anvil of commercial negotiation. The evidence here shows that the Defendants were prepared to give rent concessions at the time they entered the arrangements with the Claimant and it may be that the Defendants were prepared also to offer the terms of the AFS, including the release of covenant obligations, as an incentive to the Claimant to take on the Lease. There is nothing unusual about a landlord making commercial concessions to avoid a letting void. The court does not know (and under our law of contract cannot know) how the terms of the AFS were negotiated. I do not consider that the appeal to commercial common sense materially assists in interpreting the agreement.

56. I also do not consider that the Defendants' failure to inspect the Premises at the time the AFS was entered into carries much weight. It may be that the Defendants did not inspect because they assumed the repairing obligations would remain in place. But it is also possible that they were not particularly concerned about the repairing obligations and simply did not bother to inspect. In any case the question is not what was in their mind, it is what the contract means.

57. On the other hand, I do not give any real weight to the Claimant's argument that if they had to pay damages for breach of the repairing covenant in advance of completion there would be nothing for the release in the draft Transfer to bite on. The release is intended to be a catch all, intended to provide the parties with certainty that there would be no remaining obligations under the Lease, whether or not the parties have been able to think of what these might be. It is simply a general release of claims and I do not think that it throws any reflected light on to the meaning of cl. 6.2.

58. Having looked iteratively at the wording and the context, practical workability and the commercial consequences of the rival readings, I determine the first preliminary issue in favour of the Claimant.

The Second Preliminary Issue

59. For convenience, the second issue is this:

> "Whether, on the true construction of the AFS, the tenant was obliged to give vacant possession before the landlord could be obliged to accept a surrender."

60. The factual background to this issue is this. The Defendants say that a mezzanine floor and lift installed by the tenants in the Premises are tenant's fixtures, which should have been removed and that their continued presence in the Premises prevents the Claimant from giving vacant possession, contrary to cl. 8 of the AFS. It is not for me to resolve the factual disputes, but the Claimant says (among other things) that the items, which were installed in 2006/7 became part of the fabric of the Premises and are not tenant's fixtures; that they were *in situ* before the Claimant became the tenant under the Lease and are part of the demise; and that in any case the Defendants are barred by estoppel or election from pursuing the present point.

61. These points are disputed, but the assumption on which this preliminary issue proceeds is that, by failing to remove the lift and mezzanine floor, the Claimant failed to provide vacant possession at the completion date.

62. The Claimant accepts that it was contractually obliged under cl. 8 of the AFS to give vacant possession but submits that this was not a condition precedent to the obligations of the Defendants to complete the transaction. It submits, in summary, that a breach of cl. 8 may have a range of effects, from the trivial to the serious, and for that reason, clear words would be required to make the obligation a condition precedent. The conditions to completion were expressly set out in clause 6 of the AFS, which said nothing about vacant possession. They also say that the court may give effect to a contractual obligation (not being a condition precedent) to give vacant possession by way of damages or by making any specific performance conditional on an order for compensation.

63. The Defendants submit, in summary, that the obligation of the Claimants to give vacant possession of the Premises was a condition precedent to their obligation to complete the AFS. They emphasise that the AFS is a contract for the conveyance of an estate in land. They rely on the general law and say that in sales of land the purchaser's duty to complete is conditional on the property being delivered with vacant possession where this has been promised in the contract. The parties

deliberately adopted the usual form of a sale to convey an estate in land and did nothing to displace that general principle. The Defendants do not say that failure to give vacant possession discharged them from their obligations under the AFS or that the Claimant has repudiated the contract. They say, rather, that they do not have to complete unless and until vacant possession is given.

64. In Bremer Handelgesellschaft v Vanden Avenne Izegem [1978] 2 Lloyds Reports 109 Lord Wilberforce said that:

> "Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law."

65. It is not necessary for the word "condition precedent" or similar to be used, but the Court nonetheless has to consider whether that is the effect of the provisions (see Astrazeneca UK Ltd v Albemarle International Corp. [2011] EWHC 1572 (Comm)) at para 249. In the same case at para 250 Flaux J said this:

> "… in the absence of an express term, performance of one obligation will only be a condition precedent to another obligation where either the first obligation must for practical purposes clearly be performed before the second obligation can arise or the second obligation is the direct quid pro quo of the first, in the sense that only performance of the first earns entitlement to the second."

66. The Claimant relies on a passage from Lewison on the Interpretation of Contracts (6th Ed.) at para 16.02:

> "Because the classification of a term as a condition precedent may have the effect of depriving a party to a contract of a right because of a trivial breach which has little or no prejudicial effect on the other and causes that other little or no loss, the court will usually require clear words before coming to that conclusion."

67. That statement was based on Heritage Oil and Gas Ltd v Tullow Uganda Ltd [2014] EWCA Civ 1048. In that case, the failure to comply strictly with the condition precedent would altogether have deprived one of the parties of a right. This will often be the case if notification provisions in commercial contracts such as insurance or share sales or (closer to home) break clauses in leases are conditions precedent (as they often are). If they are not complied with on time the right in question is lost.

68. In the present case non-compliance with the term would not have such draconian consequences. Under a contract to convey land time does not become of the essence until one or other party serves a notice to complete; a failure to comply with cl. 8 would not, on either party's case, lead to the Claimant's rights under the AFS dropping dead at once. Moreover, the passage from Lewison para 16.02 refers to clear words "usually" being required. It does not say that the parties need always use such words to create conditional obligations. There may be other factors, such as the

general law concerning transactions of the type in question. As Lord Wilberforce said in the Bremer case, the question is one of interpretation of the agreement in its context, including general considerations of law.

69. Turning to the present case, the parties did not expressly describe the obligation in cl.8 of the AFS as a condition precedent or even a condition. The contract said no more than that "[t]he surrender is with vacant possession." By contrast, cl 6, which addressed completion said in terms that the payment of monies due was a condition to surrender. This different treatment is to my mind a pointer towards the Claimant's reading.

70. The Claimant also says that the AFS was a carefully drawn contract, prepared with the assistance of professional advice, and this is further reason to think that if they had intended to treat cl. 8 as a condition the parties would have said so. There is again some force in the point.

71. As the Claimant observes, a breach of the obligation to give vacant possession could have a range of different impacts. It might at one end of the range be serious. But it could also be comparatively trivial and lead to little prejudice, which could be compensated in damages. The Claimant also points out that the obligation of the Claimant, which arises under the AFS (not the Lease) would not be released by the Transfer (which only covers liabilities and covenants under the Lease). Nor would the obligation be treated as merging in the transfer (see Gunatunga v DeAlwis (1996) 72 P. & C.R. 163). The Defendants would therefore still be able to seek damages for any failure of the Claimant to comply with its obligations to give vacant possession. These are again points in favour of the Claimant's reading.

72. The Defendants counter these points by focusing on the character of the AFS as a contract for the conveyance of an interest in land. They say that under the general law concerning sales of land, where the seller has expressly or impliedly undertaken to deliver vacant possession, the purchaser is not required to complete if the seller is unable or unwilling to give such possession. They submit that the parties, who were professionally advised, understood that they were entering into a contract for the sale of land. They indeed incorporated standard commercial property conditions and agreed that they would be in the position of a seller and buyer of land respectively. The Defendants say that a reasonable reader would understand, given the established legal context, that the obligation on the Defendants, as purchaser of the estate, would only arise on delivery by the Claimant, as seller, of vacant possession of the land.

73. As to the general law, the Defendants rely on the unreported decision of the Court of Appeal in Lambeth LBC v Lexadon given on 14 June 2000. That was a case of a contract for the sale of a house. Between contract and completion squatters moved into the property. The buyer declined to complete. The seller served a notice to complete and when the buyer refused, the claimant rescinded, forfeited the deposit and sued for damages. The seller later sold the house for a lower price (in fact to the defendant) and claimed damages for breach of the first sale. The contract provided that the property was sold with vacant possession. The dispute turned on another condition, cl. 13, which addressed what would happen if the property were unlawfully occupied between contract and completion. The judge and the Court of Appeal rejected the argument that cl. 13 relieved the seller of its obligation to give vacant possession and found for the defendant. The part of the decision concerning the

meaning of cl. 13 has no direct bearing on the present case. However, at para 15 Laws LJ made some statements about the position of the parties as a matter of general law:

> "The true position, as I see the matter, depends critically upon the words of the last sentence in special condition 13. [Counsel] for the claimant local authority has to get out of those words the proposition that the purchaser is bound to complete notwithstanding that the seller cannot give vacant possession. If special condition 13 has that effect it certainly has it only by implication – and there is the first weakness, as it seems to me, in the claimant's case. If what could otherwise be the purchaser's plain right to walk away from the contract is to be denied him and if he is to be compelled to complete at the original contract price, notwithstanding that he is getting something very different from his bargain, one would expect that to be provided for in clear terms."

74. At para 20 he said that, absent cl. 13, the buyer would enjoy the right to refuse to complete the contract and the seller could not in that event serve a notice to complete because he would be in default, being unable to give vacant possession. At para 25 he said that the argument based on cl. 13 could not "prevail against the blunt fact that there is nothing in this clause to deny the important right in the hands of the purchaser to refuse to complete the sale if his seller is not giving him vacant possession".

75. Counsel for the Claimant submits that the case could be read as saying that the Court regarded the buyer as having a right to terminate the contract for repudiatory breach and that this explains Laws LJ's reference to the buyer being allowed to walk away. But that is not how Laws LJ analysed the case. There was no discussion of any acceptance by the buyer of any repudiation by the seller, and other parts of the passages I have referred to (particularly in paras 20 and 25) describe the buyer as simply being entitled not to complete because of the failure to deliver vacant possession. It may also be fairly observed that the judgment was extempore and there was no citation of authority, and that the case does not appear to have been referred to in the main textbooks. I nonetheless consider that the decision is authority for the proposition that a buyer is not required to complete a purchase of property where a seller has failed to fulfil its promise to deliver vacant possession on completion. Laws LJ appears indeed to have regarded this as self-evident.

76. The same conclusion is supported by Cook v Taylor [1942] 1 Ch. 349. The agreement in that case for the sale to the buyer of a house did not refer to vacant possession, but sales particulars containing the statement "vacant possession on completion" had been delivered by the seller's agents to the buyer. Before the date for completion the house was requisitioned by the government under a wartime statute. Simonds J held that the particulars were incorporated into the contract and that the seller had therefore agreed expressly to sell the property with vacant possession; that, in any case, an obligation to give vacant possession would normally be implied; that once the requisition notice was served, the seller was not in a position to give vacant possession; and that the seller was not entitled to specific performance of the contract. The court ordered the return to the buyer of the deposit it had paid on entering the contract. At pp.149-150 Simonds J said:

> "By this contract the vendor, as I have held, agreed to give vacant possession of the property on a particular day. That was his bargain, he must fulfil it and cannot insist on the purchaser performing some bargain which he did not enter into."

77. Counsel for the Claimant submits that this was another case of a serious breach of contract which could be explained as a repudiatory breach. That was not however how Simonds J analysed things. He said that a seller in default of his obligation to provide vacant possession could not insist on the buyer to complete the sale. That was also why the buyer was entitled to recover his deposit.

78. Megarry and Wade on the Law of Real Property (9th Ed.) cites Cook v Taylor (and several other cases) at para 14-090 for the following propositions. First, a vendor who is in breach of the obligation to give vacant possession will not be able to obtain specific performance of the contract of sale against the purchaser. Second, the purchaser may obtain specific performance against the vendor, who will have to pay compensation for the impediment to vacant possession. Third, the purchaser may refuse to complete and may both recover any deposit paid and sue the vendor for damages for loss of bargain. I consider this to be an accurate statement of the law, subject to one possible qualification.

79. The possible qualification is that where there is a small and immaterial deficiency in the delivery of vacant possession the Court may be prepared to grant specific performance at the suit of the seller, with payment of compensation for the deficiency in performance. This is based on a dictum of Viscount Haldane in the Privy Council in Rutherford v Acton-Adams [1915] AC 866 at 869-70. The dictum was relied on by Briggs J in Frasers Islington Ltd v The Hanover Trustee Company Limited [2010] EWHC 1514 (Ch). He gave the example of a seller who has agreed to convey 3,000 acres but may not be able to give title to one acre at the edge of it, and said that the court would grant specific performance with abatement of the price and the same would be true if the seller could not deliver vacant possession of one acre. That would be a case of what he called a trivial breach. It will also be noted that Briggs J said that the case before him was not in fact one where there was a failure to give vacant possession.

80. Counsel for the Claimant submits that Rutherford and Frasers Islington are inconsistent with the idea of the delivery of vacant possession being a condition of the purchaser's obligation to complete. He accepts that the Courts in those cases did not say in terms that the purchaser in such circumstances would be in breach of contract but he argues that if the Courts had treated the delivery of vacant possession as a condition precedent there could have been no question of considering the triviality or otherwise of the breach. He says that these cases therefore provide implicit support for the Claimant's position.

81. I do not think that the cases relied on bear that much weight. First, the cases concerned the equitable remedy of specific performance. A breach of contract is not a requirement of the court's intervention; the remedy is based on the mere existence of a contract, together with circumstances which make it equitable to grant a decree. The question of breach was not in issue. Second, the two cases relied on by the Claimant say no more than that a seller whose default is immaterial or trivial has standing to seek to persuade the court of equity to make an order of specific performance with

compensation for the deficient performance. A court may consider it equitable to require the buyer to complete the purchase (at a lower price) and, if it does, the buyer becomes bound by the Court's decree to do so. It does not follow that a buyer who refuses to complete because of the seller's failure to complete must be in breach of contract. As already noted, neither of the cases relied on by the Claimant suggested that the buyer would be in breach of contract. Third, I do not consider that Briggs J intended to cast any doubt on the general principle, shown by Cook v Taylor and Lambeth v Lexadon, and stated in Megarry and Wade, that a buyer under a contract for a purchase of land who has contracted for vacant possession is entitled to refuse to complete the purchase where the seller does not give possession. Fourth, and in any event, the assumption of this hearing is that the Claimant breached its obligations under cl. 8 by failing to remove the mezzanine floor and lift from the Premises. As noted above, the Claimant denies that this was a breach at all. However, the Claimant did not suggest that, if it is in breach in this way, its failure to perform is immaterial or trivial in the sense used in these authorities. For these reasons I do not think that the Claimant is able to derive any real assistance from these cases.

82. It is, in my view, worth considering what normally happens on completion of property transactions. As stated by Emmet and Farrand on Title at para 8.007:

> ""Completion" normally means the "complete conveyance of the estate and final settlement of the business" (Turner VC in Lewis v South Wales Railway Co Ltd (1852) 10 Hare 113, adopted in Killner v France [1946] 2 All E.R. 83). This may not be the only or necessary meaning of the word, but it can be adopted in the absence of a relevant special condition or good reason for construing it otherwise. Final settlement of the business normally involves the handing over of documents of title and, if sale is with vacant possession, the giving of possession, in return for payment of the purchase money or the balance."

83. Returning to the AFS, the parties entered a contract for the conveyance of the Lease with vacant possession. They did so against the background of the general law. I consider, for the reasons given above, that in general a buyer who has bargained to obtain vacant possession may refuse to complete until such possession is delivered. The law concerning transfers of land was not merely in the background: the AFS was deliberately structured by the parties as a contract for the transfer of an estate, with the parties incorporating standard conveyancing terms and referring to themselves as the buyer and the seller. The contract provided for "completion", that is, as Emmet and Farrand puts it, the complete conveyance of the estate and final settlement of the business, including the delivery of possession. The parties could of course have agreed to displace or alter the usual principle governing what is to happen on completion of a sale of land, but I do not think there is anything in the contract or context to suggest that the usual rule would not apply here.

84. This reading is also supported by commercial common sense. The Premises are a retail unit and the parties would have expected the Defendants to wish to re-let them as soon as possible after completion of any surrender. A failure by the Claimant to deliver vacant possession could well operate to prevent or hinder that.

85. I have earlier set out a test proposed by Flaux J in Astrazeneca. That was said in a context somewhat removed from a contract for the sale of land. But, adopting his words, I consider that the performance of the Claimant's obligation to give vacant possession is a direct *quid pro quo* of its entitlement to complete the surrender. The bargain involved (among other things) the transfer of the Premises with vacant possession in return for the acceptance of the surrender and the release of all liabilities under the Lease. The two things are to my mind properly to be regarded as conditional obligations, with one being needed to earn performance of the other.

86. Having carried out the iterative process of interpretation required by the cases I determine the second preliminary issue in favour of the Defendants.

Conclusions

87. I determine the first preliminary issue in favour of the Claimant and the second in favour of the Defendants.

88. I invite the parties to seek to agree an order giving effect to this judgment, including costs. I will rule on any points that cannot be agreed.