PT-2019-LDS-000008

Neutral Citation Number: [2020] EWHC 2750 (Ch)

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

The Court House
Oxford Row
Leeds LS1 3BG

BEFORE:

DEPUTY HIGH COURT JUDGE BENJAMIN NOLAN QC
(Sitting as a Judge of the High Court)

- -

BETWEEN:

CAPITOL PARK LEEDS PLC

Claimant

- AND –

GLOBAL RADIO SERVICES LIMITED

Defendant

Hearing date: 18th – 21st August 2020
Date handed down: 23rd October 2020 at 10am

- -

JUDGMENT

1. 1 Sterling Court, Capitol Park, Topcliffe Lane, Tingley, Leeds ("the Property") is a three-storey modern commercial unit constructed in 2000.

2. By a Lease dated 4th March 2002, the Property was demised to Real Radio (Yorkshire) Limited for a term of 24 years from and including 12th November 2001 (i.e. to expire 11th November 2025).

3. In June 2014, the Defendant ("Global") took an assignment of the Lease. The assignment was part of a corporate acquisition by Global of The Guardian Media Group, which included provisions for the transfer to Global of all properties owned by the Group. This resulted in Global acquiring more properties than it needed, and from the date of the assignment the Property, which was being used by Real Radio as a broadcasting studio, was surplus to requirements.

4. The Lease contained a Break Clause, as follows:

> "*10. OPTION TO DETERMINE*
>
> *10.1 The Tenant may terminate the Lease on …… the 12th November 2017 ("Tenant's Break Date") if the Tenant:*
>
> *10.1.1 Gives the Landlord at least six months and not more than nine months written notice to expire on the Tenant's Break Date of its intentions to do so.*
>
> *10.1.2 (not applicable)*
>
> *10.1.3 Has, at the date of the notice paid the rent and all other payments due under the Lease.*
>
> *10.1.4 Gives vacant possession of the Premises to the Landlord on the relevant Tenant's Break Date.*
>
> *10.2 The Landlord may in its absolute discretion and at any time expressly waive compliance with all or any of the conditions in clause 10.1.*
>
> *10.3 The termination of the Lease under this clause shall be without prejudice to any right of action of either party in respect of any previous breach of covenant or condition or this Lease by the other.*

10.4 The termination of the Lease under this clause shall be without prejudice to the right of the Landlord to demand from the Tenant the amount of any increase in the rent for any period from a review date to the end of the term together with any interest which is due and payable on the increase where the rent payable from that review date has not been determined or agreed by the end of the term."

5. On the 15th February 2017, Global purported to exercise the break clause by giving written notice under clause 10.1 to terminate the Lease on the 12th November 2017. At or around the 12th November 2017, Global returned the keys to the Property to the Claimant.

6. It is common ground that prior to the 12th November 2017, Global and/or Real Radio had stripped out various features of the Property and/or fixtures, namely:

(i) Ceiling grids;

(ii) Ceiling tiles;

(iii) Fire barriers;

(iv) Boxing to columns;

(v) Floor finishes to offices and the majority of the common areas;

(vi) Window sills;

(vii) Fan coil units;

(viii) Ventilation duct work;

(ix) Pipework connections for the fan coil unit system;

(x) Office lighting;

(xi) Smoke detection system;

(xii) Emergency lighting;

(xiii) Radiators;

(xiv) Heating pipework to serve radiators;

(xv) Floor boxes;

(xvi) Ceiling void small power; and

(xvii) Sub mains cables.

7. The option to terminate set out at paragraph 10 of the Lease is conditional upon giving "*vacant possession of the Premises to the Landlord on the relevant Tenant's Break Date*". (see 10.1.4 above). The Premises are defined in the Lease as follows:

> ""***Premises" means the property known as 1 Sterling Court, Capitol Park, Topcliffe Lane, Tingley, Leeds, shown for the purposes of identification only edged red on the plan, including the air space lying above the existing roof of the building but including all fixtures and fittings at the Premises whenever fixed, except those which are generally regarded as tenant's or trade fixtures and fittings, and all additions and improvements made to the Premises and any outside parts and any signage erected by or on behalf of the Tenant upon the estate and references to the Premises include any part of it.***"

8. The Claimant's case is that in returning the Property on the 12th November 2017, minus those elements and/or fixtures which had been stripped out, Global were not complying with the condition under paragraph 10.1.4 of the Lease to "give vacant possession of the Premises". The Defendant's case is that, acknowledging that it may be in breach of covenant in respect of the repairing obligations under the Lease and therefore liable for dilapidations, it nevertheless gave vacant possession of the Premises on 12th November 2017 and thereby complied with the condition in paragraph 10.1.4. The first question for determination therefore is whether the Defendant effectively complied with clause 10.1.4 on the 12th November 2017. If not, as the Claimant contends, the Lease continues until its term date in 2025 and the Claimant seeks a declaration accordingly. That question is very substantially a question of law to which I will return in some detail. But there is a second issue upon which there is a significant dispute of fact, namely, whether the Claimant is estopped from relying upon the alleged failure to deliver up the Premises with vacant possession in accordance with clause 10.1.4. The estoppel is said to arise from the circumstances of a meeting between the representatives of the parties on the 9th June 2017.

9. The Claimant's representative at that meeting was Mr David Burns, an experienced Chartered Building Surveyor and, at the time, an associate in the firm Knight Frank LLP. Mr Burns is the Claimant's only witness. He has made a statement dated the 28th October 2019, to which he has exhibited a copy of his report dated the 23rd November 2018. Although that report was prepared in connection with the dispute which is central to these proceedings, large parts of it are uncontroversial. Mr Burns was familiar with the Property and with the adjacent units (2 and 3) which were contemporaneous in build and had very similar specifications. Moreover, Mr Burns had access to a considerable amount of historical data, including the original building

and engineering specifications and drawing, and various photographs taken at different times over the usage and occupation of the Property. Thus, Mr Burns was able, confidently, to describe the 'base build' of the Property and to chart the various changes to the Property over the years since its initial occupation. Some of those changes were ephemeral, e.g. Real Radio had created various offices and studios by erecting partition walls. They had also added additional air conditioning units. These changes could be and were reversed by contractors instructed by Global at or about the time of the service of the Break Notice. Other changes were much more substantial, and their reversal represented a much greater engineering challenge. Details are set out in Mr Burns' report. The summary is as contained in the Particulars of Claim and repeated at paragraph 6 above.

10. The Defendant's representative at the meeting of the 9th June 2017 was Mr Gavin Foxton. Mr Foxton is also a Chartered Surveyor and, at the time, was an Associate Director of Colliers International. Mr Foxton was first instructed to inspect the Property on behalf of the Defendant in September 2014. This was to undertake an early dilapidations assessment of the Property for indicative purposes on behalf of Global following acquisition of the Property earlier that year. At this stage, Mr Foxton thought there was some uncertainty as to which elements of the Property formed part of the base build (and were therefore subject to the Tenant's repairing obligations) and which elements were Tenant's improvements carried out during the term (which might therefore constitute Tenant's fixtures which could be removed). Mr Foxton indicates that the main area of uncertainty was in relation to the mechanical systems and, in particular, to the air conditioning system. However, he reached a reasonably firm view about the base build of the Property which was not dissimilar to the position being taken by Mr Burns.

11. In November 2016, Mr Foxton was instructed to contact the Landlord's agent in order to attempt to get an agreement as to the extent of Global's potential dilapidations liability. Accordingly, he met with Mr Burns on the 15th November 2016, and various emails passed between them, between then and the service of the Break Notice in February 2017. Mr Burns's position on behalf of the Landlord was that the Property should effectively be restored to its base build open plan condition, though there was some uncertainty as to the mechanical and engineering implications of this. Mr Foxton effectively agreed with this course in principle at this stage, though I note the references in his statement and in his evidence to the telephone call with his client (Mr Lowther of Global) on the 22nd March 2017, when they discussed "strategy". Neither Mr Foxton nor Mr Lowther made any secret of the fact that from this point forward there was a degree of bluffing going on. Indeed, Mr Foxton at paragraph 23 of his statement outlines his strategy and effectively admits that the offer to restore to base build and therefore outmoded condition was disingenuous. Mr Burns, as an experienced and skilful negotiator, doubtless would have appreciated this and played his hand accordingly.

12. On the 13th April 2017, the Claimant's solicitors (DWF LLP) served the Schedule of Dilapidations dated the 14th March 2017. The letter served in accordance with the pre-action "dilapidations protocol" stated:

> "*Take this letter and the Schedule as notice to reinstate the property in accordance with clause 3.20 of the Lease.*
>
> *The attached Schedule is served entirely without prejudice to the Landlord's position, including in respect of the Lease termination. Further, the Landlord reserves the right to serve a further Schedule of Dilapidations prior to and following the Lease terminating. …*"

13. The Schedule provoked a flurry of activity on the Defendants' part. Mr Lowther of Global attempted to investigate the mechanical and engineering history, though without much success. He also put a degree of pressure upon Mr Foxton to open negotiations with Mr Burns, which he did. On the 25th April 2017, Mr Foxton emailed Mr Lowther as follows:

> "*Tim,*
>
> *Yes, I have just spoken this morning and unfortunately he was very unhelpful and said it was down to us to comply with the obligations of our Lease in order to exercise a break clause. That said, they are keen to talk about a financial settlement*."

14. In early May 2017, Global instructed contractors (Absolute Commercial Interiors Limited) to prepare a Specification of Works for reinstating the Property. Absolute's programme included strip-out works, ceiling works, raised floor works, redecoration, lift works, joinery works, and external works. Absolute started work on site on the 23rd May 2017 and, when it did so, it discovered that three boilers which provided hot water for the bathrooms and for the central heating radiators were not working. This required additional works for which Absolute quoted on the 2nd June 2017. The additional works involved stripping out all the old radiators and installing a new heat and cool pipe system so that the radiators were not required. This new system (VRF), quoted at around £80,000 plus VAT, would probably have been cheaper and almost certainly more efficient than replacing and/or repairing the old system with like-for-like. This is what the Defendants say they intended to do.

15. Shortly after receiving the additional quote from Absolute, Mr Foxton contacted Mr Burns to set up a meeting on site. By this time, Absolute had removed the partition walls and stripped out most of the Tenant's fixtures, but they had accomplished very little of the reinstatement

work. There are photographs taken on the date of the meeting, but they only give a superficial impression of the state of the premises at this date.

16. The purpose of the meeting, it is agreed by Mr Foxton and Mr Burns, was to attempt to assess the condition of the Property at the completion of the strip-out works and to establish whether a financial settlement could be achieved in lieu of the remaining works. The remaining works were extensive. However, the mechanical and engineering element of the works was uncertain. As neither Mr Foxton nor Mr Burns were mechanical or electrical engineers, they agreed for a Mechanical and Electrical Consultant to produce a report on the Property so that they would have some idea as to the cost of this work. Mr Burns proposed to Mr Foxton that they instructed a firm called Carbon Plan Engineering to prepare a mechanical and electrical engineering report. Mr Foxton agreed to this and instructions were sent.

17. Present at the meeting, which lasted around 45 minutes, were Mr Burns, Mr Foxton, and Mr Richard Chandler. Mr Chandler was a trainee at Colliers International, and shadowed Mr Foxton at the meeting. He did not contribute to any of the discussions.

18. It was apparent to Mr Burns that the Defendant had carried out significant strip-out works, but that substantial works would be required in order to comply with the repair and yield up provisions of the Lease. Mr Burns was under the impression that the contractors had only been instructed to undertake the strip-out works at that point and had not been given authority to go beyond the strip-out. There was agreement between Mr Burns and Mr Foxton that a mechanical and electrical engineering consultant be instructed to identify the extent of the mechanical and electrical work required. According to Mr Foxton, he and Mr Burns agreed that Global should instruct Absolute to finish the strip-out and thereafter to leave the Property clean and tidy and stop the work, whereafter they would attempt to agree the dilapidations so that the parties could do a "cash deal" in lieu of repair and reinstatement.

19. Mr Burns' recollection of the discussion is that although there was an obvious potential for settlement in respect of the dilapidations and the surrender of the Lease and that it made sense for Global to instruct a temporary stop to the work so that the value of the works would remain the same during negotiations, he is adamant that he did not agree any permanent or long-term cessation of the works. As he put it: "*Such a decision would be at the Defendant's own risk, as there was no guarantee that the parties would come to any final Settlement Agreement*". He adds that the Defendant was not given any encouragement by him permanently to stop any further works.

20. Mr Chandler, in his statement, concedes that he does not remember the words used, but his recollection is that Mr Foxton and Mr Burns agreed that the contractors would be instructed to

stop the works and that the keys (i.e. the contractors' keys) would be handed back to the Landlord.

21. On the 14th June 2017, Mr Foxton sent an email to Absolute, saying: "*As discussed, you are to stop the works following removal of the remaining VRS systems, the ground floor ceiling, and finishing of the raised floor …*".

22. The third witness to give evidence about this meeting was Mr Tim Lowther, who is the Defendant's Head of Property and Infrastructure Projects. Mr Lowther was Mr Foxton's principal point of contact to whom he reported on a regular basis. Mr Lowther's evidence is that he spoke with Mr Foxton on the 14th of June, when Mr Foxton contacted him to tell him how the meeting with Mr Burns on the 9th of June had gone. He says:

> "*I do not remember the words used, but I am sure Gavin told me Mr Burns had agreed that Global should stop works on site subject to completing a few minor tasks so that the parties could agree a financial settlement. Gavin had also copied me into his email to Absolute that morning, instructing them to stop the works following some finishing off, which Mr Burns had specifically required. I do not remember further details as to the call, but I do recall being cautious about requiring clear confirmation that the agreement to stop works was something the Landlord had agreed to. As I have reiterated, I did not want to do anything which would disrupt the Break Option or put the operation of it at risk in any way. Unless Gavin had confirmed that Mr Burns had agreed that the works should be stopped, I would not have allowed him to tell Absolute to stop the works*."

23. His evidence continued:

> "*I agreed to Gavin instructing Absolute to stop works because he told me that had been agreed by the Landlord. I had already gone through the process of instructing a tender for the works, negotiated the tender and contracts, and authorised the works to be carried out. I was happy with that position. I wasn't surprised that Mr Burns had agreed we should stop work. I had thought from an early stage that would make sense from the Landlord's perspective. If Gavin had not reached agreement with Mr Burns, I would have instructed the works to continue. We had a contract in place for the works and my concern throughout had been to ensure Global completed the works required to successfully operate the Break Option, so I was only willing to instruct the works to be stopped if this had been agreed on behalf of the Landlord. Accordingly, Absolute completed the*

final items of work agreed with Mr Burns and then left the Property on or around the 23rd of June 2017 …"

24. Mr Burns makes the point that following this meeting on the 9th of June 2017, he did not receive any email or other form of correspondence from Mr Foxton purporting to confirm any agreement to permanently stop working on the reinstatement of the Property. Had he received such an email, he says, he would have immediately confirmed that there was no such agreement and that stopping the works pending an agreement would be at their client's own risk.

25. On the 13th June 2017, Ms Lucy Archer, on behalf of the Claimant, emailed Mr Burns, saying: "*Please could you provide me with an update on Global Radio for the next Board meeting?*" Mr Burns replied:

> "*Generally, Global Radio are stripping out and apparently finished their stripping out on Friday last week. They are looking to agree a financial settlement as they are worried about the break and the level of reinstatement works. I have met with their agent on site and have gone through some of the dilapidation items. I have also spoken with their L&T Surveyor to discuss the break and the merits of a financial settlement. I have also asked an M&E Consultant to inspect and comment upon the services and what parts of these can realistically be salvaged. I expect most will require replacement. Global are to propose a figure when they have sight of the M&E Services Report and we will take it from there. They have until November on the Lease, but clearly the merits of a financial settlement are greater the further away from the break we are. I expect to move this on later this week, once we have the known facts on the M&E*."

26. Mr Burns received the Mechanical & Electrical Engineering Report from Carbon Plan on the 4th July 2017 and forwarded it on to Mr Foxton the next day. The total cost of the M&E works amounted to £153,250. Mr Foxton responded on the 6th July 2017 to say that he would be in the office the next day and that he would come back to Mr Burns with his comments with a view to agreeing a dilapidations settlement figure and a proposal for an early surrender.

27. For whatever reason, Mr Foxton dragged his heels somewhat and the first and only offer he made to Mr Burns was dated the 10th August 2017. As Mr Burns points out, that waws 62 days after the meeting on the 9th June 2017. This offer was for a cash settlement on the repair works and the remaining rent up to the Tenant Break Date. The offer was £206,358.

28. Mr Burns consulted with colleagues as to the level of rent remaining and then replied to Mr Foxton on the 16th August 2017 saying that he did not expect the offer to be acceptable as the

notional amount available for repair and reinstatement works was inadequate. After further exchanges, Mr Burns inspected the Property again on the 1st September 2017 and, due to the poor state of the Property at that date, he recommended that the Claimant contact its solicitors asking them to write to the Defendants to remind them of their obligations and of the conditional nature of the Break Clause. The Claimant's solicitors (DWF PLC) wrote to the Defendants on the 15th September 2017, saying:

> "*The upcoming Break Date is 12 November 2017. We are instructed to contact you to remind you that the Break Provision contained in the Lease dated 4th March 2002 is conditional upon you having paid the rent and all other payments due under the Lease, and upon delivery up of vacant possession of the Property (Clause 10.1).*
>
> *The Lease also provides that you are to remove all alterations, additions or improvements made to the Property during your occupation and before the end of the term to reinstate the Property. In accordance with our client's reasonable request to do so (Clause 3.4.5) we would like to take this opportunity to confirm that our client does require you to remove all alterations, additions and improvements made to the Property*.
>
> *Please confirm whether or not you intend to undertake the work specified in our client's Schedule of Dilapidations to ensure that the Property is delivered up in accordance with the terms of the Lease*.
>
> *For the avoidance of doubt, our client reserves its right to refuse to accept that the Break Option has been validly executed if vacant possession is not delivered up and/or to claim for its losses as a consequence of any failure to comply with the yielding up provisions contained in the Lease. This includes claiming for the cost of any works but also for any loss of future rent.*
>
> *Should you be in any doubt as to the meaning of or the contents of this letter, then you should take legal advice."*

29. During the two weeks between Mr Burns' inspection on the 1st September 2017 and the solicitors' letter (above), further negotiations continued between Mr Burns and Mr Foxton. The upshot of those negotiations is set out in an email from Mr Foxton to Mr Lowther, dated the 7th September 2017. There is a typographical error within that email but, as corrected, Mr Foxton was telling Mr Lowther that the parties were around £250,000 apart. Mr Foxton's suggestion to Mr Lowther was:

> "*I am going to issue our detailed response over the next couple of days. That said, if they remain at the £400k mark I suggest the best thing to do is tender the works, ensuring that we have a contractor in the running, and negotiate on the back of the return. I will call tomorrow to discuss*."

30. Following that email and the subsequent discussions, Absolute were instructed to tender for the remaining works, for which purpose they inspected the Property on the 15th September 2017. The tender, which was received by the Defendants on or about the 22nd September, was for £279,000 – a figure very much in excess of their original tender of £175,000. The difference is accounted for by the fact that the original tender had not included the cost of replacing the air conditioning, which by September 2017 was acknowledged to be part of the base build.

31. Although Absolute had tendered on the 22nd September, they informed Colliers that there would be a 12-week programme for the remaining works and therefore that it would not be possible for them to complete the works prior to the Break Date. For the reasons explained by Mr Lowther, it was decided not to commence the remaining works but to attempt further negotiations. By email dated the 22nd September 2017, Mr Radford of Colliers (deputising for Mr Foxton who was away) informed Mr Burns of the revised tender from Absolute and invited a revised offer of settlement. None was forthcoming, and on the 3rd October 2017 Mr Foxton informed Mr Burns by email that they had run out of time to undertake the works. On the 12th November 2017 (i.e. the Break Date), Mr Foxton returned the keys to the Property to the Claimant's representative and purported to give vacant possession of the Property.

The Estoppel Issue

32. At this point, it is convenient (though arguably somewhat illogical) for me to review and make findings on the estoppel issue, the estoppel being said to arise from the alleged agreement on the 9th June 2017 by Mr Foxton and Mr Burns that the Defendant's contractors should halt the remedial works pending negotiations for a financial settlement of the Defendant's outstanding liabilities.

33. There is a sub-issue as to Mr Burns's authority. In re-examination it was established that Mr Burns's instructions from the Claimant were given to him by Mr Heydecke, a Director of the Claimant company, on the 13th February 2017, when he sent Mr Burns an email saying:

> "*We welcome this approach, the order of play needs to be Break Notice, agreement on delaps, then settlement on rent, rates and service charge. David, please proceed with the delaps as soon as you are able. No doubt you will collect fees from the Tenant in the usual way*."

34. On behalf of the Defendant, it is argued that the email contains no limitations on Mr Burns's authority, and that the instructions to proceed in the usual way meant – in the usual role of a dilapidations surveyor, which was to agree with their opposite number what works should and should not be done. Mr Burns agreed in cross-examination that this was the usual basis upon which a dilapidations surveyor would be instructed. It is contended on behalf of the Claimant that he had no instructions to reach a concluded financial settlement or to waive all or any of the conditions of the Lease. Mr Foxton, in his evidence, conceded that this would be a matter for the solicitors and not within the scope of the authority of a dilapidations surveyor. But that is not the Defendant's case. As I understand it, from the oral and written submissions of Mr John Male QC for the Defendant, the Defendant's case is that Mr Burns had authority to agree with his opposite number what work should be done. That authority included the authority to agree what work need not or should not be done, and that his agreement that the work should stop on the 9th June was within the scope of that authority. If there was such an agreement then I consider that that submission is well founded. Moreover, the estoppel is said to arise not from any waiver of the conditions of the Lease by Mr Burns, but by his agreement to a course of action (or inaction) whereby the Defendant acted upon the agreement by altering its position so that it would be inequitable for the Claimant to act inconsistently with it. Male includes in his bundle of authorities the relevant paragraphs from Snell's Equity (34th Edition) and argues that it is not necessary for the Defendant's conduct to derive its origin solely from the Claimant's agreement. The principal issue is whether the Claimant's agreement had a sufficiently material influence on the Defendant's conduct to make it inequitable for the Claimant to depart from it. Says Mr Male, this is easily tested by asking what would have happened if Mr Burns had not made the agreement with Mr Foxton, in which situation it is said that the Defendant would have done the necessary work to reinstate or replace the 17 items in the Particulars of Claim and would have done so in time for the Break Date. The Claimant could not then have pleaded its case as per the Particulars of Claim and this action would never have been brought. Thus, it is said that all the elements of estoppel are established. The Claimant's case is quite simply that there was no agreement and therefore there can be no estoppel.

35. In urging me to prefer the evidence of Mr Foxton to that of Mr Burns, Mr Male points to the strategy which was explained by Mr Lowther in his evidence and the documentary support for that strategy set out in a number of emails. In particular, Mr Male relies upon the email from Mr Foxton to Mr Lowther, dated the 1st June 2017, where Mr Foxton gives Mr Lowther a progress report. The last paragraph of the email reads:

> "*Unfortunately, the Landlord's surveyor is away on holiday this week. I am keen to get him down to the Property as I think it would be in the Landlord's best interests to discuss us stopping works after strip-out and negotiating a cash*

settlement for the remaining works if he intends to update the unit with a full refurbishment."

36. A further email, dated the same date, from Mr Lowther to a senior colleague, Peter Radford, says:

> "*I spoke with Tim. He sounds a lot happier. I am going to update him next week after I have met the Landlord. He agrees we should maybe pull the contractor if the Landlord is reasonable. I explained there may be some abortive costs in doing so. I said I would assess this and go back to him*."

37. Mr Male argues that this is a clear announcement of Mr Foxton's agenda for the forthcoming meeting, and of his intention to reach an agreement with Mr Burns. That he reached such an agreement, says Mr Male, is supported by the evidence of how he reported back to Mr Lowther, as dealt with above. There is further support for the agreement in the email which Mr Foxton sent to the contractors, dated the 14th June 2017, instructing them to stop the works. Mr Male further relies upon the evidence of Mr Chandler as corroboration of Mr Foxton's account.

38. For the Claimant, Ms Joanne Wicks QC, relies upon the fact that there is no documentary evidence of such an agreement; there are no notes of the meeting; no confirmatory email was sent by Mr Foxton to Mr Burns recording the alleged agreement; and no confirmatory written report or email from Mr Foxton to his client or to his more senior colleague, Mr Radford. The email from Mr Burns to his client's representative, Lucy Archer, as set out in paragraph 25 above, is in effect Mr Burns' report back to his client on the meeting and makes no mention of any agreement.

39. By the 11th September 2017, Mr Lowther was emailing Mr Foxton and Mr Radford, as follows: "*Assuming we need to have delaps done for the break, then we need to get our skates on – can we have a call tomorrow please?*" This email preceded the solicitor's letter, dated the 15th September 2017, in effect saying the same thing, albeit in more formal language. From here on, argues Ms Wicks, when the clock is running down against the Defendant's team, there is no mention by any of them of the agreement to stop works. Further, in the pre-action protocol correspondence, which is dated December 2017, the Defendant's solicitors are silent on the issue of the alleged agreement and/or any reliance upon it. The first mention of the alleged agreement and the Defendant's reliance upon it comes in the Amended Defence which is dated May 2019, i.e. some two years after the meeting. It seems that Mr Foxton was first asked to recall what happened shortly before the Amended Defence was filed. Mr Chandler's statement is dated October 2019. He confirmed in evidence that he had been first asked to recall the meeting by Mr Foxton. Logically, that must have been at or after the time that Mr Foxton first

gave an account of it. In any event, says Ms Wicks, Mr Chandler was a disinterested observer who did not participate in any meaningful way in the meeting. He is unlikely to have any clear recollection of it.

40. I have recited Mr Lowther's recollection of his conversation with Mr Foxton about the meeting, at paragraph 22 above. Mr Lowther makes the point that if Mr Foxton had not reached an agreement with Mr Burns, then he would have instructed the works to continue. If that be the case, then it is even more surprising that there is no contemporaneous documentary evidence of the agreement. Mr Lowther, in my judgment, is a shrewd and experienced property and project manager, skilled in the art of negotiation. If he genuinely believed that he had the advantage which he claims, then I would have expected him to ask for that in writing. At the very least, I would have expected to see a note or email to Mr Foxton and/or Mr Radford asking for confirmation from Mr Burns and/or his client. The absence of such a request is, to my mind, telling.

41. After reviewing all the evidence, I have come to the firm conclusion that I prefer the evidence of Mr Burns to that of Mr Foxton and Mr Chandler. There was no agreement. That is not to say that there was a disagreement. I am quite satisfied that Mr Foxton discussed with Mr Burns his intention to put a temporary stop to the works and that various aspects of tidying up were discussed. But Mr Burns' position, as he said in his evidence, was that was a matter for the Defendant and not for him. The proposal made sense to him, particularly as the M&E Report was still outstanding. But he was in no position to consent or dissent from the course proposed by Mr Foxton, and he did neither. This, to my mind, dispenses of the Defendant's claim to an estoppel.

The Main Issue

42. So, I now turn to the main issue in the case, namely whether the Defendant complied with the condition in Clause 10.1.4 of the Lease when it purported to give vacant possession of the Property to the Landlord on the 12th November 2017. It is common ground that by then the Property had been stripped out of all the Tenant's fixtures but that it was handed back minus the 17 original fittings relied upon in the Particulars of Claim. For the Claimant, Ms Wicks argues that the Defendant did not give back "*the Premises*" and therefore did not comply with Clause 10.1.4 and was not entitled to exercise the Break Clause. She relies upon the case of *Siemens Hearing v Friends Life* (2014) EWCA Civ 382 for the proposition that conditions of break clauses in a Lease must be strictly complied with or the Lease will continue. She points to the definition of "*the Premises*" in the Lease, which includes:

(a) The existing building which was there when the Lease was granted; and

(b) "All fixtures and fittings at the Premises whenever fixed (except Tenant's fixtures)".

43. She argues that as the items listed at paragraph 15 of the Particulars of Claim were all part of the building or Landlord's fixtures when the Lease was granted; she accepts that there are two caveats to the requirement to deliver up "*the Premises*" under Clause 10.1.4, namely that, first, the *de minimis* rule would apply, secondly, the Landlord cannot complain if the reason why there has been a change in the Property being delivered up is because one or both parties have complied with their obligations in the Lease. For example, if the Tenant has replaced the Landlord's fixture pursuant to its obligations in Clause 3.3.2, it obviously must give back the replaced fixture and not the original one. Or, if the Landlord has rebuilt all or part of the Property because it was damaged by an insured risk, pursuant to its obligation in Clause 4.3.1, it gets back the rebuilt building, not the original one. Such changes, however, would have been expressly contemplated by the parties when they entered into the Lease. Neither caveat therefore applies in this case.

44. Mr Male for the Defendant argues that the concept of "*vacant possession*" is an uncomplicated one, and the vacant possession condition does not require an assessment of whether the physical condition of the demised Property is as required by the Lease, or any investigation of the Tenant's repairing obligation. Further, he submits that the words "*the Premises*" in Clause 10.1.4 refer to the Premises as they are from time to time. Those words, he says, are to be interpreted in an "always speaking" sense by reference to what is on the demised land at any particular point in time. Accordingly, says Mr Male, the Defendant complied with its obligations under Clause 10.1.4.

45. Both sides readily acknowledge that the issue is essentially one of interpretation, and I am helpfully provided with copies of the decisions of the Supreme Court in *Arnold v Britton (2015)* UKSC 36 and *Wood v Capita Insurance Services Limited* (2017) UKSC 24 as to the general rules of contractual interpretation.

46. In *Arnold v Britton*, Lord Neuberger said:

> "*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 in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2)*

of each of the 25 leases, 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. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30".

47. In *Capita*, Lord Hodge said:

> "*10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381 (1383H-1385D) and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as*

signalling a break with the past. But Lord Bingham in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11. Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

48. The six points identified by Lord Neuberger in *Arnold v Britton* are amplified in the full judgment, along with an added point seven. As to point (i), Mr Male submits that the natural and ordinary meaning of the words "*the Premises*" is the Premises as they may be from time to time. Hence his use of the term "*always speaking*".

49. This interpretation, he submits, is consistent with authorities. In particular in *Ponsford v HNS Aerosols Limited* (1979) AC 63, a rent review clause in a Lease in the factory provided that the rent would be reviewed to "*a reasonable rent for the Demised Premises*". The factory burned down. A new factory was built. Lord Fraser said:

> "*There is no dispute that "the Demised Premises" which originally meant the factory described in Class 1 of the Lease now means the factory as rebuilt after the fire*."

50. In *Peel Land and Property (Ports number 3) Limited v TS Sheerness Limited* (2014) EWCA Civ 100, a Tenant of a steel works covenanted not to make any alterations to the Demised Premises. The Court of Appeal held that the reference to the Demised Premises was to be interpreted in an "*always speaking*" sense, which referred to "*the buildings and site from time to time*". It is, however, pertinent to note that the Lease in that case was a form of Buildings Lease which required the Tenant to erect a new building on the site.

51. As to Lord Neuberger's point (ii) (other relevant provisions of the Lease), Mr Male contends that it is instructive to consider Clause 10.3, which provides that the termination of the Lease under Clause 10 shall be without prejudice to any right or action of the other party in respect of any breach of covenant. So, the Landlord has a remedy for mis-repair in any event. Further, Mr Male points to the provisions of Clause 3.20, whereby the Tenant is required:

> "*To yield up the Premises to the Landlord at the end of the Term with a vacant possession, in a state of repair, condition and decoration which is consistent with the proper performance of the Tenant's covenants in the Lease*."

52. Mr Male argues that the comparison between the two clauses is instructive and could not be clearer. Clause 10.1.4 does not require the Tenant to give vacant possession "*in a state of repair, condition and decoration which is consistent with the proper performance of the Tenant's covenants in the Lease*". It simply requires the Tenant to "*give vacant possession of the Premises to the Landlord on the relevant Tenant's Break Date*". The contrast, says Mr Male, is a further reason for adopting the "always speaking" sense of interpreting the Premises.

53. Under Lord Neuberger's point (iii) (the overall purpose of the clause and the Lease), Mr Male admits that the overall purpose of a Break Clause is to ensure that the Landlord gets back the Property free of people, free of chattels, and free of legal interest. The purpose, he says, is not to set a trap for a Tenant so that if something untoward happens, such as vandalism the day before the Break Date, the Tenant is thereby stuck with the Lease until it expires by effluxion of time. If the parties had intended the Break Option to be conditional on the performance of one of the Tenant's covenants in the Lease, such as its covenant relating to the condition of the Property, then that would have been expressly set out, argues Mr Male, as a condition of the break. In this regard, he points to a trend whereby in the past Break Options in Leases often used to make the exercise of the Option conditional on the performance, or substantial performance, by the Tenant of its covenants in the Lease. This type of option, he submits, has

lost traction in the market in favour of a compromise which is less onerous, by which a Tenant only has to give vacant possession. Mr Male refers to the Encyclopaedia of Forms and Precedents (5th Edition) 2016, Re-issue Volume 21(1), wherein at para 159.3.2 reference is made to the Code for Leasing Business Premises in England and Wales, which states that the only appropriate pre-condition to Tenants exercising any Break Clause should be that they are up-to-date with the main rent, give up occupation, and leave no continuing sub-lease. At footnote 2, it is suggested that: "*Disputes about the state of the Premises or what has been left behind or removed should be settled later on a normal Lease expiry*". Although, as Mr Male concedes, the introduction of the Code post-dates the Lease in this case, it represents, he contends, what sensible commercial parties would be likely to agree, i.e. that disputes about the state of the Premises should be settled later and not in the context of whether or not the break is being validly exercised.

54. As to Lord Neuberger's point (iv) (the facts and circumstances known or assumed by the parties at the time that the document was executed), Mr Male merely observes that the Claimant's witness statement (including the report from Mr Burns who researched the history of the Property) does not point to any particular facts or circumstances in favour of the Claimant's interpretation.

55. Under point (v) (commercial common sense), Mr Male refers the Court to the observation of Lord Hodge in *Wood v Capita (Ante)*:

> "*Interpretation is … a unitary exercise, where there are rival meanings, the Court can give weight to the implication of rival constructions by reaching a view as to which construction is more consistent with business common sense*."

56. In his original Skeleton Argument and again in his closing submissions, Mr Male sought to identify a number of anomalies and absurdities which could flow from a literal and strict reading of the words in the definition of "*Premises*". (See paragraphs 107 to 116 of his Skeleton Argument). The Defendant's interpretation of the condition avoids any absurdities and, argues Mr Male, makes good business common sense.

57. For the Claimant, Ms Wicks asserts that the starting point of the interpretation of Clause 10.1.4 is to consider the words used by the parties. The words used are "*the Premises*" (with a capital P), and the parties have chosen to add a definition of the words which includes "*all fixtures and fittings at the Premises whenever fixed and/or additions and improvements made to the Premises*". She argues that by ignoring the words which the parties chose to use, the Defendant starts its interpretation in the wrong place and contrary to the first, third and fourth of Lord Neuberger's seven points. As to points (v) and (vi) (commercial common sense), Ms Wicks

argues that the anomalies and absurdities pointed to by Mr Male are overplayed and exaggerated. In particular, the burden on a Tenant, be it an original Tenant or an Assignee, in identifying the base build and original fixtures and fittings is not, she says, a heavy one. In any event, she reminds the Court that the Defendant did not remove the items listed in paragraph 15 of the Particulars of Claim because it was mistaken about what belonged to the Landlord as part of the base build. It removed them because it was planning to replace them but unilaterally paused the works in order to pursue a negotiated settlement with the Claimant, which it did not ultimately achieve. Any 'grey' areas as to the state or status of the plant and equipment were resolved by the jointly commissioned M&E survey. In relation to what she described as Mr Male's "*extreme examples*" of situations in which he contended the Claimant's construction of the Lease would give rise to unfairness, for example, if the building burned down or the roof blew off the day before the Break Date, she cautioned the Court against deciding a case which was not before it.

58. As to the "*always speaking*" cases, Ms Wicks contended that these are of no assistance. She reminded the Court that the authority recently relied upon by the Defendant – *R v Secretary of State for Health Ex P Quintavalle (on behalf of Pro Life Alliance) (2003) UKHL 13*, was a case where the phrase "*always speaking*" had been developed in the context of statutory construction where it is necessary to consider whether a statute is intended to apply to new situations, for example, technology which did not exist at the time that the statute was passed. As to the three property cases which the Defendant relied upon in seeking to apply the concept to contractual interpretation, Ms Wicks pointed out these were all cases about things being **added** to a property not, as here, taken away. And they therefore engage the legal rule that items which are built on or fixed on the land (for example, a new building) are treated as part of the land itself. The present case, she reminds me, is not concerned with this issue because it is about items which are taken away from the land and not fixed to it. Furthermore, the definition of "*the Premises*" in this Lease specifically includes Landlord's fixtures "*whenever fixed*", and "*all additions and improvements made to the Premises*".

59. Ms Wicks, in her closing submissions, returned to the cases of *Ponsford v HMS Aerosols Limited* (1979) AC 63, and *Peel Land and Property v TS Sheerness* (2014) L&TR 20 (both cases relied upon from the outset by Mr Male in his Skeleton Argument). She also focused on the Privy Council case of *Goh Eng Wah v Yap Phooi Yin* (1980) 82 EGLR 148 – which Mr Male cited in his written closing submissions. She pointed out that all three cases were concerned with additions and/or improvements to the Premises and that the only Judge who had used the expression "*always speaking*" in relation to the interpretation of a Lease (as opposed to the interpretation of statutes was Rimer LJ who in *Peel* had used it when referring to additions to the Demised Premises, which in law are treated as becoming part of the land,

and not to things taken away. Thus, she says "*always speaking*" cases are of no relevance to this. I agree with her. I express my admiration for the creativity of Mr Male's advocacy in this regard, but I firmly conclude that the concept of "*always speaking*" has no place in the interpretation of this relatively straightforward condition of the Break Clause in this Lease.

60. A similar factual thread runs through the cases cited on the meaning of "*vacant possession*". Namely, that they were all cases concerned with things left behind and not, as in this case, with things taken away. Initially, the Claimant appeared to rely upon the first instance case of *Riverside Park Limited v NHS Property Services Limited* (2016) EWHC 1313 (Ch), a case decided by HH Judge Saffman sitting as a Judge of the High Court.

61. Riverside was considered by Nugee J in *Goldman Sachs International v Procession House Trustee Limited and Another* (2018) EWHC, also a Break Clause case. Mr Male cites part of the judgment of Nugee J, as follows:

> *"39. ….it is also common ground that what the obligation to give vacant possession normally requires is threefold. That is to return the premises to the landlord free of, or vacant of: first, people; secondly, chattels (subject to the decision of the Court of Appeal in Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264, which is to the effect that a party is only in breach of the obligation to give vacant possession by leaving chattels on the property if the physical impediment substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property); and, thirdly, legal interest. So, a person does not comply with the obligation to give vacant possession if it is subject to a legal right in somebody else to take possession. That trilogy of people, chattels, and interest, which was put forward by Mr Seitler, was not dissented from by Mr Sefton and I accept accurately reflects the general law of vacant possession.*
>
> *40. Mr Sefton, however, says that if you are obliged as a tenant to remove your trade fixtures, then a failure to do so means that you are in breach of the obligation to give vacant possession and he is able to rely in support of that submission on a decision of HHJ Saffman, sitting as a judge of the High Court, in Riverside Park Ltd v NHS Property Services Limited [2016] EWHC 1313 (Ch). In that*

case, the judge first of all decided that the things in question, which were partitioning, kitchen units, window blinds and the like were, in fact chattels and, as such, the tenant had to remove them in order to give vacant possession. However, at the end of his judgment he dealt with the position (necessarily obiter) if the relevant things were tenant's fixtures. Having considered at some length the question of whether they were incorporated into the premises, he came to the conclusion that there was an obligation to remove them. At [92], he says:

> *"In all the circumstances, even if I had found that the Works and particularly the partitions were not chattels but fixtures or otherwise formed part of the Premises, I would have found that there was an obligation to remove them arising out of the fact that the licence to erect them had ceased to have effect and that their presence, in the Premises on the date of purported termination of the Lease meant that vacant possession of the Premises was not given."*

41. *Mr Sefton can undoubtedly say that it is implicit in that that HHJ Saffman took the view that if the tenant was obliged to remove fixtures then his obligation to give vacant possession included removing those fixtures. Mr Seitler said that I should not follow that case. It was obiter and that part of his judgment contains no reasoning or reference to the well understood concept of vacant possession, and that I should say that, in my view, it is wrong.*

42. *I do not propose to decide this question. I accept the ordinary meaning of what it is to give vacant possession in terms of the trilogy of people, chattels, or interests. I accept that one cannot find in HHJ Saffman's judgment in Riverside any real discussion of the point as to whether the conclusion that the works in question were fixtures which the tenant had to remove meant that the tenant was in breach of an obligation to give vacant possession – indeed, for all one*

knows from the judgment, the point may not have been argued at all and may have been conceded – but I do not regard it as necessary for the purposes of this case to resolve the question."

62. Mr Male also relied upon the first instance decision of Lewison J. (as he then was) in *Legal & General Assurance Society Limited v Expeditors International UK Limited*:

> *"The first question arising under this head is vacant possession of what? In this case vacant possession of the premises. The premises will, in my view, exclude anything that is not demised. This means first in case of Unit 15 it will exclude the yard and in the case of all the units it will exclude the grass verges. Items left in these areas may amount to a trespass for which damages are recoverable, but they do not affect compliance with the condition itself.*
>
> *Secondly, in my judgment the premises will include anything which in law has become part of the premises by annexation. A fixture installed by the tenant for the purposes of his trade become part of the premises as soon as it is installed, although the tenant retains a right to sever the fixture on termination of the tenancy. Whether something is a fixture depends on the degree and purpose of annexation; in each case looked at objectively. If something has become part of the premises by annexation, then it is part of a thing of which vacant possession has to be given. Its presence does not amount to an impediment to vacant possession itself.*
>
> *……*
>
> *Mr. Wood rightly submits that vacant possession is a phrase in regular use in domestic conveyancing of both freehold and leasehold property up and down the country and it is necessary to have some certainty as to what it means. The leading case on the topic is the decision of the Court of Appeal in Cumberland Consolidated Holdings Limited v Ireland [1946] 1 K.B. 264. The case concerned the sale of a fire damaged warehouse for the sum of £1,000. Underneath the warehouse were approximately 1,900 square feet of cellars and two-thirds of the cellars were filled with rubbish consisting mainly of bags of cement which had gone hard and empty drums. Although it seems that part of the contents of the cellars was removed before completion, none the less the continuing presence of the hardened cement and other material in the cellars meant that the cellars were unusable until the rubbish had been removed. The claimant had removed the rubbish at a cost of approximately £80, that is to say some 8 per cent of the overall purchase price. It*

was held that leaving the premises in that condition was a breach of the obligation to give vacant possession.

The judgment of the Court of Appeal was given by Lord Greene M.R.. He proposed, as I see it, two possible tests for deciding whether or not vacant possession had been given. The first appears at p.270 of the judgment in the following terms:

> *"Subject to the rule de minimis a vendor who leaves property of his own on the premises on completion cannot, in our opinion, be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, namely, as a place of deposit for his own goods inconsistent with the right the purchaser has on completion to undisturbed enjoyment.*

The second possible test is that which appears at p.271 of the report in which Lord Greene says the right to actual unimpeded physical enjoyment is comprised in a right to vacant possession. He continues:

> *''We cannot see why the existence of a physical impediment to such enjoyment to which a purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser. It is true that in each case the purchaser obtains the right to possession in law, notwithstanding the presence of the impediment. But it appears to us that what he bargains for is not merely the right in law, but the power in fact to exercise the right. When we speak of a physical impediment, we do not mean that any physical impediment will do. It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property. Such cases will be rare, and can only arise in exceptional circumstances, and there would normally be (what there is not here) waiver or acceptance of the position by the purchaser.''*

In Norwich Union Life Insurance Society v Preston [1957] 1 W.L.R. 813 Wynn Parry J. applied the first of those tests. The situation was that a borrower under a mortgage had been ordered to give possession of the mortgaged property. Although he personally had been evicted by the sheriff, he had refused to remove his furniture, motor car and household goods. The judge held (applying the first

of the two tests I have mentioned) that possession had not been given and ordered the removal of the furniture and so on.

In Hynes v Vaughan (1985)50 P. & C.R. 444 Scott J. applied the second of the two possible tests enunciated in the Cumberland Consolidated Holdings case. That was a case of rubbish left on property. Plainly it was not a continuing activity of the vendor. Rather he was dealing with the physical condition of the property.

In a judgment of mine in Royal Bank of Canada v Secretary of State for Defence [2004] 1 P. & C.R. 28 I also applied the second of these two tests.

It seems to me that the difference between the two tests is as follows. The first test looks at the activities of the person who is required to give vacant possession. If he is actually using the property for purposes of his own otherwise than de minimis, he will be held not to have given vacant possession. Thus, in the Norwich case the borrower continued to keep his household furniture in the mortgaged property after he had been ordered to give possession of it. That was an activity carried out by a person who ought to have given possession.

The second test looks at the physical condition of the property from the perspective of the person to whom vacant possession must be given. If that physical condition is such that there is a substantial impediment to his use of the property or a substantial part of it then vacant possession will not have been given. As the Court of Appeal said in the Cumberland case, that is likely to be satisfied only in exceptional circumstances.

63. The Court of Appeal considered the Legal & General case in *NYK Logistics (UK) Limited v Ibrend Estates BV* (2011) EWCA Civ 683. This was another Break Clause case concerned with the condition of giving vacant possession. The Tenants (NYK) had purported to give vacant possession on the Break Date but still had contractors and their equipment in the building and a security presence. Though they had offered to return the keys, they had not in fact done so by the Break Date. It is a case which emphasises the need for strict compliance with a vacant possession condition. Mr Male relies upon the judgment of Rimer LJ, in which he said:

"…If NYK was to satisfy the vacant possession condition in the break option, it had to give such possession to Ibrend by midnight on 3 April and by not a minute later. What, to that end, did it need to do? The concept of 'vacant possession' in the present context is not, I consider, complicated. It means what it does in every domestic and commercial sale in which there

is an obligation to give 'vacant possession' on completion. It means that at the moment that 'vacant possession' is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property."

64. Mr Male invites me to apply what Rimer LJ says was a "*not complicated concept*" (or vacant possession) to this case, and to do as Nugee J did in Goldman Sachs (Ante), namely to "*accept the ordinary meaning of what it is to give vacant possession in terms of the trilogy of people, chattels or interest*".

65. Both Counsel accept that the authorities do not address the situation here where the Property may have been left empty but devoid of essential fixtures and fittings, whether part of the base build or "*additions and improvements made to the Premises*". As the M&E Report exhibited by Mr Burns points out:

"Deterioration of the condition of building services plant and installations can lead to failures resulting in a number of undesirable outcomes:

- Significant losses due to business disruptions;
- Non-compliance with legal requirements;
- Damage to property;
- Health and safety problems;
- Depreciation of asset value;
- Increase of energy and environmental costs."

66. In my judgment, these were generically the sort of outcomes against which the Claimant was guarding when it drafted or adopted the definition of "*the Premises*". Moreover, it made commercial common sense so to guard. By including the words "*all fixtures and fittings at the Premises whenever fixed (except Tenant's fixtures)*" and "*all additions and improvements made to the Premises*", the Claimant was ensuring that a Tenant exercising its Break Option could

not do so by handing back an empty shell of a building which was dysfunctional and unoccupiable.

67. But in the end, this is what the Defendant did. On my findings, they stopped the work unilaterally in the hope of negotiating a settlement. Those negotiations failed, the clock ran down, and the Defendant gave back considerably less than "*the Premises*" as defined in the Lease. It did not give vacant possession. In my view, this is an exceptional case and therefore the second test identified in Cumberland and in Legal & General is satisfied, namely that the physical condition of the Property was such that there is a substantial impediment to the Landlord's use of the Property, or a substantial part of it. Accordingly, I rule that on the 12th November 2017 the Defendant did not give the Claimant vacant possession of "*the Premises*" and, as there is no estoppel, the Claimant is entitled to the declaration sought. It may be that a final order can be agreed. If not, I will hear any further submissions in the case remotely by CVP if requested. I am very grateful to both Counsel and their Instructing Solicitors for the thorough and good-natured assistance which they have given me in this case.

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

Claim No: PT/2019/LDS/00008

B E T W E E N:

CAPITOL PARK LEEDS PLC
Claimant

-and-

GLOBAL RADIO SERVICES LIMITED
Defendant

JUDGMENT
