Neutral Citation Number: [2021] EWCA Civ 995

Case No: A3/2021/0171

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
Benjamin Nolan QC (sitting as a Deputy High Court Judge)
[2020] EWHC 2750 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2021

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE NEWEY
and
LADY JUSTICE ELISABETH LAING

- -

Between:

(1) CAPITOL PARK LEEDS PLC **(2) CAPITOL PARK BARNSLEY LIMITED**	**Claimants/ Respondents**
- and -	
GLOBAL RADIO SERVICES LIMITED	**Defendant/ Appellant**

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- -

Mr John Male QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellant**
Ms Joanne Wicks QC (instructed by **DWF LLP**) for the **Respondents**

Hearing date: 17 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Monday 05 July 2021 at 10:30am

Lord Justice Newey:

1. The question raised by this appeal is whether the appellant, Global Radio Services Limited ("Global"), has terminated a lease of 1 Sterling Court, Capitol Park, Topcliffe Lane, Tingley, Leeds ("1 Sterling Court") by the exercise of a break clause in the lease. Mr Benjamin Nolan QC ("the Judge"), sitting as a Deputy High Court Judge, concluded that the lease continued because Global had failed to give "vacant possession of the Premises" in accordance with the break clause. Global challenges that decision.

2. The lease in question ("the Lease") is dated 4 March 2002 and provided for the "Premises" to be demised for 24 years from 12 November 2001. Clause 1.1 of the Lease defined "Premises" as:

> "the property known as 1 Sterling Court, Capitol Park, Topcliffe Lane, Tingley, Leeds shown for the purpose of identification only edged red on the Plan including the airspace 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".

3. The original tenant, Real Radio (Yorkshire) Limited, used 1 Sterling Court as a broadcasting studio, but Global took an assignment of the Lease in 2014 following its acquisition of Guardian Media Group's radio business and did not need the property. On 15 February 2017, therefore, Global sought to bring the Lease to an end on 12 November 2017 by exercising the "option to determine" found in clause 10 of the Lease. This reads:

> "10.1 The Tenant may terminate this Lease on either [NB Insert day and month of term commencement date] day of 2009 and 2017 ('Tenant's Break Date') if the Tenant
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> 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 intention to do so
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> 10.1.2 in respect of the first Tenant's Break Date accompanies the notice with a payment equivalent to two years Rent then reserved and payable pursuant to this Lease plus any VAT that may be properly payable
>
> 10.1.3 has at the date of the notice paid the Rent and all other payments due under this 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 of 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]".

4. It is common ground between the parties that the opening words of clause 10.1 of the Lease should be read as referring to 12 November 2017.

5. The Lease further provided as follows:

   i) By clause 3.3.1, the tenant covenanted to keep the Premises in repair, "but excluding any damage or destruction by any of the Insured Risks unless the insurance is vitiated or payment refused as a result of any act neglect default or omission of Tenant or anyone at the Premises expressly or by implication with the Tenant's consent";

   ii) By clause 3.4, the tenant covenanted not to make any structural or external alterations to the Premises and not to carry out non-structural alterations without consent in writing and, where such consent had been given, to carry out the works in accordance with the plans and specifications supplied to the landlord;

   iii) By clause 3.20.1, the tenant gave a covenant in these terms:

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

   iv) By clause 4, the landlord covenanted to insure against damage or destruction by the "Insured Risks" and, if any of the "Insured Risks" resulted in any loss or damage to the Premises, to make good the loss or damage carrying out the necessary work of reinstatement or rebuilding as soon as reasonably practicable.

6. The first respondent, Capitol Park Leeds plc, was the freehold owner of 1 Sterling Court and so Global's landlord when it sought to exercise the break clause in the Lease. More recently, title to 1 Sterling Court has been transferred to the second respondent, Capitol Park Barnsley Limited. I shall refer to both respondents as "Capitol" in this judgment.

7. It is common ground that by 12 November 2017 Global had stripped out from 1 Sterling Court a range of items. These comprised ceiling grids, ceiling tiles, fire barriers, boxing to columns, floor finishes, window sills, fan coil units, ventilation duct work, pipework connections for the fan coil unit system, office lighting, smoke detection system, emergency lighting, radiators, heating pipework to serve radiators, floor boxes, ceiling void small power and sub mains cables. The evidence before the Judge showed that these features had been part of the original base build specification and so landlord's fixtures or, perhaps, elements of the building itself.

8. It is Capitol's case that, in the circumstances, Global did not give "vacant possession of the Premises" on 12 November 2017 and so failed to comply with clause 10.1.4 of the Lease. That being so, Global's purported exercise of the break clause was, Capitol maintains, ineffective and the Lease continues.

9. At trial, the Judge rejected a contention advanced on behalf of Global to the effect that Capitol was estopped from relying on the alleged failure to satisfy clause 10.1.4 of the Lease. He further concluded that Global had not complied with clause 10.1.4 and, accordingly, granted a declaration that the Lease did not terminate on 12 November 2017 and continues until the end of its term. In this connection, the Judge said this in his judgment:

> "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:
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> 'Deterioration of the condition of building services plant and installations can lead to failures resulting in a number of undesirable outcomes:
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> • Significant losses due to business disruptions;
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> • Non-compliance with legal requirements;
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> • Damage to property;
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> • Health and safety problems;
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> • Depreciation of asset value;
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> • Increase of energy and environmental costs.'
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> 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* [i.e. *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 KB 264 and *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch), [2006] L&TR 22] 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…."

10. Before us, Mr John Male QC, who appeared for Global, objected that it had been no part of Capitol's case 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", and so that "the second test in *Cumberland* and in *Legal and General* is satisfied". However, Ms Joanne Wicks QC, who appeared for Capitol, did not seek to support the Judge's decision in this respect and, for his part, Mr Male did not pursue the estoppel issue. There is thus a single issue to be considered: does Global's removal of the missing items mean that it did not "[give] vacant possession of the Premises to the Landlord" on 12 November 2017 within the meaning of clause 10.1.4 of the Lease? As both counsel recognised, the point is essentially one of construction.

11. Miss Wicks argued that, to comply with clause 10.1.4 of the Lease, the tenant must give back the "Premises". Having regard to the definition of the term in the Lease, the "Premises" include both the building which was in existence when the Lease was granted and "all fixtures and fittings at the Premises whenever fixed" (except tenant's fixtures). Miss Wicks accepted, first, that, if an item were replaced in compliance with covenants in the Lease (for example, the tenant's repairing covenant), the "Premises" would encompass the replacement rather than the original and, secondly, that the de minimis rule applies. The "Premises" to be returned under clause 10.1.4 thus extend to the original building and to landlord's fixtures, whenever fixed, subject only to replacement of any items in accordance with the covenants in the Lease and to the de minimis rule. Here, Global removed parts of the "Premises" as so understood and, Ms Wicks said, it accordingly failed to comply with clause 10.1.4 and, hence, in its exercise of the break clause.

12. In contrast, Mr Male submitted that clause 10.1.4 of the Lease is not concerned with the physical state of 1 Sterling Court, but with whether the landlord is recovering it free of things, people and interests. Mr Male contrasted clause 10.1.4 with the yield up covenant which, unlike clause 10.1.4, requires "a state of repair condition and decoration which is consistent with the proper performance of the Tenant's covenants".

Capitol's interpretation of clause 10.1.4 would, Mr Male argued, run counter to business common sense and give rise to anomalous and unfair consequences which the parties cannot have intended. If needs be, the "Premises" should be understood in the context of clause 10.1.4 to be "the Premises as they are from time to time".

13. On balance, I agree with Mr Male. In the first place, "vacant possession", which is what clause 10.1.4 of the Lease requires, conventionally involves a "trilogy of people, chattels, and interests" (to quote Nugee J in *Goldman Sachs International v Procession House Trustee Ltd* [2018] EWHC 1523 (Ch), [2018] L&TR 28, at paragraph 39). As Nugee J noted in the *Goldman Sachs* case at paragraph 39, "what the obligation to give vacant possession normally requires is threefold": "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". Of itself, therefore, an obligation to give "vacant possession" refers to giving back the property in question free of "people, chattels, and interests", not to its physical condition.

14. It has not been uncommon for a break clause to be expressed to be conditional on the tenant having observed and performed covenants in the lease. A clause of that kind can be seen in, for example, *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch), [2006] L&TR 22 (see paragraph 3). In the present case, however, the parties to the Lease did not choose to provide for any such requirement in clause 10, nor even to say that the tenant must have fulfilled its repairing obligations under the Lease. In this respect, there is a telling contrast with clause 3.20.1 of the Lease, which stipulates that the Premises must be yielded up with vacant possession "in a state of repair condition and decoration which is consistent with the proper performance of the Tenant's covenants". The fact that clause 10.1.4 makes no mention of repair or condition when clause 3.20.1 does lends support to Global's case that clause 10.1.4 is not concerned with such matters.

15. Secondly, Capitol's interpretation of clause 10.1.4 of the Lease would have implications which the parties are unlikely to have intended and which would run counter to business common sense. For example, were part of 1 Sterling Court to be destroyed by fire (one of the "Insured Risks"), it would be incumbent on the landlord to make good the loss (under clause 4.3.1) and the tenant's repairing covenant would not apply, yet on Capitol's case, as Ms Wicks accepted, the tenant could not give back the "Premises" in their entirety and so would be unable to bring the Lease to an end. Again, the tenant could exercise the break clause notwithstanding the fact that the building had been allowed to fall into a dreadful state of repair and become unlettable, but could not do so if a more than minimal number of ceiling tiles were missing, and that regardless of whether the deficiency could be said to be the tenant's fault. Supposing that an intruder caused damage the day before the break date, the Lease would still terminate whatever the extent of the damage unless it happened to involve, say, loss of a fixture. In that event, if the fixture remained somewhere in the building, it might possibly be suggested that the tenant could still give vacant possession of it, but there could be no question of its doing so if the intruder had dumped the item in the street.

16. That leads to a third point: that Capitol's approach gives rise to a particular difficulty in relation to clause 3.20.1 of the Lease. Ms Wicks said that, just as missing fixtures would prevent a tenant from giving vacant possession of the "Premises" for the purposes of clause 10.1.4, so they would entail that the tenant was not yielding up the "Premises" within the meaning of clause 3.20.1. To the extent that the two clauses overlap, Ms Wicks said, they must mean the same thing. While, therefore, clause 3.20.1 speaks merely of the "Premises" being "in a state of repair condition and decoration which is consistent with the proper performance of the Tenant's covenants", the tenant would breach clause 3.20.1 in whatever way a deficiency in the "Premises" had come about. The tenant would thus be liable even where, say, the "Premises" had been damaged by "Insured Risks". However, that would make no sense when the Lease expressly excludes damage or destruction by "Insured Risks" from the tenant's repairing covenant and, to the contrary, obliges the landlord to make good such loss or damage. The construction of clause 10.1.4 for which Capitol contends would thus render the Lease internally inconsistent.

17. A fourth point is that the approach to clause 10.1.4 of the Lease espoused by Global does not leave the landlord without a remedy for deficiencies in the building. Clause 10.3 specifically states that termination under clause 10 is to be without prejudice to any right of action in respect of any previous breach of covenant or condition. It would thus be open to the landlord to recover compensation from the tenant for, for instance, failure to repair in accordance with clause 3.3. Ms Wicks pointed out that Mr Male had accepted at trial that, on Global's case, a tenant could demolish the building altogether, hand back a patch of bare earth and say that it had complied with clause 10.1.4. That may be so, but, aside from the improbability of the scenario, the landlord would be entitled to compensation.

18. Turning, fifthly, to the significance which Ms Wicks attached to the definition of "Premises", Mr Male submitted that, in the context of clause 10.1.4 of the Lease, the "Premises" should be understood to refer to "the Premises as they are from time to time". Such an interpretation is, as it seems to me, consistent with the fact that the definition of "Premises" encompasses "all fixtures and fittings at the Premises whenever fixed" and so extends to fixtures and fittings fixed after the commencement of the Lease which at the relevant time are "at the Premises". What "Premises" comprises is not therefore finally settled at the point at which the Lease is concluded. Mr Male's contention also derives a degree of support from *Ponsford v H.M.S. Aerosols Ltd* [1979] AC 63 ("*Ponsford*") and *Peel Land and Property (Ports No.3) Ltd v TS Sheerness Ltd* [2014] EWCA Civ 100, [2014] L&TR 20 ("*Peel*"). *Ponsford* concerned a rent review clause providing for rent to be "a reasonable rent for the demised premises". The factory having been burnt down and rebuilt, there was, Lord Fraser said at 82-83, "no dispute that 'the demised premises,' which originally meant the factory described in clause 1 of the lease, now means the factory as rebuilt after the fire, including the improvements made at the expense of the tenants, with the approval of the landlord". *Peel* involved a lease under which the tenant covenanted both to erect a new building and, by clause 2(6), not to make alterations to "the said premises", which were defined to mean the demised site together with "the Buildings erected thereon". Rimer LJ concluded in paragraph 37 that, "whatever sense may be attached to the use of the phrase 'the said premises' in other provisions of the lease, there can be no doubt that in cl.2(6) 'the said premises' is a reference to the buildings and site from time to time", while Vos LJ said in paragraph 47 that, "Though the term 'Buildings' is not

defined, since the covenant is expressed to apply 'at any time during the said term', it must be construed as referring to both existing buildings and those built in accordance with cl.1".

19. Ms Wicks countered that Mr Male's interpretation of "Premises" departs from the language used in the Lease, but her own approach also involves reading words into either the definition of "Premises" or clause 10.1.4. She suggested, in particular, that allowance must be made for replacement of items in compliance with covenants in the Lease, notably the tenant's repairing covenant. Although alterations for which a tenant had asked for and obtained permission under clause 3.4.2 of the Lease might be said to be voluntary and so not in "compliance" with the Lease, it would make no sense if they, too, were not catered for: a tenant could presumably exercise the break clause if it were giving vacant possession of the "Premises" as renewed or altered either in compliance with obligations under the Lease or as permitted under its terms, unless at least the landlord had required the tenant to reinstate pursuant to clause 3.4.5. A further issue could potentially arise if, in carrying out alterations for which it had obtained consent, there had been a departure from specifications which had been supplied to the landlord in accordance with clause 3.4.3 (say, because a contractor had used the wrong type of ceiling tile). Could the landlord deny that clause 10.1.4 had been satisfied on the basis that, although there were ceiling tiles in place, the "Premises" were not in a permissible form?

20. Finally, the fact that the conditions prescribed in a break clause must be strictly complied with (see e.g. *Siemens Hearing Instruments v Friends Life Ltd* [2014] EWCA Civ 382, [2014] L&TR 27, at paragraphs 27-29) does not mean that the clause must be construed strictly or, in particular, adversely to the tenant. A tenant wishing to exercise a break clause has to comply fully with whatever conditions have been attached to the exercise of the clause, but it does not follow that the conditions should be interpreted so as to favour the landlord.

21. In all the circumstances, it seems to me that, construing it in the context of the Lease as a whole, clause 10.1.4 requires the tenant to return the "Premises" as they are on the break date free of the "trilogy of people, chattels, and interests". On that basis, Global's exercise of the break clause was effective and the Lease terminated on 12 November 2017. True it may be that the building was left in a dire state, as Ms Wicks said, but that will not have precluded valid exercise of the break clause. Capitol's remedy is to seek compensation for whatever loss it may have suffered.

22. I would allow the appeal.

Lady Justice Elisabeth Laing:

23. I agree.

Lord Justice Moylan:

24. I also agree.