Judgments

CHANCERY DIVISION

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IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

PROPERTY TRUSTS AND PROBATE

LIST (ChD)

[2018] EWHC 1523 (Ch)

Royal Courts of Justice, Rolls Building,

Thursday, 3 May 2018

Before:

B E T W E E N :

GOLDMAN SACHS INTERNATIONAL **Claimant**

- and -

(1) PROCESSION HOUSE TRUSTEE LIMITED

(2) PROCESSION HOUSE TRUSTEE 2 LIMITED **Defendants**

MR J. SEITLER QC (instructed by Burges Salmon LLP) appeared on behalf of the Claimant.

<u>MR M. SEFTON QC</u> (instructed by Eversheds Sutherland (International) LLP) appeared on behalf of the Defendants.

J U D G M E N TMR JUSTICE NUGEE:

1 I have before me a Part 8 claim which seeks the determination of a question of construction of a break clause in a lease. The claimant is the tenant, Goldman Sachs International, and appears by Mr Seitler QC. The defendants are two companies: Procession House Trustee Limited and Procession House Trustee 2 Limited who, together, form the landlord and appear by Mr Sefton QC.

2 The lease is dated 17 April 2000 and was granted by a predecessor of the landlord called Heron Procession House Limited to the tenant, Goldman Sachs International. It is a lease of office premises at Procession House, 55 Ludgate Hill and 110 New Bridge Street in the City of London, which is a building which surrounds the City Thameslink railway station. The term granted was for 25 years from and including 29 September 1999, which means it would otherwise expire by effluxion of time in September 2024, but that is subject to clause 23, which is the break clause. I should read the whole of clause 23 which reads as follows:

TENANT'S BREAK OPTION

23.1 subject to the Tenant being able to yield up the Premises with vacant possession as provided in clause 23.2, this Lease shall be terminable by the Tenant at the expiry of the twentieth year of the Term by the Tenant giving to the Landlord not less than 12 months' and one day's previous notice in writing.

23.2 On the expiration of such notice, the Term shall cease and determine (and the Tenant shall yield up the Premises in accordance with clause 11 and with full vacant possession) but such determination shall be without prejudice to the respective rights of either party against the other in respect of any antecedent claim or breach of covenant.

23.3 The Tenant shall not be entitled to give such notice while it shall be in arrears in payment of the Rent."

3 Clause 23.2 refers to clause 11. Clause 11 is a clause headed "YIELDING UP" and reads as follows:

"11.1 Unless not required by the Landlord, the Tenant shall, at the end of the Term, remove any alterations or additions made to the Premises (and make good any damage caused by that removal to the reasonable satisfaction of the Landlord) and shall reinstate the Premises to their original layout and to no less a condition than as described in the Works Specification.

11.2 At the end or sooner determination of the Term the Tenant will quietly yield up the Premises to the

Landlord in such condition as is set out in the Works Specification.

Provided in either case that: -

(a) Tenant will not be required to reinstate upgrades to the building plant machinery and equipment and to the extent that such upgrades do not reduce the net internal area (or in the reasonable opinion of the Landlord), adversely affect the value or the Landlord's ability to let the Premises in the future and the Tenant shall be entitled to no compensation in respect of any such upgrades; and

(b) The Tenant may use substitute materials of comparable quality if materials specified in the Works Specification are not readily available at the time of reinstatement."

4 The initial rent for the lease was just over £4 million. It was subject to five yearly reviews but I was told that it has, in fact, not been reviewed and that that is still the passing rent. The premises are currently vacant and Goldman Sachs intends to operate the break clause which will enable it, if it can operate it successfully, to break the lease in September 2019 and they have brought these proceedings in good time before the break clause comes to be operated so that they know precisely what it is they have to do in order to operate it successfully. It will be seen that the advantage to them of being able to break the lease five years early is to save some £20 million in rent.

5 The rival contentions are these. The tenant, through Mr Seitler, says that the words in clause 23.1 "yield up the Premises with vacant possession as provided in clause 23.2" oblige the tenant to yield up the premises with vacant possession, the reference to clause 23.2 simply qualifying, or being governed by, the words "with vacant possession". So the only cross-reference in clause 23.1 to clause 23.2 is the reference to "with vacant possession".

6 The landlord, through Mr Sefton, says by contrast that those words mean that the tenant has to yield up the premises both with vacant possession and as provided in clause 23.2, and that the effect of that is that it has to comply with the obligations of clause 11, that clause being expressly referred to in the bracketed part of clause 23.2.

7 Various matters were common ground. There was no real dispute over the principles of contractual construction. I was referred by both parties to the speech of Lord Neuberger in *Arnold v Britton & Ors* [2015] UKSC 36 for his statement of the principles at [15] to [23]. He sets out at [15] what the court is seeking to do, that is 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." He says:

"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."

Then he then sets out various factors which have to be taken into account.

8 Then at [16] onwards, he emphasised seven particular factors. The passage as a whole, which I have read the whole of, is a very helpful reminder of the factors to take into account but it is too long to read into this judgment.

9 I was also referred, although not taken specifically, to the later decision of the Supreme Court in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 where Lord Hodge at [8] to [15] restates again the principles applicable, in particular, at [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."

10 Also, at [13] where he says:

"Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement."

11 Mr Sefton, by reference to [15] of Lord Neuberger's judgment in *Arnold v Britton* said that the words were the main tool for construction. I do not intend to restate the principles in my own words but I certainly accept that it is clear from both those cases and numerous other cases that the task of the court is to ascertain the meaning of the language that has been used, not other language that has not been used, and that in the end, that is what the court is doing. It is interpreting the parties' language and it is, as Lord Neuberger points out, the one aspect of their contract that the parties can control (see [17] of his judgment). However, in ascertaining the meaning of the language the parties have used, as both judgments again make clear, the court can make more or less use of tools which go beyond the mere words on the page. As I say, there was not really any dispute between the parties as to the principles of construction.

12 Certain other matters were common ground. First, that although clause 23.1 refers to the option being subject to the tenant "being able to yield up the Premises with vacant possession as provided in clause 23.2", it is accepted by Mr Seitler that that is a condition which in fact means that the tenant must actually yield up the premises at the termination of the term. That, as I say, was common ground and it follows that it is not disputed that there are at least two preconditions to the exercise of the break option, one in clause 23.3 which is to be satisfied at the time that the notice is given, which is that the tenant should not be in arrears in payment of the rent when the notice is given, and the other in clause 23.1 which is the obligation to yield up with vacant possession when the notice expires or would expire if valid, which is one which looks forward to the termination date. As I say, that is common ground. The only dispute between the parties is whether it is also a precondition in clause 23.1 that the tenant complies with the entirety of clause 23.2 including the obligation to yield up the premises in accordance with clause 11.

13 It is also common ground that clause 11 does apply on either party's construction to impose contractual obligations on the tenant to yield up in the condition required by clause 11 on the successful implementation of the break clause. That is clear not only because clause 23.2 says so, but because even if clause 23.2 had not said so, clause 11 itself refers to the tenant complying with clause 11 at the end of the Term and there is a provision in clause 2.3.7 as follows:

"References to the end of the Term are to the end of the Term whether before, at, or after the term of years granted by this Lease."

“Term” itself is defined as “a term of 25 years… (but subject to clause 23)…”

14 It seems to me therefore that even without clause 23.2, it would have been clear that clause 11 would apply on the successful implementation of the break clause to require the tenant to hand back the premises to the landlord in compliance with its obligations under clause 11. Mr Seitler expressly accepted that if the tenant failed to do so, it exposed itself to a liability for damages, those damages being likely to consist both of the costs to the landlord of putting the premises into the state they should have been put in in order to comply with clause 11, and any loss of rent occasioned to the landlord by not being able to let until that had been done. All that, as I say, is common ground.

15 I come now to the arguments which have been put forward by the parties and I will start with the language of clause 23.1 itself. There is authority that it does not matter where one starts as long as one considers all the appropriate factors, but it does seem to me in this case that the sensible place to start is with the language.

16 Mr Seitler's argument is that the words “as provided in clause 23.2” go with the words “with vacant possession”. On this argument, the condition imposed by clause 23.1 is that the tenant yields up the premises and then there is only one requirement to add to that and that is that it is with vacant possession as provided in clause 23.2.

17 Mr Sefton says that there are difficulties with reading the language in that way. In particular, it does not explain what the words “as provided in clause 23.2” are doing at all. They are, in fact, completely redundant because adding those words in does not change anything from what the clause would have meant had it simply stopped after the words “with vacant possession” so that it read “subject to the Tenant being able to yield up the Premises with vacant possession.” It is not suggested that the meaning of vacant possession in clause 23.1 is changed by the cross-reference to clause 23.2.

18 That, Mr Sefton says, is the first difficulty with the clause construed in the way that Mr Seitler would have it and the arguments from redundancy do not stop there because, in fact, on Mr Seitler's argument, the entirety of the words in brackets in clause 23.2 are also redundant because they provide that the tenant shall yield up the premises in accordance with clause 11 and with full vacant possession. The obligation of the tenant to yield up the premises in accordance with clause 11 when the term determines is one that, as I say, that one could have collected in any event from reading clause 11 together with the definition of the end of the Term.

19 As for the obligation to yield up with full vacant possession, although Mr Seitler at one stage suggested that the word “full” was of some assistance, in the end it did not seem to me that he placed much reliance on that and he accepted that full vacant possession means the same as vacant possession, there not being different standards of vacant possession. Either vacant possession is given or it is not and the obligation to yield up the premises with full vacant possession is one that would be implicit in clause 23.1 even without the express reference to it in clause 23.2.

20 Those redundancies on Mr Seitler's construction are, Mr Sefton says, good indications that clause 23.1 is doing something more than simply obliging the tenant, as a pre-condition of being able to break the lease, to give vacant possession. If one wants to know what more they are doing, one looks to the words “as provided in clause 23.2”, one looks to the words in the brackets in the clause 23.2, and, in particular, the reference to yielding up in accordance with clause 11.

21 Mr Seitler has two answers to that. One is to say that the cross-reference to clause 23.2 does add something because it tells the reader of the lease when the tenant has to yield up the premises with vacant possession, the answer being "It is on the expiry of the notice." The difficulty I have with that is that the notion of a party giving up vacant possession at a stage at which their interest under the lease was continuing is one that is so absurd and so contrary to all one's understanding of how a lease is to be determined and possession given up that it would, in my judgment, require very clear words to require a tenant to give vacant possession of premises to a landlord at a stage at which the lease was still continuing. That means that even without the cross-reference to clause 23.2, one would read the obligation to yield up the premises with vacant possession in clause 23.1 as meaning at the end of the term when the break clause takes effect. That, as I say, I did not regard as a point of any real strength at all.

22 Secondly, Mr Seitler says that there is authority, particularly in regard to leases, that draftsmen have a torrential style of drafting. He referred me to two comments to that effect by Lord Hoffmann: one when at first instance as Hoffmann J in *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137, he said at 138D, reflecting a submission of Mr Neuberger's:

"According to normal rules of construction the additional words should be given some additional meaning. But Mr Neuberger says, with some justification, that this rule can frequently not be applied in its full force to documents such as leases, where a torrential style of drafting has been traditional for many years..."

23 Then a bit further down at 138F, he says:

"Now I accept that in the construction of covenants such as this one one cannot, for the reasons I have already given, insist upon giving each word in a series a distinct meaning. Draftsmen frequently use many words either because it is traditional to do so or out of a sense of caution so that nothing which could conceivably fall within the general concept which they have in mind should be left out."

24 Then again in the House of Lords, as Lord Hoffmann in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd and Others* [1999] 1 AC 266, he said this at 274A:

"I think, my Lords, that the argument from redundancy is seldom an entirely secure one. The fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words. Sometimes the draftsmanship is clumsy; more often the cause is a lawyer's desire to be certain that every conceivable point has been covered. One has only to read the covenants in a traditional lease to realise that draftsmen lack inhibition about using too many words."

That was not a lease case but as can be seen, he did refer to the position with leases.

25 Mr Sefton countered with a statement by Coulson J in *Jani-King (GB) Ltd v Pula Enterprises Ltd & Ors* [2007] EWHC 2433 (QB) at [26] where he says:

"I am conscious that this construction makes cl 9.1 of the second franchise agreement redundant. A court should always think long and hard before arriving at a construction which renders otiose a part of the written agreement... [and then he gives some authority] ...although there is a good deal of modern authority to the effect that this presumption against surplusage is relatively weak... [and refers to other authority]."

26 I accept Mr Sefton's submission that the present case is not quite what Hoffmann J had in mind in the

Norwich Union case as being a torrential style of drafting, that being, to my mind, really directed to the case where a clause contains numerous words such as 'repair', 'rebuild', 'reconstruct', or 'renew' where one would have thought that one word or two would be sufficient, and that it is a stronger thing to do to treat not just a few words as surplus but an entire provision as not doing anything or not adding anything to the parties' obligations.

27 Nevertheless, I think there is some force in what Mr Seitler says that just because a draftsman has spelt out the consequences of the break clause being exercised in clause 23.2, it does not mean that that necessarily was intended by the draftsman to add anything to the position as it would be collected from the other provisions of the lease. It does seem to me there is some force in his point that the traditional style of drafting break clauses is to indicate in the clause both what is needed to exercise the clause and what the consequences of the exercise of the clause will be. That is what is done here by clause 23.1 and clause 23.2, clause 23.1 telling you what you need to do in order to exercise the break, which is to give notice and importing the condition (whatever it means), and clause 23.2 then explaining what the consequence is of giving the notice, namely to bring the term to an end.

28 I also accept his point, although it is a very small point in the context of this dispute, that the fact that in clause 23.2 the consequences of the term coming to an end are put in brackets “(and the Tenant shall yield up the Premises in accordance with clause 11 and with full vacant possession)” has slightly the flavour of a reminder to the reader of the lease and the parties what the consequences are of the term coming to an end rather than necessarily imposing a fresh obligation.

29 Mr Sefton's construction, as I have already said, treats the words “yield up the Premises with vacant possession as provided in clause 23.2” as really imposing a double condition, that is (i) to yield up the premises with vacant possession and (ii) to yield up the premises as provided in clause 23.2. On this construction, it explains what the reference to clause 23.2 is doing in clause 23.1 and it explains what the bit in brackets in clause 23.2 is doing, namely to set out what it is to yield up the premises “as provided in clause 23.2”.

30 Pausing there, without looking at any wider considerations and just considering the language which I have been looking at, I agree that both constructions are possible as a matter of language but I prefer Mr Seitler's. It does seem to me that the natural and ordinary meaning of the phraseology found in clause 23.1 is to read it as imposing a single condition, that is an obligation to yield up and to yield up in a certain way, and that way is with vacant possession as provided in clause 23.2, rather than to read it as importing effectively two separate conditions, that is to yield up the premises with vacant possession and to yield up the premises in accordance with clause 11.

31 The reasons that I say that are, to some extent, not capable of being precisely articulated because the way in which language strikes a reader as having a natural and ordinary meaning is an accumulation of experience of how language is ordinarily used, but doing the best I can, I think it is this. If Mr Sefton's construction had been intended, there are a number of other ways to do it which would have been, to my mind, a much more natural way of expressing the concept which he says is intended rather than the rather awkward way in which it has been done. One way, and perhaps the simplest, would simply be to put an “and” in between the word “possession” and “as” so it read “yield up the Premises with vacant possession and as provided in clause 23.2”, or if one wanted to be slightly more strictly accurate “and otherwise as provided in clause 23.2”. Another way would be to omit the reference to vacant possession at all and simply say “to yield up the premises as provided in clause 23.2”. As Mr Sefton accepted, that would achieve precisely the same result.

32 Of course, it is always the case that a clause which comes before the court for construction is one

which could have been drafted more clearly because otherwise there would not be the dispute which requires the court to construe the language but here, as I say, I think that the words which have actually been used are an awkward way of saying what Mr Sefton says they were intended to say. That is because clause 23.2 has very clearly two separate obligations on the tenant when yielding up. One is to yield up in accordance with clause 11 and the other is to yield up with full vacant possession. Those are given equal weight and that seems to me to be appropriate - they are two separate obligations - and the tenant is required by clause 23.2 to comply with both of them.

33 There is no reason to give one of them primacy over the other but when one comes to clause 23.1, if what Mr Sefton had said had been intended, one would naturally and ordinarily expect that the precondition requiring yielding up would do the same thing and would say “in accordance with clause 11 and with vacant possession”, or “in accordance with clause 11 and with vacant possession as provided in clause 23.2”, or as I have already said, simply “as provided in clause 23.2”.

34 There is no explanation that can be given on Mr Sefton's construction as to why in clause 23.1 the draftsperson has singled out one of the limbs of the yielding up obligation set out in clause 23.2, namely with “vacant possession”, and not made any reference at all to the other one, namely “in accordance with clause 11”. On the other hand, if Mr Seitler's construction was intended, it explains why clause 23.1 makes no reference to the clause 11 obligation but does single out the vacant possession obligation.

35 In those circumstances, purely as a matter of language, I find myself inclining towards Mr Seitler's construction rather than Mr Sefton's. It is true that that involves a degree of redundancy, both in clause 23.1 itself where, as I have said, on this construction the words “as provided in clause 23.2” really do not add anything, and in the words in clause 23.2 itself, which are unnecessary if they do not explain what the cross-reference in clause 23.1 is. However, as I have sought to suggest, although the part in brackets in clause 23.2 may be unnecessary, that does not necessarily mean that it is unhelpful to have a reminder in clause 23.2 itself of what the consequences are of successfully breaking. That is the view I have reached simply looking at the language.

36 The second aspect that I was asked to take into account by Mr Sefton, not I think by Mr Seitler particularly, was to look at the lease as a whole. Mr Sefton had one point here which is that the obligation in clause 11 is an obligation to remove any alterations or additions made to the premises and reinstate the premises to their original layout. It appears to be common ground that the premises were let, as office premises are I am told very commonly let in modern times, as open layout and that it is the tenant who then erects partitions and the like in order to make such use of the space as the tenant wishes to do so. Things like internal partitions are very likely to be fixtures. They are likely not to be chattels because they are likely to be fixed to the floor and the ceiling in such a way as to form part of the internal structure of the building.

37 As a matter of general law, it is not disputed that the position with tenant's fixtures, that is fixtures fixed by the tenant for the tenant's own trade purposes, is as follows: a tenant is entitled to remove them at the end of the lease but if he chooses not to do so (and the option is his), they form part of the premises and accrue to the landlord. Since the obligation of the tenant to give vacant possession is to give vacant possession in terms of not leaving behind chattels, the obligation to give vacant possession does not normally require the tenant to remove fixtures. One can see this all set out in the judgment of Lewison J in *Legal & General Assurance Society Limited v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch) where at [32] he says:

“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 becomes 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."

38 But, Mr Sefton says, it is different if the tenant, far from having an option to remove tenant's fixtures, is obliged to remove tenant's fixtures. Since clause 11.1 obliges the tenant to return the premises to their original layout, this lease does require the tenant to remove its trade fixtures, such as internal partitioning, even if they would otherwise have become part of the premises and, says Mr Sefton, in those circumstances, the obligation to give vacant possession does require the fixtures to be removed.

39 I should say that 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 interests, 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.

43 On any view, the obligation in clause 11 goes a good deal beyond an obligation merely to remove certain fixtures. That is because it requires the tenant to return the premises to the condition specified in the Works Specification. The Works Specification, which is annexed to the lease, is a technical specification describing the building as it was completed by the developer in 1999. It is a lengthy document which runs to some 14 pages and provides quite a lot of detail as to the state of the premises in 1999. The obligation in clause 11 therefore, in any view, goes well beyond simply removing the fixtures.

44 Mr Sefton said that the real force of clause 11 was the removal of things. I am not sure that I entirely agree with that because the requirement to put the premises into no less a condition than as described in the Works Specification means that quite a lot of work may need to be done both to make matters good and to restore things which were originally there in the Works Specification and over 20 years have ceased to be there for one reason or another. However, in any event, I do not find that this particular question, that is whether the bulk of clause 11 is about removing things or not, and whether if the tenant is obliged to remove fixtures that means the obligation to give vacant possession requires the tenant to remove fixtures, is of any real help on the question of construction of clause 23. Mr Sefton's point was that the reasonable objective reader of the lease would see that the obligation to give vacant possession contained a significant overlap with the obligation in clause 11 and therefore would not find it very surprising if the rest of clause 11 was also something which the tenant had to comply with in clause 23.

45 I do not find that particular argument one that carries any great weight. What the reasonable objective reader of the lease would see is that there are two different obligations, one to give vacant possession and one to comply with clause 11. As I have said, on any view, the clause 11 obligation goes beyond the giving of vacant possession. In those circumstances whether or not the vacant possession obligation by itself would require the tenant to remove fixtures does not seem to me to assist very much with the question faced by the reasonable reader on reading clause 23 which is whether the obligation in clause 23.1, which is a precondition to being able to give the break notice, is to comply with both clause 11 and the obligation to give full vacant possession, or only with the obligation to give full vacant possession.

46 I also do not need to decide, and do not propose to say anything about, an argument floated by Mr Seitler against himself but one which neither party asked me to determine, which I will briefly mention, which is this. Clause 23.1 requires the tenant to yield up the “Premises”. That is a defined term and the term is defined twice but I think in the lease itself, as opposed to the particulars, it is defined as follows:

“The Building and every part thereof other than the two Shop Units and the total net internal area of the Premises has been agreed between the parties hereto as comprising 95,846 sq.ft. measured in accordance with the RICS Joint Code of Measuring Practice (Fourth Edition).”

47 Mr Seitler accepted that it was arguable, but as I say did not invite me to conclude, that that might oblige the tenant when giving vacant possession to restore the premises to a net internal area of 95,846 sq.ft. and therefore, in itself, require the tenant to remove things which reduced the net internal area. I do not again find that of any real assistance in deciding the question I do have to decide which is whether the precondition includes a precondition of complying with clause 11 or not.

48 I move on then from consideration of the other terms of the lease which in the end I find of little assistance to commercial common sense. This is not a case where either party has suggested that the other side's construction is so absurd as to be one of those cases where the court says that simply cannot be what the parties meant. There are cases of that type going back for very many years. There are authorities which say that a construction which flouts business common sense is one the court should not adopt unless it really

has no choice. Rather, this is a case of the *Rainy Sky* type, the principle in which was referred to Lord Hodge in *Wood v Capita* as follows, at [11]:

"Interpretation is, as Lord Clarke JSC 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."

49 Mr Seitler's main point on this is that to require the tenant not only to give vacant possession but to comply with clause 11 makes less commercial common sense for this reason. It is well established and well known that when one has a break clause with preconditions, the preconditions must be complied with strictly and that if they are not, the break clause cannot be exercised. A break clause in a lease of this type, where the passing rent at the date of the lease was over £4 million and was subject to review, was one that was of great commercial importance to the tenant, leading to an ability to extricate itself from an obligation to pay over £20 million, a figure which could, if the rent had been reviewed in the intervening 20 years, have been very much more.

50 In those circumstances, there are drastic consequences attached to a failure to comply with a precondition for the giving of a break notice, such that one does not want the precondition to be one which gives rise too readily to disputes. He said that although the giving of vacant possession is a relatively straightforward concept such that it is relatively easy to see whether it has been complied with or not, the same was not true of the clause 11 obligation. He took a number of points. One of the points he took was that clause 11 starts off with the words "unless not required by the Landlord" in clause 11.1, and he said that the landlord could leave it until shortly before the expiry of the lease to say whether things were required or not. That particular point I place no weight on. It seems to me that the tenant must proceed under clause 11 on the assumption that the landlord does require everything to be removed and the other parts of clause 11 complied with unless told otherwise and that that causes the tenant no particular difficulty.

51 However, the other points referred to by Mr Seitler seem to me to have more force in them. The nature of the obligations in clause 11 are, of their very nature, such that there is room for, and likely to be, argument. There should not be room for very much argument as to what is an alteration or addition made to the premises, but if alterations or additions are made to the premises, the tenant is then obliged to make good any damage caused to the reasonable satisfaction of the landlord. One can see straightaway, accepting as I do Mr Sefton's point that this imports an objective standard, that there is quite likely to be room for dispute as to whether, if the landlord is not satisfied with the making good of any damage that is something which is reasonable or not.

52 Then there is an obligation to restore the premises to no less a condition than as described in the Works Specification. The Works Specification, however, is not really written with a view to specifying with precision exactly what it is the tenant has to do. There are a number of places, as Mr Seitler showed me, where this, which is avowedly a description of the premises, refers to things which are generally the case. For example, it refers to internal doors being "generally 2.4 m high" and walls being "generally plastered or drylined and painted". If there were a dispute whether a particular wall should be plastered or drylined and painted, the Works Specification would not tell you the answer to that dispute and one could see that arguments of that type could be multiplied.

53 Then Mr Seitler said that the provisos, particularly the second proviso which allowed the tenant to use substitute materials of comparable quality if materials specified in the work specification are not readily available, imports a number of requirements which are not simple black and white questions. Are materials readily available? Are the substitute materials of comparable quality? Those are the sorts of things which could give rise to disagreements between landlord and tenant.

54 Mr Sefton said that the tenant was obliged to comply with clause 11 in any event. So all these questions which might arise on clause 11 are questions which might arise in any event. The purpose of clause 11 however was to put the landlord in the position where it has premises which are returned to it in a state in which it can re-let them on day one, and the landlord, who is giving up a right to look to the tenant for the last five years of rent of over £20 million, wants the tenant not just to promise to do the things it has promised to do in clause 11 but to actually do them and not just leave and leave behind a dispute. That, he says, is a perfectly sensible way to approach the commercial justification of the clause. If the tenant wants this valuable privilege of giving up the premises, it should be under no illusions that it has to make sure that it does comply scrupulously with the obligations in clause 11. It is a powerful incentive to ensure that the tenant does, in fact, give the landlord back the premises in the state the landlord is entitled to have them back that the price for failure to do so will be loss of the break clause.

55 These arguments to my mind to some extent illustrate that what makes commercial sense from the point of view of the landlord does not necessarily make commercial sense from the point of view of the tenant. In the end, I do not find these arguments of what makes commercial sense something on which I can place a great deal of reliance. I can see entirely why the landlord might wish to use the break clause obligations to put very significant pressure on the tenant to ensure that it did do what clause 11 required it to do. However, on the other hand, I see also entirely the force of Mr Seitler's point that it seems a disproportionate response to what could be quite a trivial breach of the obligation to comply with clause 11. Suppose, for example, some part of the specification had not been strictly complied with, or the tenant took the view that materials were not readily available but the landlord was ultimately found to be right that materials were readily available, it seems a disproportionate response to what could be quite small breaches that a tenant should lose a right to break.

56 As I have already said, I do not find these considerations of great weight in this case but I think I should say that in the end, if I had to choose, I would again prefer Mr Seitler's construction on these grounds. The way I see it is this. It is perfectly true that the sort of (and it may be this is unavoidable) slightly vague obligations which are found in clause 11 with words such as “comparable quality”, “readily available”, “reasonable opinion of the landlord”, and “reasonable satisfaction of the landlord”, where there is likely to be room for dispute in any particular case whether the obligations have been complied with or not, are not very suitable to have as a precondition to the valid exercise of a break notice. As Mr Seitler said in the course of a short but effective reply, the one thing which does make commercial sense for both landlord and tenant is to know without much difficulty whether a break clause has been validly exercised or not because the tenant will want to know whether it really has to leave and has no further liability for rent, and the landlord will want to know whether it will get the premises back and have to re-let them.

57 In the case of obligations which are necessarily less than precise, such as are found in clause 11, it is of course the case that even a trivial breach gives rise to a claim at least for nominal damages, but the practical reality is that unless the things which are said to be breaches are sufficiently serious to cause the landlord to spend money on remedying them and to delay letting the premises, the landlord will not pursue a claim for damages.

58 The practical effect of that is that there is a certain amount of tolerance in the nature of an obligation like clause 11 so that no sensible landlord looking after their own commercial interests will pursue the question of a breach of clause 11 unless it has significant material consequences. However, if instead the prize for the landlord of establishing even a minor breach of clause 11 is not a claim for nominal or very small damages but is the ability to claim another £20 million in rent, the landlord will have a much greater incentive to pursue even very small divergences (or alleged divergences) from the strict letter of the tenant's obligation in clause 11.

59 That, of course, is a regime that the parties can agree to, if they wish, and what a landlord might well wish to have for the reasons Mr Sefton put forward, but it does not seem to me to be the most commercially sensible place to leave the parties' obligations. In so far therefore as the commercial good sense of the competing constructions is to be given any weight at all, for the reasons I have sought to give, I prefer Mr Seitler's construction on this point as well.

60 The final point that was argued, albeit very much as a make-weight point, is a point taken by Mr Seitler in reliance on what is now quite an old case, *Dann v Spurrier* (1803) 3 Bos & P 399, in which the court said that as a matter of general principle, a lease is to be construed most favourably for the lessee, and he said that if there were any doubt about the matter, that also supported his construction.

61 It became apparent in the course of discussion, largely with Mr Sefton who showed me very helpfully some passages from Sir Kim Lewison's book on *The Interpretation of Contracts,* that *Dan v Spurrier* is to be regarded as an example of the principle of construing matters *contra proferentem*, or against the person putting them forward. He was able to point not only to a statement that the maxim is itself ambiguous because (see page 391) it might mean the person who prepared the document as whole, the person who prepared the particular clause, or the person for whose benefit the clause operates, but also to a statement by Lord Neuberger, then Master of the Rolls, in *K/S Victoria Street (A Danish Partnership) v House of Fraser (Stores Management) Ltd & Ors* [2011] EWCA Civ 904, cited at page 390 of Sir Kim Lewison's book, who said:

"...such rules are rarely, if ever, of any assistance when it comes to construing commercial contracts. Quite apart from raising abstruse issues as to who is the *proferens* (and, in particular, whether the issue turns on the precise facts of the case or hypothetical analysis), 'rules' of interpretation such as *contra proferentem* are rarely decisive as to the meaning of any provisions of a commercial contract. The words used, commercial sense, and the documentary and factual context, are, and should be, normally enough to determine the meaning of a contractual provision."

It should however be pointed out that Sir Kim Lewison follows that with the words:

"However, the principle still survives (perhaps with a weaker and more limited role)…"

62 In the present case, I would treat the *proferens*, if the principle applied at all, as being the landlord. Of course, the clause as a whole, clause 23, is for the benefit of the tenant but it is for the landlord to impose such preconditions as it wishes to stipulate, and I accept Mr Seitler's submission that the relevant *proferens* is the person who benefits from the precondition, which in this case is the landlord.

63 In the end, rather than treating this as a general principle that leases should be construed against landlords, or against the landlord in this particular case, what Mr Seitler's submission amounted to was that if one wishes as a landlord to impose a precondition on the exercise of a break option, given the drastic consequences in terms of the loss of the option which flow from a failure to comply with a precondition, it is incumbent on the landlord to make it clear exactly what the tenant has to do in order to exercise the break clause. In other words, applying that to clause 23 here, if the landlord had wished to make strict compliance with clause 11 a precondition of the exercise of the break clause, the landlord really should have said so expressly rather than leaving it to be teased out of the cross-reference in ambiguous terms in clause 23.1. I accept that arguments of this type are, and can only be, very much arguments that support and make weight for other more central arguments, questions of construction, as I have said, being primarily concerned with what the words on the page mean in their context and not in modern times dictated by a resort to presumptions and general rules of this type. That said, I think there is some force in what Mr Seitler said.

The nature of a break clause is that it is, although contained in a bilateral contract, something which can be exercised unilaterally. It is often, as this case illustrates, of great importance to the parties seeking to exercise it and it does seem to me that it is appropriate that if the landlord wishes to impose a precondition on the tenant, he should make it quite clear in the drafting of the clause what it is that the tenant has to do rather than leave it to be argued out at the stage at which it may be too late to do anything about it, with the prize for the landlord being the potential ability to defeat the clause. So although it is only a make- weight point, that point too to some small extent inclines me to prefer Mr Seitler's construction.

64 Having been through all the arguments, I hope, which were addressed to me, I go back to the natural and ordinary meaning of the language and as I have already said, it does seem to me that Mr Seitler's construction reads more naturally than the slightly awkward way in which Mr Sefton's does. Since that is not only what strikes me as the more natural and ordinary meaning of the words, but is also consonant with all the other arguments which I have examined, in my judgment, the meaning of clause 23.1 is that it is a precondition of the tenant successfully being able to exercise the break clause that it gives vacant possession, but that it is not a condition that it yields up the premises in accordance with clause 11. I will make a declaration to that effect and hear counsel as to precisely what is required.

MR SEITLER: My Lord---- My Lord, first, both my learned friend and I are indebted for your Lordship having disposed of this in one day.

MR JUSTICE NUGEE: Well, so am I. I am very pleased not to have it hanging around.

MR SEITLER: It obviously-- it obviously helps the parties and-- and both sides are indebted for that. My Lord, I do not know whether your Lordship has had a chance to look at the form of declaration sought which is in the claim form.

MR JUSTICE NUGEE: Well, I saw that you wanted more than one but I could not really work out why. So I thought I would leave that.

MR SEITLER: It is slightly torrential drafting, to be honest. What---- There was-- there are three declarations sought. The first is-- is-- is a declaration subject to the claimant yielding up the premises with vacant possession. So the-- the purpose of the first one is to emphasise the vacant possession. The term is terminable by the term on 28 September 2019. The second one is on the true construction, neither 23.1 nor 23.2 require the tenant to yield up the premises in accordance with Clause 11. That is what-- that is what-- the central finding your Lordship has made. And then the third one is a nod to 23.3 to say that save for the tenant not being entitled to give the notice while it shall be in arrears of rent, the lease imposes no other conditions upon the tenant's ability to serve the notice nor upon termination of the lease in reliance upon above to serve notice. So it is quite full but we think it covers it.

MR JUSTICE NUGEE: Well, I think it more than covers it. The-- but---- Well, let me hear from Mr Sefton.

MR SEITLER: Yes.

MR JUSTICE NUGEE: Mr Sefton, do you object to a-- declarations in those forms?

MR SEFTON: My only concern is in relation to the second one and whether it----

MR JUSTICE NUGEE: Yes.

MR SEFTON: -- it shuts out the point that I was advancing in relation to *Riverside* because, of course, Clause 23.1 imposes the obligation to yield with VP.

MR JUSTICE NUGEE: Yes, and-- and I have deliberately not decided the----

MR SEFTON: Well-- well, quite.

MR JUSTICE NUGEE: -- either of the VP points, either the *Riverside* point or Mr Seitler's premises point. I am not sure that declaration 2 precludes that, but if you want to draft something which makes it clear that I am not deciding what the content of vacant possession is.

MR SEFTON: Quite.

MR JUSTICE NUGEE: I am just deciding that it is not a separate precondition you need to comply with Clause 11.

MR SEFTON: Mr Seitler and I could liaise on that----

MR JUSTICE NUGEE: Yes.

MR SEFTON: -- and we-- we will agree a form of----

MR JUSTICE NUGEE: Well-- and I will leave it to you to draft appropriate declarations----

MR SEITLER: Yes. So, my Lord, we----

MR JUSTICE NUGEE: -- with liberty to apply if you really cannot agree, but I do not----

MR SEFTON: We-- we will----

MR JUSTICE NUGEE: -- expect to be troubled, yes.

MR SEITLER: We will-- we will do a minute and-- and the object-- the purpose of the minute will be to ringfence and reflect the fact that your Lordship has decided neither the vacant possession point nor-- which is the *Riverside* point, nor the point about the date the----

MR JUSTICE NUGEE: Premises. The other vacant possession point.

MR SEITLER: The premises capital payment.

MR JUSTICE NUGEE: Yes.

MR SEITLER: That-- that will be the objective of the exercise. Thank you.

MR JUSTICE NUGEE: If you want to say something like I have not decided as to what vacant possession-- what the content of the obligation to give vacant possession is---- What I have decided is it is a precondition to give vacant possession. It is not a precondition you comply with Clause 11 as such, but I have not decided anything about what the content of the obligation to give vacant possession consists of.

MR SEITLER: Yes. So we may do that as a recital but we will think----

MR JUSTICE NUGEE: But-- but you can think about it, yes. As I say, I am sure that you can agree something sensibly. If not, you can have liberty to apply but I would hope that it is not necessary to----

MR SEITLER: Yes.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital
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