

# COMMERCIAL PROPERTY LEASE CONFERENCE

## Break Clauses - Case Notes

### Fulfilling the Pre-Conditions

*Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd & Anr*  
[2016] 4 All ER 441

**Facts:** M&S successfully exercised break clauses in four commercial leases on 25 January 2012, by fulfilling the conditions that there be no arrears of basic rent or VAT thereon and the payment of a prescribed fee. After the end of the service charge year, BNP credited M&S with the overpayment of the excess versus the estimated interim payments. M&S then sought to recover the two months of apportioned rent upto 25 March 2012.

**Held:** As s.2 of the Apportionment Act 1870 only applies to rent payable in arrears and rent is not apportionable in time in common law, M&S had to establish that the apportionment was an implied term of the leases.

At first instance Morgan J allowed the tenant's claim on the basis that the implied term gave effect to what the leases would reasonably be understood to mean.

The Court of Appeal and Supreme Court both disagreed with this approach. Where, as here, the lease was a full and carefully considered document, it could not be said that the contract was unworkable without the implied term.

*NYK Logistics (UK) Ltd v Ibrend Estates BV* [2011] EWCA Civ 683

**Facts:** In September 2008 NYK gave notice to exercise a break clause and end the term on 3 April 2009. In March 2009 Ibrend provided a schedule of terminal dilapidations, which NYK elected to carry out (compliance with the repairing covenants not being a pre-condition of the break option). The keys were not returned on 3 April.

Ibrend sought a declaration that the lease of a warehouse continued in reliance on (i) the maintenance of security at the premises by NYK, (ii) the presence of some equipment on site; and, (iii) the presence of NYK's contractors completing the repairs.

**Held:** The judge upheld ground (iii), as NYK had retained control of the premises for their own purposes. The Court of Appeal rejected NYK's argument that the landlord's agent agreeing to collect the keys (with knowledge that contractors were still there) operated as a waiver of the pre-condition to give vacant possession.

*Riverside Park Ltd v NHS Property Services Ltd* [2016] EWHC 1313 (Ch)

**Facts:** The landlord claimed that a break clause had not been validly exercised as vacant possession had not been given because certain “works” remained on the premises. These works included partitioning, kitchen units, blinds, floor coverings, an intruder alarm and water stand pipes.

**Held:** The items were chattels: they had been installed for the convenience of the tenant and were removable without injury to themselves or the fabric of the premises. Their presence was a substantial interference with RPL’s right to possession as the premises were not in a lettable condition.

In any event, had they been fixtures, the failure to remove them would still be in breach of the pre-condition because (i) the definition of the premises excluded tenant’s fixtures; and, (ii) on the proper construction of the lease, the partitioning did not become part of the demise.

Nb. The landlord accepted that, if the works were alterations or additions that had become annexed to the land, then there had been no request to remove them pursuant to the licence for alterations. However, the landlord argued that the obligation to reinstate had arisen as the licence had ceased to have effect for material breach.

## **Waiver**

*Avocet Industrial Estates LLP v Merol Ltd* [2011] EWHC 3422 (Ch)

**Facts:** Tenant tendered a cheque for the outstanding sums due the day before the break date and asserted that they had met the payment pre-conditions. The landlord did not respond. After the break date the landlord realised that £130 of default interest was due and sought a declaration that the lease continued.

**Held:** The tender of a cheque was effective, where in the course of dealings the landlord had accepted cheques in payment rather than requiring the tender of legal currency. The lease did not require the landlord to make a demand for default interest and the sums were properly due. Had there been evidence that Avocet had known of their tenant’s mistake, an estoppel would have arisen.

*MW Trustees Ltd v Telular Corporation* [2011] EWHC 104 (Ch)

**Facts:** On 10 August 2009 Telular formally served a notice to break the lease on 1 March 2010. It was sent by the prescribed means, but on the wrong person, the freehold reversion having been assigned to the Claimant. The notice was then sent informally to the landlord. On 17 August 2009 the managing agent’s confirmed that

they were happy for the lease to be broken, but asked that a copy of the letter be sent to a further address. This was not done.

**Held:** The landlord's agent had waived the right for strict compliance with the service mechanism alternatively the landlord was estopped from denying the validity of the break notice. The request to send a further copy was not a pre-condition of the break. Had the landlord simply acknowledged receipt of the notice, they would have been able to challenge its validity.

*Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2007] EWCA Civ 7

**Facts:** After service of a break notice, L&G served a schedule of dilapidations so that the tenant had notice of what would constitute 'substantial performance' of the repairing, redecoration and reinstatement covenants. The respective surveyors agreed a monetary value for those works, which included six weeks' loss of rent, and the parties entered into a settlement agreement. This provided that if the tenant paid £172k it would be released from its liabilities and covenants under the lease "*so far as the same relate to the state and condition of the Premises*". The tenant paid the agreed sum, but had not completely moved out by 30 December 2004.

**Held:** The Court of Appeal (Lloyd LJ dissenting) upheld Lewison J's decision that, in order to give business efficacy to it, the settlement agreement contained an implied term that the landlord waived the right to rely on the remaining conditions of the break clause to defeat the notices. It was the obvious but unexpressed intention of the parties where the settlement agreement included compensation for liabilities that would only arise on the termination of the lease (the reinstatement and loss of rent). The lease would come to an end whether or not the tenant gave vacant possession as required and any failure to yield up on time would sound in damages.

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November 2016