

Dreams Ltd v Pavilion Property Trustees Ltd and another [2020] EWHC 1169 (Ch)

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Facts

The claimant (D) was the current tenant under a lease which, following a deed of variation, ran until 2024. The lease contained a full tenant's repairing covenant and a tenant's covenant to remove its belongings and fixtures at the end of the term. The defendants (P) were the landlords under this lease.

D and P entered into an agreement to surrender the lease with vacant possession. This agreement gave each party the right, on six months' written notice, to require the surrender of the lease on certain days. Completion of the surrender was conditional on D paying 'any money due on completion'. In October 2018, D notified P of its wish to surrender the lease on 25 April 2019.

P refused to complete on the agreed completion date because some dilapidations identified in a schedule of dilapidations prepared on behalf of P after D's initial notice to complete remained outstanding. P calculated the cost of those works at £102,699 plus VAT and required payment of that sum in advance of completion. In addition, P argued that a mezzanine floor and lift installed by D were tenant's fixtures and should have been removed and that their continued presence prevented D from giving vacant possession at the completion date.

Issues

1. Was it a condition of completion of the surrender that D had to pay to P damages for any outstanding dilapidations under the lease?
2. Was it a condition of completion of the surrender that D had to give vacant possession even though it was not expressly set out as a completion condition in the agreement to surrender?

Decision

1. The phrase 'any money due on completion' meant a crystallised debt or payment obligation (e.g. rent or service charge) and not an unresolved claim for unliquidated damages for breach of a repairing covenant. A potential, but unresolved, liability under the general law to pay damages for breach of a repairing obligation would not naturally or ordinarily be called 'money due'.
2. In general, a buyer who has bargained to obtain vacant possession can refuse to complete until such possession is delivered.

In this case, the property was a retail unit and the parties would have expected P to wish to re-let it as soon as possible after completion of any surrender. A failure by D to deliver vacant possession could well operate to prevent or hinder that.

The performance of D's obligation to give vacant possession was a direct quid pro quo of its entitlement to complete the surrender. The bargain between the parties had involved, among other things, the transfer of the property with vacant possession in return for the acceptance of the surrender and the release of all liabilities under the lease. The two things were properly to be regarded as conditional obligations, with one being needed to earn performance of the other.

Points to note/consider

1. The first issue was important because the draft transfer attached to the agreement to surrender provided that D was released on completion from all liabilities, covenants and obligations under the lease. P argued that it made no commercial sense for D to be relieved of its repairing obligations if it surrendered its lease but liable to comply with them if the lease continued for its full term. The judge however rejected this argument on the basis that it is not the court's function through interpretation to remake bargains which later appear unwise or surprising (the court's task is to construe the contract the parties have reached, not to construct a reasonable contract for the parties).
2. On the second issue, the judge pointed out that his conclusion did not have the draconian consequences of immediately depriving D of its right to surrender the lease because, under a contract to convey land, time does not become of the essence (thus entitling a party to terminate it) until one or other of the parties serves a notice to complete (which had not yet happened here). Although this case predated the current situation, this issue does though highlight the difficulties that parties might experience in providing vacant possession (whether as a condition of a contract or a condition of exercising a break clause) whilst observing social distancing requirements.
3. At the same time as the parties entered into the agreement to surrender, they also entered into a deed of variation reducing the contractual term of the lease. Although it did not affect the outcome of the case, the judge commented in passing that this variation took effect as a deemed surrender and regrant. If that is correct (and case-law up until now suggests that only an extension of the contractual term or an addition to the property demised has that effect), it can have unforeseen and significant implications for the parties (e.g. a lease that was previously contracted out may now enjoy security of tenure under Part 2 of the Landlord and Tenant Act 1954).

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