



Quirkco Investments Ltd-v-Aspray Transport Limited (23/11/2011).

The Message: Tenant Break Clauses continue not to run smoothly.

The Case: The Court has, yet again, had to consider whether a tenant has successfully exercised a conditional break clause. In 2001, Aspray took a Lease of commercial premises in Castleford, West Yorkshire for a term of 15 years but with a right to break the Lease on 18 December 2010. The Lease provided that, in order to successfully terminate at that date, Aspray had to give not less than 9 months notice and there had to be no arrears or any material breaches of covenant at the break date.

On 8 March 2010, Aspray correctly served the break notice and it duly vacated by 18 December 2010 but Quirkco, its landlord, claimed that the break was ineffective as there were arrears and material repairing breaches at the break date.

Quirkco accepted that there were triable issues as to the extent of disrepair but it sought an immediate declaration the Lease was continuing on the basis that there were clearly insurance monies outstanding. The Lease put the obligation on Quirkco to arrange the insurance and provided that Aspray had to then pay its contribution within 14 days of demand of "such yearly sum as the Lessor may from time to time expend in insuring and keeping insured the demised premises".

The insurance was renewed with effect from 30 November 2010 and Aspray's contribution for the whole forthcoming year was £3,609.72. On 23 November 2010, Quirkco demanded payment of the premium for the whole year but Aspray made no payment as they considered that they should only be invoiced up to the break date so that they only had to pay insurance of £151.50 for 18 days occupation.

Unfortunately for Aspray, they made no payment before the break date and, according to Quirkco, the Lease therefore was to continue until 2015. However, Aspray argued the break was effective as no valid demand for their insurance contribution had ever been served as it could only have been lawfully demanded once Quirkco had paid the insurers and they had not made payment until January 2011. They further argued the breach was so trivial it should be overlooked anyway.

The Court therefore had to decide what was meant by the words "may expend from time to time in insuring"? Aspray argued the words should be given their literal interpretation so that the landlord had to have expended funds on insuring before it could recover any contribution from them. Quirkco argued that a commercial interpretation had to be applied so that all that was required was for it to have incurred the liability for the premium rather than having to have discharged such liability.

The Court found for Aspray. It did not think the word "may" meant that payment could be in the future but just reflected that, as at the time the Lease was entered into, the landlord's expenditure on insurance was both in the future and of an unknown amount.

The Court noted that the Lease required the landlord to produce a receipted invoice for the premium payment if the tenant required this and it considered this was consistent with its interpretation that payment had to have first been made before Aspray could become liable.

The other arguments raised by Aspray failed. The Court held that they did not have to be first noted on the policy and that there was no de minimis rule when it came to complying with the requirement for there to be no arrears. However trivial any amount outstanding was, that would be sufficient to invalidate the break.

Aspray also sought repayment of the rent paid for the whole of the period up to 24 December 2010 but the Court confirmed that rent payable in demand is not apportionable and, as modern leases now do provide, there has to be an express provision for rent to be repayable. The fact that the Lease provided for the annual rent to be paid proportionally for any part of the year only covered the first payment on Lease commencement and the last payment if the Lease expired on 17 December 2015.

So, the question of whether the Lease did terminate on 18 December 2010 remains uncertain and will now depend on whether Aspray was in material breach of its repairing obligations. If it was, then the Lease will continue for a further 5 years from the break date.