

## **For want of £130: Break clauses and strict compliance – again!**

### **Case update**

On 19 December 2011, Mr Justice Morgan gave judgment in *Avocet Industrial Estates LLP v Merol Ltd & anor.*

As we often explain, most court decisions can be described as fact sensitive. Nonetheless, there can be themes of general interest. This case is no different. It also serves as yet another reminder of the need to take great care when trying to break a lease or to deny a break has taken place.

In the end, the tenant did not successfully break the lease, because it had not paid a sum for interest that might amount to no more than £130.

In very brief summary, Merol had a lease of 10 years, with an option to break it after 5 years. The break clause required, among other things, that at the break date any payment under the lease should have been paid and so should a “penalty” sum. If those payments were not made at the break date, then the lease would continue. There was a similar provision in relation to repairs – the lease would not end if there was a subsisting material breach of the tenant’s covenants relating to the property’s state and condition.

While the break clause was reasonably onerous for the tenant, one does encounter clauses even more fearsome requiring, for example, total compliance with the repairing obligations.

The tenant served a valid break notice in good time. It sought confirmations from the landlord about compliance with the lease and, in the run up to the break date, handing back possession. The landlord did not really engage with any of that correspondence.

While there was an issue about the amount of rent payable under the lease and about the condition of the property, nothing ultimately turned on that.

The two issues were whether the tenant had made the required “penalty” payment often required as part of the price for breaking the lease early and whether it had an obligation to pay interest on monies paid late.

In relation to the first of those issues, the point turned on whether the tenant was entitled to make the payment by cheque, as it had sought to do at a point in time when it would not clear before the expiry of the break date. The answer is fact sensitive and depended on the course of dealing between this landlord and this tenant and various communications between them. The judge agreed that in this case the tenant was able to make the required payment by cheque.

However, the tenant failed on the second issue.

The lease required payment of interest where payments under it were late. That is not unusual. The argument by the tenant was that it did not have to pay interest until the landlord demanded it, thereby informing the tenant what was due. The landlord contended that no demand was necessary for the tenant to make the interest payments.

Of course, the tenant put forward other arguments to try to retrieve the position.

The judge totted up what he thought the relevant interest in this case might amount to - c.£130.

Again the outcome is the result of detailed judicial analysis of the lease and facts in question.

Even though he described the lease terms in relation to this issue as representing a trap for the tenant and the outcome harsh, he concluded that the tenant had an obligation to pay interest that was not dependent on demands for it being made by the landlord and the landlord was not prevented from relying on non-payment of interest.

So, the break did not operate and the lease will continue at a rent vastly in excess of the £130 interest.

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