

Sweet Dreams or a Nightmare? (A case law update with no mention of Covid-19)

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Rosalind Cullis

The case of Dreams Limited v Pavilion Property Trustees Limited and (2) Pavilion Trustees Limited serves as a reminder of the need for clear drafting and a full understanding of the parties' expectations when negotiating terms of a surrender.

Dreams was tenant of retail premises in Margate, Kent and had entered into an Agreement for Surrender with its landlord, Pavilion, pursuant to which each party could give 6 months' notice to require the surrender of the lease on certain specified dates. The other relevant terms of the surrender provided that a) it was a condition of completion that the Tenant pay 'any money due on completion' b) the surrender was with vacant possession and c) that 'Up to and including Actual Completion all rents and other monies due under the Lease remain payable', with such sums to be apportioned. Completion of the surrender would take place by execution of a Transfer incorporating the Standard Commercial Property Conditions, the form of which was attached to the Agreement and provided that Dreams would be released from past, present and future liabilities. The lease itself under which Dreams occupied the premises contained standard repairing and yielding up obligations and requirements to pay rent, service charge and insurance charges.

In October 2018 Dreams gave notice to surrender the lease on 25 April 2019. A schedule of dilapidations was duly served by Pavilion claiming approximately £173,000 in damages and requiring Dreams to surrender the premises in the condition required by the schedule. Dreams disputed liability, relying on the release from all liabilities envisaged in the draft Transfer. Pavilion countered that the monies due on completion of the surrender included the damages claim and that it would not complete the surrender unless payment was made in full. This is what transpired and therefore Dreams issued proceedings seeking specific performance of the Agreement but, first, two preliminary issues of construction of the Agreement had to be determined. Firstly, whether it was a condition of completion that Dreams pay Pavilion damages in respect of its dilapidations liability. Secondly, whether Dreams was obliged to give vacant possession before Pavilion could be obliged to accept a surrender.

In finding the first issue for Dreams, the judge placed importance on the need to interpret the words 'any money due on completion' in their contractual setting and context - the 'language always takes its colour from the situation in which it is used'.

Whilst 'any money due' might in some contexts be broad enough to include a damages claim, in this case, considering various aspects, he considered it meant a crystallised liability particularly as payment was a precondition of completion. The inclusion of the word 'any', as Pavilion sought to argue, did not change this. Pavilion also pointed to the fact that it made no commercial sense for Dreams to be released from such liability upon early surrender but not if it occupied for the full lease term. Relying on clear guidance from recent cases on contractual interpretation, the judge said it was not the court's function to 're-make bargains which may later appear un-wise'.

As to the second issue, this concerned whether Dreams had to give vacant possession before Pavilion was obliged to accept the surrender. Dreams argued that the Agreement did not expressly provide for this and that Pavilion could be compensated in damages. The judge, ultimately, preferred Pavilion's argument that the Agreement was a contract for the conveyance of an interest in land (which incorporated the Standard Commercial Property Conditions) and that, under the general law, where a seller has undertaken to deliver vacant possession, the purchaser is not required to complete if the seller is willing or unable to give vacant possession. He noted that this finding was also supported by commercial common sense given that the premises comprised a retail unit which the parties would expect the Defendant to want to re-let as soon as possible after completion. Failure by the Dreams to give vacant possession could hinder this.

With these points of construction resolved, the parties can focus on the remaining issue in dispute, namely whether, by failing to remove a lift and mezzanine floor which it installed, Dreams has failed to give vacant possession.

For further information please contact:

Rosalind Cullis
Real Estate Disputes Partner
T: 020 3465 4325
E: rcullis@maplesteesdale.co.uk