Ibrend Estates BV v NYK Logistics (UK) Ltd

[2011] EWCA Civ 683

COURT OF APPEAL, CIVIL DIVISION

WARD, MOORE-BICK AND RIMER LJJ

8 MARCH, 16 JUNE 2011

Landlord and tenant – Lease – Option to determine – Break clause – Vacant possession – Notice under break clause effective where tenant had delivered up vacant possession – Meaning of vacant possession.

The tenant rented commercial premises from the landlord. Under the terms of the lease the tenant was entitled to terminate the lease under a break clause, provided that it gave the landlord six months' previous written notice, and provided that it had paid all the rent up to the break date and had delivered up vacant possession of the property on that date. The tenant gave valid notice of its wish to end the term. However, two days before the break date it became apparent that some of the tenant's repairing and redecorating obligations under the schedule of dilapidations remained outstanding. The tenant wished to make the repairs itself and therefore proposed extending its occupation of the premises for a further week in order to finish the works, on terms that it would pay the continued security costs for the premises, although no more rent and rates, and it offered to hand over the keys so the landlord had full access. Although the tenant had no response from the landlord, the tenant's workmen entered the premises the week after the break date to complete most of the work. The landlord subsequently sought a declaration that the lease had continued after the break date and claimed payment of rent due since that date on the basis that the tenant had failed to give vacant possession. The judge found that workmen remained on the premises for the tenant's own purposes, namely for the purpose of carrying out the further repairs that it was in its interest to complete, and so the tenant had not given vacant possession. The tenant appealed on the ground, inter alia, that the judge should have asked himself whether such continuing use and occupation as it made of the premises following the break date was a substantial hindrance, impediment or interference, or was inconsistent, with the landlord's right immediately to occupy the premises and enjoy them beneficially.

Held – Where a tenant wished to exercise a break clause under a lease which required him to deliver up vacant possession of the premises to the landlord, the concept of vacant possession was the same as it was in every domestic and commercial sale in which there was an obligation to give vacant possession on completion. It meant that at the moment vacant possession had to be given, the property was empty of people and that the purchaser was able to assume and enjoy immediate and exclusive possession, occupation and control of it. In addition, the premises had to be empty of chattels, although that requirement was likely only to be breached if any chattels left in the property substantially prevented or interfered with the enjoyment of the right of possession of a

substantial part of the property. In the instant case, therefore, the tenant had not delivered vacant possession of the premises. The appeal would accordingly be dismissed (see [44]–[45], [48]–[50], [57]–[59], below).

Cumberland Consolidated Holdings Ltd v Ireland [1946] 1 All ER 284 applied.

Royal Bank of Canada v Secretary of State for Defence [2004] 1 P & CR 448 and *Legal and General Assurance Society Ltd v Expeditors International (UK) Ltd* [2007] 1 P & CR 103 considered.

Notes

For completion: vacant possession, see 42 *Halsbury's Laws* (4th edn reissue) para 123.

Cases referred to in judgments

Cumberland Consolidated Holdings Ltd v Ireland [1946] 1 All ER 284, [1946] KB 264, CA.

Engell v Fitch (1869) LR 4 QB 659, Ex Ch.

Hynes v Vaughan (1985) 50 P & CR 444.

Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871, [1971] AC 850, [1970] 3 WLR 287, HL.

Legal and General Assurance Society Ltd v Expeditors International (UK) Ltd [2006] EWHC 1008 (Ch), [2007] 1 P & CR 103.

Matthews v Smallwood [1910] 1 Ch 777, [1908–10] All ER Rep 536.

Norwich Union Life Insurance Society v Preston [1957] 2 All ER 428, [1957] 1 WLR 813.

Royal Bank of Canada v Secretary of State for Defence [2003] EWHC 1479 (Ch), [2004] 1 P & CR 448.

Royal Bristol Permanent Building Society v Bomash (1887) 35 Ch D 390.

Appeal

The defendant, NYK Logistics (UK) Ltd, appealed with permission from the decision of Judge Bullimore in the Sheffield County Court on 28 September 2010, granting the declaration sought by the claimant, Ibrend Estates (BV), that a commercial lease continued after the defendant purported to exercise a break clause and that the defendant was liable to rent due after 2 April 2009. The facts are set out in the judgment of Rimer LJ.

Dermot Woolgar (instructed by *Franklins Solicitors LLP*, Milton Keynes) for NYK.

John de Waal (instructed by *Reed Smith LLP*) for Ibrend.

Judgment was reserved.

16 June 2011. The following judgments were delivered.

RIMER LJ (giving the first judgment at the invitation of Ward LJ).

INTRODUCTION

[**1**] This appeal is by NYK Logistics (UK) Ltd (NYK), the defendant in the proceedings. The respondent (the claimant) is Ibrend Estates BV (Ibrend). NYK's appeal is against an order dated 28 September 2010 made in Sheffield County Court (although the claim had been issued in Rotherham County

Court) by Judge Bullimore, who also gave permission to appeal. NYK was represented before us by Dermot Woolgar, and Ibrend by John de Waal, both of whom also appeared below.

[**2**] NYK is a former lessee of a warehouse owned by Ibrend. NYK claimed that it had terminated the lease on 3 April 2009 by exercising a right under a break clause. Ibrend disputed that NYK had validly exercised the break option, asserting that it had failed to give vacant possession on 3 April 2009, a condition of its exercise. If Ibrend was right, it was agreed that the lease continued after 3 April 2009 until 25 December 2009, when it was terminated following the exercise by NYK of a further break option (which was exercised without prejudice to its claim that the lease had already terminated).

[**3**] By its claim, Ibrend sought a declaration that the lease had continued after 3 April 2009 and claimed payment of the rent due since then (which had been paid by NYK also on a without prejudice basis). By its defence and counterclaim NYK denied that the lease had so continued and claimed repayment of the rent it had paid (a claim which was not disputed if NYK was correct that it had validly exercised the break option).

[**4**] The judge found that NYK had not given vacant possession on 3 April 2009 and so had not validly exercised the break option. He also rejected NYK's alternative case that Ibrend had waived its right to claim that it had not been validly exercised. NYK challenges both limbs of the judge's decision.

THE FACTS

[**5**] Ibrend is a Netherlands investment company that owns several properties in the United Kingdom. At the material time they included warehouse premises known as Mangham 2, Barbot Hall Industrial Estate, Rotherham (the warehouse). Commercial Estates Group Ltd (CEG) managed Ibrend's properties; and Paul Richardson, CEG's asset manager, had relevant involvement with the warehouse. Neil Leetham, a chartered surveyor with Savills Commercial Ltd, also acted for Ibrend in relation to it.

[**6**] The warehouse premises occupy an area of some 80,000 sq ft and include a building three or more storeys high and a two-storey office block. They also include a large tarmac yard that was surrounded during most of the relevant time by a temporary security fence. There was a Portakabin at the entrance to the yard from which security checks would be made on vehicles passing in and out. The local area was said to suffer from vandalism and theft.

[**7**] NYK is a business providing haulage and storage services. It holds a number of commercial properties, usually on lease. It is a former lessee of the warehouse. Its original interest in it was as an assignee of a ten-year lease dated 6 April 2003. It had taken the assignment in order to meet the needs of a continental sweet manufacturer. Those needs ceased and so NYK exercised its right to terminate the lease. They then, however, re-arose and NYK negotiated with Ibrend a new lease of the warehouse. It was dated 3 April 2008 and incorporated the provisions of the old lease save as varied by the new one. The term of the lease was two years from and including 3 April 2008 and the yearly rent was £278,000.

[**8**] The schedule to the lease included two tenant's break clauses. The first entitled NYK to terminate the term on 3 April 2009. If that option was not exercised, the second entitled NYK to terminate the term at a subsequent date. The terms of the first break clause, the material one, were as follows:

'3.1 If the Tenant shall wish to determine the term hereby granted on 3rd April 2009 (the "first date of determination") then the Tenant shall give the Landlord not less than 6 months previous notice in writing to that effect and in such event upon the first date of determination the term hereby granted shall cease and determine but without prejudice to any claim by any party against the other in respect of any antecedent breach or claim under these presents provided that the Tenant must on the first date of determination:–

(a) Have paid all the rent due under these presents up to an [sic] including the first date of determination without deduction; and

(b) Have delivered up vacant possession of the Premises

And in the event that the above conditions have not been satisfied on or before the first date of determination then unless (at the Landlord's discretion) the Landlord waives the conditions the term hereby granted shall not cease and determine.'

The dispute turned primarily on whether NYK, in its claim to have exercised the break option, had satisfied condition 3.1(b) by giving vacant possession of the warehouse to Ibrend on 3 April 2009. If it had not, there was a secondary issue as to whether Ibrend had waived its right to claim that condition 3.1(b) had not been satisfied. That argument was not based on the provisions of the coda to para 3.1 but on general principles. I must now summarise the facts that the judge found leading up to and following 3 April 2009.

[**9**] NYK gave a valid notice to Ibrend on 26 September 2008 of its wish to end the term on 3 April 2009. In January 2009 Ibrend, via CEG, instructed Savills to prepare a 'terminal' schedule of dilapidations. It was prepared in January and was reviewed by Mr Leetham. Its preparation overlooked, however, a provision in the lease that, by reference to a schedule of condition, limited the standard to which the repairs and decorations needed to be performed.

[**10**] Savills' schedule was passed to NYK on 11 March. There was no explanation for the delay in doing so, even though everyone knew of the 3 April deadline. NYK passed it to David Louch, of Douglas Luff Ltd, its chartered surveyors. Mr Louch e-mailed Mr Leetham on 23 March, pointing out that the schedule had not been prepared with reference to the schedule of condition but also explaining his response to it. He wrote: 'In short my client will yield up the premises substantially (if not totally) in compliance with its lawful obligations.' He proposed a site meeting before the end of the tenancy 'to review the position and the works which NYK are in the process of completing' and suggested a meeting on Thursday 26, Friday 27 March or any day the following week. Mr Leetham replied on 26 March, agreeing to a meeting on Wednesday 1 April, which was just two days before the lease was due to end. Mr Louch's evidence was that NYK liked to do any necessary repairs itself and that he advised it that it would generally be better off if it extinguished the liability for dilapidations before handing the premises back. NYK knew that there could be a liability for dilapidations. Robin Tate, its fleet engineer, also gave evidence that NYK preferred to do any repairs itself: it could thereby control the cost and quality of the work.

[**11**] The meeting duly took place on 1 April. In addition to Messrs Leetham and Louch, it was attended by Mr Tate. Only Mr Louch had what the judge called a 'usable' copy of the schedule of condition. Mr Leetham conceded at the meeting that Savills' schedule had been prepared on an incorrect basis.

Whilst the two surveyors agreed that NYK had substantially complied with its repairing and redecorating obligations, they also agreed that there were still some outstanding items of repair, some of which were first identified at the meeting, although the judge found that 'there was uncertainty about the extent of some roof repairs and repairs to certain windows'. That was apparently because they were unable to gain access to the relevant parts in order to carry out an inspection. The judge also found that it was clear that the outstanding matters could not be dealt with by Friday 3 April (just two days later) but could be completed shortly afterwards. He found yet further that by 1 April the warehouse was empty of NYK's fixtures, fittings, furniture and stock save for a small quantity of items that would easily fit into a small van. In addition, NYK had removed the temporary security fence around the tarmac yard.

[**12**] Mr Tate asked Mr Leetham at the meeting how long NYK had in order to complete the outstanding repairs, to which Mr Leetham replied 'technically two days—ie until the 3rd', meaning 3 April. Mr Tate then suggested to him that there should be a week's extension to allow NYK to complete the works and offered to continue to pay for security guards for that period. Mr Leetham saw the sense of that. There was a dispute at the trial as to how that matter was left. NYK's case was that Mr Leetham was to take Ibrend's instructions, whereas Mr Leetham contended that it was for NYK to take the matter up with Ibrend. The judge did not resolve that dispute by his findings but that omission was not material because it was neither side's case that any agreement on the matter was concluded between Ibrend and NYK. Whatever way forward might have been agreed, no new tenant was due to come into the warehouse on or after 4 April and so that would not have been a relevant consideration.

[**13**] On Thursday 2 April, at 9.42 am, Mr Louch e-mailed Mr Leetham (and copied it to Mr Tate), saying this:

> 'I did manage to inspect the roof yesterday having bunged the collection driver a fiver to give me a lift. It was a bid [sic] hairy at full stretch but I saw all that I needed. I will need to speak to you further on the condition of the plastisol coating and the incidence of spot corrosion.
>
> I also have some more information on the racking.
>
> As agreed yesterday there were a number of (relatively minor) defects which [Mr Tate] has agreed to undertake and indeed this would seem to be the most pragmatic way of achieving a resolution. However time is now pressing so we have a proposal that NYK will fund the existing security cover for the building for a further week during which time his tradesmen will be able to deal with the remaining items. NYK would not however pay rent/rates etc but we would hand over the keys on the due date so your client has full access.
>
> Can you come back to me on this today, please? As I will not be in the office this afternoon can you also copy [Mr Tate] into your response? …'

[**14**] Mr Leetham forwarded that e-mail to Mr Richardson at CEG at 10.13 am on the same day, saying in his message that—

> '[a] small number of works are still outstanding which they would like to attend to and have put forward a proposal for your consideration in the [forwarded] email … In the meantime if you could confirm your position as to the [forwarded] proposal I will revert to the tenant accordingly.'

There was no further communication between Ibrend and NYK, or their agents, on 2 April.

[**15**] Friday 3 April arrived, the day when NYK had to give vacant possession to Ibrend: it had to be out by midnight. Mr Louch telephoned Mr Leetham, who told him that he had not yet heard from Mr Richardson. Having had no positive response from Mr Leetham, Mr Louch tried twice, without success, to speak to Mr Richardson direct. He then e-mailed him at 5.22 pm, copying it to Mr Tate, to Mr Bent (NYK's head of commercial contracts) and to Mr Leetham, and saying:

> 'I have been attempting to contact you today to make arrangements for the handover of keys and to take final meter readings etc as this is the last day of my client's tenancy but as this is now unlikely I would be grateful if you would contact me as soon as possible next week.
>
> I met on site with Neil Latham [sic: should be Leetham] on Wednesday, following which I sent the attached mail which should be self-explanatory. I gather also that he has been unable to make contact with you.'

The attached e-mail was the one he had sent Mr Leetham at 9.42 am on 2 April (see [13], above).

[**16**] At 11.26 am on 3 April, Mr Tate sent Mr Bent the list of outstanding works agreed during the meeting on 1 April. There were 29 agreed items but the list also referred to there being a dispute about '7 double glazed units'. Sixteen of the listed items had been completed by 3 April. Mr Louch's evidence was that the 13 remaining items would require two to three days of intensive work. A cherry picker was needed in order to gain access to the roof.

[**17**] On Monday 6 April NYK's contractors entered the warehouse in order to carry out the remaining repairs. They worked on the repairs over 6–9 April. On 8 April they did work on the roof, using a cherry picker which they had brought.

[**18**] On Tuesday 7 April, at 9.14 am, Mr Bent e-mailed Mr Richardson about the keys. He said that Mr Louch had advised him (Mr Bent) that he (Mr Louch) had tried to return the keys to Mr Richardson, whom he had tried to e-mail and call but without response. Mr Bent asked Mr Richardson to advise him what he wished to happen to the keys. Mr Richardson telephoned Mr Bent two hours later, acknowledged that he had had a number of messages and asked for a name and contact number of the key holder in order to arrange for the collection of the keys. Mr Bent replied that he would check who held them and at 5.01 pm e-mailed Mr Richardson that it was Mr Tate and provided his contact details. The judge found that during this conversation, contrary to Ibrend's case, Mr Richardson did not ask Mr Bent to confirm that the warehouse was vacant.

[**19**] At 5.03 pm Mr Richardson telephoned Mr Tate to make arrangements to collect the keys and said he would arrange for a lady who would be in the area the following day (Wednesday 8 April) to contact Mr Tate to arrange their collection. During this conversation Mr Tate told Mr Richardson that 'some minor finishing off and cleaning up' was in the process of completion. Mr Tate asserted that this was said *before* the lady was mentioned. Mr Richardson said that it was *after* and that it came as a complete surprise. The judge was asked to make a finding as to whose account he preferred. He said it was not possible for him to do so and made no such finding.

[**20**] In the event, no one on behalf of Ibrend contacted Mr Tate on 8 April. The judge inferred, no doubt correctly, that following his conversation with Mr Tate, Mr Richardson had sought advice from Ibrend's solicitors, Reed Smith LLP. Mr Richardson went to the warehouse on 8 April where he spoke to

the security guard, but did not go in: the security guard was cautious about giving him access and Mr Richardson did not press his right of entry as Ibrend's representative. On Friday 9 April, at 8.55 am, Mr Tate e-mailed Mr Richardson (copied to Mr Bent) saying that he had not been contacted by 'your lady yet re handover of keys'. He added that NYK—

> 'have security on site until tomorrow, you will need to make arrangements after that. If you do not the site will almost certainly be wrecked very quickly. Please advise your intentions asap.'

[**21**] Mr Richardson did not respond to Mr Tate but did e-mail Mr Bent at 10.15 am. He attached a letter from Ibrend's solicitors dated 8 April and addressed to Mr Bent. It referred to the break option and its purported exercise and continued:

> 'As you are aware, it is a condition of exercising the right to break that you pay all rents due and give vacant possession of the premises by the 3 April 2009. We are advised that the latter has not been complied with and that your representatives still remain on the premises. In the circumstances, the lease has not been effectively determined and you therefore remain liable for payment of rents and compliance with covenants until lease expiry.'

[**22**] Mr Bent sent a prompt response at 10.54 am, saying that he had forwarded the letter to NYK's solicitors but that:

> 'In the meantime I must say that this is outrageous, the site is vacant possession [sic]. We have tried to return the keys on several occasions to no avail—as you are aware, given you were contacted on several occasions but did not respond—!!
>
> We have maintained a security presence as agreed—this helps the landlord given the area and likelihood of vandalism.
>
> Please advise where the keys need to be returned—if I do not have a response then these will be returned to your office.'

Mr Richardson's response at 12.56 pm was that Ibrend stood by its solicitors' advice that 'the break is now invalid' and that it would not accept the keys.

[**23**] NYK's workmen remained in the warehouse until 9 April, by when they had completed a further 11 of the remaining 13 of the 29 agreed items of disrepair. The works included the removal of redundant floodlight brackets, repairing holes in brickwork created by the removal of air-conditioning equipment, pointing of mortar on demarcation kerbs, renewal of dock buffers, fixing bent plates, removing redundant clips from light fittings, replacing two ceiling tiles and a light tube, repairing some 30 metres of expansion joint in the warehouse, repairing six light units in the small warehouse, repairing leaks to roof valley gutters and putting in a new cistern and cover in a WC. Two of the 29 agreed items (13 and 29) were not carried out.

THE JUDGE'S DECISION

[**24**] Ibrend's case was that NYK had failed to give vacant possession by 3 April and so had not satisfied the condition in para 3.1(b) of the break clause, an omission meaning that it had not validly exercised the break. The lease therefore continued. Its case was not based on NYK's failure to hand over the keys, but upon (i) the maintenance of security by NYK at the warehouse after 3 April and the alleged prevention of Mr Richardson from access to the

warehouse on 8 April; (ii) the retention in the warehouse after 3 April of the admittedly small quantity of NYK's equipment; and (iii) the retention of contractors in the warehouse from 6 to 9 April for NYK's own purposes, that of completing the repairs required by the schedule of dilapidations. *a*

[**25**] In addition to his main judgment of 22 June 2010, the judge delivered a supplemental judgment on 29 July 2010. There was a good reason for that but there is no need to explain it. He rejected the latter limb of ground (i) on the basis that the evidence did not prove that Mr Richardson was denied the entry to the warehouse to which he was entitled. He did not address himself expressly to the first limb of ground (i). He rejected ground (ii) on the basis that anything still left in the warehouse after 3 April was 'plainly de minimis'; that it was 'not clear that NYK were keeping any items on the premises for their own purposes'; and that there 'is nothing to show NYK had any of their items on site after 3 April which they were keeping there until it was convenient to move them'. *b* *c*

[**26**] That left ground (iii), one based on the retention of people in the warehouse rather than the retention in it of property that should have been removed. The judge upheld Ibrend's case on this ground. He said: *d*

> '60. … NYK are in the unhappy position of having to ride two horses, or at least one-and-a half, namely that they gave vacant possession, and also that they remained on site in the belief they had a degree of or informal permission or agreement to do so. Their presence was by no means great—and I prefer Mr Tate's evidence on how many men were on site [which was that there were "just a couple of chaps on site" in the week commencing 6 April] and Mr Louch's evaluation of how much was to be done in that week [which was that what was required to finish the outstanding items was two to three days of intensive work], rather than Mr Richardson's, whose information was less, and second-hand—but it was in essence for their own purposes. There was nothing to stop them clearing out on 3 April, and leaving any dispute about unrepaired items to be resolved thereafter. Ibrend could not have complained if they had done that. There was no obligation on NYK to complete any works before quitting, only to pay rent up to date and give vacant possession. This is not a conclusion I have come to happily or lightly, and I am well aware that Ibrend's interests were not in fact affected at all. NYK however remained in possession simply for their own purposes.' *e* *f* *g*

[**27**] The judge turned to NYK's alternative defence, based on waiver. That case was that Mr Richardson's statement to Mr Tate on 7 April that he would send someone around for the keys was consistent only with Ibrend acknowledging that the lease had been terminated. Only on that basis was it entitled to the keys and it was said that it was necessarily accepting that vacant possession had been given. *h*

[**28**] The judge held that there had been no waiver. Mr Richardson first learned on 7 April, from his conversation with Mr Tate, that there were workmen on the site, a matter sprung on him. Whether he learned that before or after what he had said about collecting the keys (as to which the judge made no finding), anything he said without pause for reflection should not be held against Ibrend. Whether there had been a failure to give vacant possession required investigation and advice. The judge's view (para 68) was that Mr Richardson— *j*

> 'needed time to digest what he had been told, investigate and take advice. To make arrangements for recovering of the keys on the following day through a colleague, does not seem to me an unequivocal assertion that (if) there had been a breach (which of course NYK have been at pains to deny), that it was being waived.'

[**29**] The judge also observed that the waiver point was NYK's fall-back argument. Its primary case was that it *had* given vacant possession on 3 April, despite the continued presence after that date of its workmen in the warehouse. The waiver argument required an understanding by Mr Richardson during the telephone conversation with Mr Tate that in fact NYK had *not* given vacant possession; and that, in making the arrangements that he discussed in relation to the keys, he was acting on the basis of that understanding. The judge said in paras 9 and 11 of his supplemental judgment:

> '9. If it had been put to Tate at the time: so you're not giving us vacant possession (because of the presence of security and the workmen on site), that would have been met with a spirited denial. That was not such an obvious and clear position, as [NYK's] stance at the trial underlines, that Richardson must have understood vacant possession had not been given, so that to ask for the keys in those circumstances would say in effect, never mind you have not complied with the terms for breaking the lease, we will accept possession from you …
>
> 11. Again this is all put forward as a later interpretation of the course of events. Richardson may well have been aware of [Ibrend's] right to waive the condition that vacant possession be given, but this was not a case of tenants accepting they were in breach and seeking indulgence, quite the contrary. There is nothing in the evidence which suggested that Tate believed any breach was being forgiven; Tate firmly believed there was no such breach. Until Richardson realised that what he had been told did amount to a failure to give vacant possession—or at least until a reasonable man in his position and aware of the surrounding circumstances that Richardson himself would have known of, would have done so—then no waiver could occur. As at the end of the telephone conversation, I find that Richardson was not in that position.'

[**30**] NYK therefore failed in its assertion that it had terminated the lease on 3 April. The judge gave Ibrend judgment on its claim, declared that the lease did not determine until 25 December 2009, dismissed NYK's counterclaim and ordered it to pay the costs of the claim and counterclaim.

THE APPEAL

[**31**] Mr Woolgar, for NYK, challenged the judge's conclusion on both the vacant possession and the waiver points. I take the vacant possession point first.

(*a*) *Vacant possession*

[**32**] The judge held that NYK had failed to give vacant possession to Ibrend on 3 April because its workmen continued after then to occupy the warehouse for the purpose of finishing off some items of repair, a continued occupation which was simply for NYK's own purposes. Mr Woolgar submitted that his decision was both unjust and wrong. He said it was unjust because NYK had done all it could on 2 and 3 April to reach agreement with Ibrend's surveyors as to the basis on which it might continue in occupation for the purpose of

carrying out the relatively modest remaining repair works, which would be for Ibrend's benefit, yet despite its best endeavours it received no response to its proposals. Whilst NYK could, given such lack of response, have taken the cautious approach of leaving the warehouse on 3 April and returning the keys to Ibrend, it did not do so. It was, however, unjust that the modest repairing activities in which it engaged over the following days should be held to have resulted in a failure by it to have given vacant possession on 3 April.

[**33**] Mr Woolgar accepted that his complaint about the claimed injustice of the judge's order was not sufficient to get NYK home. But he also submitted that the judge's decision was wrong. He accepted that, down to midnight on 3 April, NYK had been in possession of the warehouse as tenants. He was unable to point to any act performed by NYK over the following days that evinced a delivery by it of possession to Ibrend. He accepted that after 3 April NYK continued to maintain the security guard in place and to control the access to the warehouse and that, at the very least, it remained in occupation of it with what he called 'a degree of factual possession'. On the assumption (necessary for the purpose of NYK's argument) that the lease had determined at midnight on 3 April, he said that NYK afterwards remained in occupation of the warehouse as a trespasser, although not as a trespasser with any intention to possess. By that he meant that NYK had no intention of excluding Ibrend from access to and occupation of the warehouse.

[**34**] Whilst accepting that NYK therefore maintained such a presence in the warehouse after 3 April, Mr Woolgar submitted that, in disposing of NYK's case in the way he did, the judge asked himself the wrong question. The right question for the judge to have asked himself was whether such continuing use and occupation as NYK made of the warehouse following 3 April was a substantial hindrance, impediment or interference, or was inconsistent, with Ibrend's right immediately to occupy the warehouse itself and enjoy it beneficially. If the answer to that question was no, there was no failure to give vacant possession. He said the question required a practical answer by reference to what would have happened on the ground if, during the six days following 3 April, Ibrend had sought to occupy and enjoy the warehouse.

[**35**] Mr Woolgar's submission was that the answer was that Ibrend would have suffered no such hindrance, impediment or interference in its occupation and enjoyment of the warehouse. NYK's continued use was minimal, for the single and restricted purpose of completing the remedial works recently agreed between both sides' surveyors. It was a use (i) that involved no claim by NYK to beneficial occupation, (ii) was capable of immediate cessation, and (iii) the continuance of which was always implicitly dependent upon Ibrend's response to what Mr Woolgar described as the objectively reasonable proposal that Mr Tate had made at the meeting on 1 April and that Mr Louch had repeated in his e-mail of the morning of 2 April. That was a reference to the proposal to Mr Leetham that NYK should continue to provide security at the warehouse for a further week whilst it carried out the remaining works that needed to be done. NYK was, Mr Woolgar submitted, reasonably entitled to assume that its proposal would be accepted. But if it had not been accepted, and Ibrend had turned it down and demanded control of the warehouse, NYK would have complied. That, said Mr Woolgar, was apparent from NYK's e-mails up to and including 3 April. His submission was, therefore, that NYK's continued occupation of the warehouse was always conditional upon, and subordinate to,

Ibrend's wishes. The problem arose simply because Ibrend's agents did not respond to NYK's proposal and so left it in the invidious position in which it found itself on 3 April.

[**36**] Mr Woolgar's further submission was that if the judge did ask himself the right question, he answered it incorrectly since it was wrong to regard NYK's continued occupation of the warehouse as 'for its own purposes'. As, Mr Woolgar submitted, such use was not inconsistent with Ibrend's right to undisturbed occupation of the warehouse, the judge's characterisation of the nature of NYK's continued use of the warehouse was unsound.

[**37**] These submissions were founded upon the basis that the principles as to the performance of an obligation to give 'vacant possession' are to be found in the decision of the Court of Appeal in *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 All ER 284, [1946] KB 264, to which I must refer. The case followed the completion of the sale of a disused warehouse, a special condition of the contract having provided that the property was sold 'with vacant possession on completion'. Cellars under the warehouse were rendered unusable by reason of rubbish left in them on completion, including many sacks of hardened cement. The purchaser's claim against the vendor was for damages for breach of the special condition. The county court judge awarded the purchaser damages of £80 odd, the cost of having the rubbish removed.

[**38**] The judgment of the court dismissing the appeal was delivered by Lord Greene MR. The court's reasoning was based on what were, on the face of the judgment, two different grounds. The first ground was as follows ([1946] 1 All ER 284 at 287, [1946] KB 264 at 270):

> 'Subject to the rule *de minimis* a vendor who leaves property of his own on the premises on completion cannot, in our opinion, be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, *sc*, as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment.'

[**39**] Lord Greene MR explained the second ground as follows:

> 'But there is, we think, a quite different ground upon which the judgment under appeal can be supported. The phrase "vacant possession" is no doubt generally used in order to make it clear that what is being sold is not an interest in a reversion. But it is not confined to this. Occupation by a person having no claim of right prevents the giving of "vacant possession," and it is the duty of the vendor to eject such a person before completion: see [*Royal Bristol Permanent Building Society v Bomash* (1887) 35 Ch D 390 at 395 and *Engell v Fitch* (1869) LR 4 QB 659]. The reason for this, it appears to us, is that the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment to which the purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser. It is true that in each case the purchaser obtains the right to possession in law, notwithstanding the presence of the impediment. But it appears to us that what he bargains for is not merely the right in law, but the power in fact to exercise the right. When we speak of a physical impediment we do not mean that any physical impediment will do. It must be an impediment which substantially prevents or interferes with the

enjoyment of the right of possession of a substantial part of the property. Such cases will be rare, and can only arise in exceptional circumstances, and there would normally be (what there is not here) waiver or acceptance of the position by the purchaser. The facts as found by the county court judge are of a very exceptional nature, since the presence of the rubbish which the purchaser never bought and to whose presence he never submitted did in fact make it impossible for him to use a substantial part of the property which he had bought.

The appeal must be dismissed with costs.'

[**40**] Before commenting on the application of that authority to this case, I shall refer also to the decision of Lewison J in *Legal and General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch), [2007] 1 P & CR 103. Lewison J cited the two passages from the *Cumberland Consolidated Holdings* case that I have, prefacing his citation (at [36]) with the observation that Lord Greene MR 'proposed, as I see it, two possible tests for deciding whether or not vacant possession has been given'. Lewison J then referred (at [38]–[40]) to *Norwich Union Life Insurance Society v Preston* [1957] 2 All ER 428, [1957] 1 WLR 813, in which Wynn-Parry J applied the first test (a case in which a mortgagor who had been ordered to give possession had refused to remove his possessions from the property, and in which the court ordered him to do so); to *Hynes v Vaughan* (1985) 50 P & CR 444, in which Scott J applied the second test (a case of rubbish left on the property); and to an earlier decision of his own, *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1479 (Ch), [2004] 1 P & CR 448, in which he applied the second test. Lewison J then said:

'[41] It seems to me that the difference between the two tests is as follows. The first test looks at the activities of the person who is required to give vacant possession. If he is actually using the property for purposes of his own otherwise than de minimis, he will be held not to have given vacant possession. Thus in the *Norwich* case the borrower continued to keep his household furniture in the mortgaged property after he had been ordered to give possession of it. That was an activity carried out by a person who ought to have given possession.

[42] The second test looks at the physical condition of the property from the perspective of the person to whom vacant possession must be given. If that physical condition is such that there is a substantial impediment to his use of the property or a substantial part of it then vacant possession will not have been given. As the Court of Appeal said in the *Cumberland* case, that is likely to be satisfied only in exceptional circumstances.'

[**41**] Mr Woolgar submitted that the suggestion that this court, in the *Cumberland Consolidated Holdings* case, had identified two separate grounds or tests for the determination of whether or not vacant possession is given was mistaken and that in fact it had identified just one ground. He referred to the closing words of the first passage from the *Cumberland Consolidated Holdings* case that I have cited: 'the right which the purchaser has on completion to undisturbed enjoyment' and to the similar words in the second passage I have cited, the reference to the purchaser's right to 'actual unimpeded physical enjoyment'. He said that there was no material distinction between these phrases.

[**42**] I suspect that Lord Greene MR, who was clear that the court was deciding the case on two 'quite different' grounds, would regard that

submission as failing to interpret those phrases correctly in the different contexts in which they were respectively used. The answer to Mr Woolgar's point would appear to me to depend on the nature of the interference with his right to 'undisturbed enjoyment' from which, on Lord Greene MR's first ground, the purchaser was suffering. Was it (i) the mere presence of the unwanted goods in the property; or (ii) the right purportedly reserved and asserted by the vendor to use the property as a depository of his own goods and, presumably, to recover them at will? Given that Lord Greene MR regarded the second 'quite different' ground as centring on the mere presence of unwanted goods in the property, I regard it as probable, and favour the view, that the answer must be alternative (ii). I would not therefore accept Mr Woolgar's proposition that the *Cumberland Consolidated Holdings* case was decided simply on the basis of one ground; and the court clearly did not think so. I consider that Lewison J in *Legal and General Assurance Society Ltd v Expeditors International (UK) Ltd* correctly identified the essence of the two grounds upon which the *Cumberland Consolidated Holdings* case was decided.

[**43**] Having said that, I am not convinced that the decision in the *Cumberland Consolidated Holdings* case, plainly an exceptional one on its facts, is of great assistance on the very different facts of the present case. The *Cumberland Consolidated Holdings* case was exclusively about the handing over on completion of a property that contained a material amount of rubbish that the purchaser had neither bought nor wanted and that rendered part of the property unusable. The present case has no comparable feature. The judge's route to his decision was provided by Lord Greene MR's first ground, the judge applying by analogy Lord Greene MR's reference to the vendor 'claiming a right to use the premises for his own purposes, namely, as a place of deposit for his own goods'. So also here, the judge held, NYK continued to use the warehouse for its own purposes after 3 April, namely, for the purpose of carrying out the further repairs that it was in its interest to complete.

[**44**] I would not, with respect, regard the judge as having been wrong to explain the position in the way he did. But it does appear to me that the present case is, in principle, a straightforward one whose resolution does not require reference to an authority about cellars full of rubbish. If NYK was to satisfy the vacant possession condition in the break option, it had to give such possession to Ibrend by midnight on 3 April and by not a minute later. What, to that end, did it need to do? The concept of 'vacant possession' in the present context is not, I consider, complicated. It means what it does in every domestic and commercial sale in which there is an obligation to give 'vacant possession' on completion. It means that at the moment that 'vacant possession' is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property.

[**45**] In the present case NYK did not give such possession to Ibrend on 3 April. It made a sensible proposal at the meeting of 1 April, repeated in Mr Louch's e-mail of 2 April, to the effect that Ibrend should extend its occupation for a week in order to enable it to finish the repair works, on terms that it would pay the continued security costs, although no more rent or rates. It would also give the keys to Ibrend by 3 April, so that Ibrend would have access to the warehouse. In substance, although NYK may not have so analysed

it, it was proposing that it would give possession on 3 April and then make a brief return to the warehouse after 3 April as Ibrend's licensee. Had an arrangement along such lines been agreed, it is probable that this litigation would never have happened. *a*

[**46**] NYK's misfortune was, however, that by 3 April it could raise no response—neither a Yes nor a No—from Ibrend. In that respect, I have some sympathy for NYK, but not a lot. The terms of its own proposal show that it *knew* that, in order not to prejudice the operation of the break option, it needed to obtain Ibrend's agreement to what it wanted to do. It ought also to have known that, when that agreement was not forthcoming by 3 April, its only safe course was to move everyone out of the warehouse on Friday, including its security guard; to have e-mailed Ibrend's agents on that day to explain that that was what it was doing and that it would the same day deliver the keys to the agents. It could then have contacted Ibrend on Monday 6 April and asked it whether it would permit it to return to the warehouse as its licensee in order to complete the outstanding works. Had NYK taken legal advice on 3 April as to what to do, I should be surprised if such advice would have been otherwise than that NYK should act along the lines I have suggested. *b c d*

[**47**] NYK did not, however, take that course. Mr Woolgar made much of NYK's concern that if it walked out on Friday and removed its security guard, there was a high risk that the place would be vandalised over the weekend. That may have been so. But that risk was not NYK's, it was Ibrend's, which also knew, or ought to have known, that NYK would be likely to leave on 3 April. Any concern that NYK had about the vandalism point was not one that entitled it to award itself an extension of time for the giving of possession. The other point, also of obvious concern to it, was that it wanted to complete the repairs. Whilst it is true that such works would benefit Ibrend, the reason that NYK wanted to carry them out was dictated exclusively by its own interests. It did not *have* to carry out them out as a condition of the exercise of the break option. It *wanted* to do them in order to avoid the prospect of a subsequent claim for damages in excess of its own cost of doing them. Its wish in that respect was also no justification for giving itself an extension of time for the giving of possession. *e f*

[**48**] On what basis did NYK remain in the warehouse after 3 April? On, as before, the same necessary assumption that the lease had determined at midnight on that day, Mr Woolgar's answer to the question was that after 3 April NYK remained in occupation of the warehouse with what, as I have said, he called a 'degree of factual possession'. He recognised that NYK continued, via its security guard, to control access to the warehouse. He said that it was a trespasser, but without having any intention to possess. By that he meant that NYK would, he said, readily have complied with an instruction from Ibrend to stop work and to leave: that was an inference that could properly be drawn from the e-mails, and I am prepared to accept that that is correct. *g h*

[**49**] But does that description of the status of NYK in the warehouse during the period subsequent to 3 April mean that it had given 'vacant possession' to Ibrend by or before midnight on 3 April? One difficulty in answering Yes to that is that, so far as I can see, it had done nothing by then to manifest that it was giving up possession. It had offered to return the keys, but had not done so. It maintained on and after 4 April exactly the same control of the warehouse that it had maintained on and before 3 April. It remained in occupation of it on and after 4 April in the like manner as it had on 3 April; and it manifested that *j*

occupation by bringing its workmen to the warehouse on 6 April in order to continue with the works. Quite apart from NYK's continued occupation of the warehouse, its carrying out of those works was itself a further trespass to Ibrend's property. On NYK's case that it had terminated the lease on 3 April, it had no right to carry out such works.

[**50**] I cannot accept that on these facts NYK delivered vacant possession of the warehouse to Ibrend on 3 April. It remained in occupation and so did not give vacant possession. Mr Woolgar's argument ultimately reduces to the proposition that provided that NYK would have downed tools and left the warehouse the moment that Ibrend asked it to, its occupation after 3 April was not inconsistent with Ibrend's right to vacant possession and therefore it *had* given such possession. I do not accept that proposition as a correct statement of principle. If right, it would mean that a vendor who (perhaps retaining an extra set of keys) continued (without the purchaser's consent) to occupy the sold premises after completion until such later date as he knew the purchaser would actually seek to occupy it himself, at which point he willingly departed, would have given vacant possession on completion. I suspect that the purchaser would regard such a proposition as obviously wrong. So would I. I would reject the first ground of NYK's appeal.

(*b*) *The waiver point*

[**51**] The legal basis on which the waiver point was advanced to the judge does not appear to have been spelled out to him very clearly. His judgment includes no analysis of it. But in advancing the waiver argument to us, Mr Woolgar made it clear that his case was that during the relevant telephone conversation with Mr Tate Mr Richardson was faced with making an *election*; and that he had exercised it by accepting that the lease had been terminated. Mr Woolgar submitted that, in telling Mr Tate that he would ask a colleague to arrange for the collection of the keys, Mr Richardson was asserting a right to collect them and, by implication, was necessarily asserting unequivocally that the lease had been determined. He said that the judge was wrong to attach weight to the fact that Mr Tate did not understand that Mr Richardson was waiving any failure there might have been to give vacant possession, he (Mr Tate) himself not then understanding that such possession had not been given. All that Mr Tate needed to know was that Mr Richardson was asserting that the lease had come to an end and Mr Tate obviously did understand that. In so far as the judge also held that Mr Richardson's words should not be held against Ibrend as he had not had time to reflect upon the information given to him, there was no authority supporting that approach: if he was aware of facts constituting a non-compliance with the vacant possession condition, any statement by him constituting a waiver of such non-compliance was not negatived because he had had no intermediate opportunity to consider the position or take advice.

[**52**] Mr Woolgar submitted, therefore, that Mr Richardson had a clear choice before him as to whether (i) to assert that vacant possession had not been given and that the lease continued, (ii) to accept that the lease had been terminated, or (iii) to adopt a non-committal stance until he had considered the matter further. He unequivocally elected for alternative (ii). Whether he subjectively intended to do that was irrelevant.

[**53**] The difficulty with all of that, as Moore-Bick LJ pointed out to Mr Woolgar in the course of argument, is this. The need to make an election only arises when the putative elector is faced with two alternative rights that

are inconsistent with each other and with having to make a choice between them. A typical example is the case in which a landlord learns that his tenant has incurred a forfeiture and is faced with a choice between (i) asserting the forfeiture and taking proceedings to recover possession, and (ii) waiving the forfeiture and affirming the lease. He must do one or the other and his choice of one of the rights will waive the other. See *Matthews v Smallwood* [1910] 1 Ch 777 at 786, 787, [1908–10] All ER Rep 536 at 541, 542 per Parker J; and *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871 at 894, [1971] AC 850 at 882–883 per Lord Diplock.

[**54**] In the present case, the premise of the election argument, as Mr Woolgar accepted, is that at the time of the conversation between Mr Richardson and Mr Tate the lease had *not* been validly determined. Mr Richardson was not therefore faced with a choice of alternatives between conflicting rights: he was not faced with a choice that required him either to affirm or deny the continuance of the lease. On the premise that the lease was continuing, his proposal with regard to the collection of the keys could therefore at most have amounted to a representation that Ibrend was waiving the non-compliance with the vacant possession condition. Such representation could not however, without more, enable NYK to assert that the lease had been validly determined when, on the relevant assumption, it had not. NYK would also at least have to show that it had in some way relied or acted upon the representation, whereas it was no part of its case that it had. Its case was advanced purely on the basis that there had been an election. Having recognised and considered the difficulty that the election argument presented, Mr Woolgar abandoned it.

[**55**] Accepting therefore that Mr Richardson had not made an election, Mr Woolgar's argument modulated to the alternative proposition that, by his statement to Mr Tate about the keys, Mr Richardson nevertheless still effected a sufficient waiver, which Mr Woolgar described as a 'pure waiver'. He submitted that what Mr Richardson was thereby doing on behalf of Ibrend was to waive NYK's lease. He cited no authority demonstrating the nature of the 'pure waiver' principle; and the page or so of the textbook to which he did refer us did not provide any clear explanation of it.

[**56**] Mr Woolgar's proposition, namely that a landlord, by the mere oral uttering of such words as Mr Richardson used, can thereby extinguish a legal estate in a term of years vested in his tenant is one that, with respect, I cannot understand. All that happened was that Mr Richardson said that he would arrange for the keys to be collected. In the event, he did not do so; and the reason for that is that, following its solicitors' advice, Ibrend had changed its mind. Had Ibrend in fact accepted the keys, it might perhaps have been arguable that there had been a surrender of the lease by operation of law. But that never happened. Mr Woolgar was compelled to submit that it was Mr Richardson's mere words, and those alone, that brought the lease to an end, despite (i) the absence of any writing satisfying s 53(1)(a) of the Law of Property Act 1925, (ii) any consideration moving between the parties, (iii) any acts performed by NYK in reliance on Mr Richardson's statement that might have enabled it to assert that it would have been inequitable for Ibrend to go back on Mr Richardson's words, or (iv) anything else that might have entitled NYK to hold Mr Richardson to them. In these circumstances, I do not accept that there is any substance in the waiver argument. Mr Richardson's words had no effect on the parties' respective rights and legal positions.

DISPOSITION

[**57**] I would dismiss NYK's appeal.

MOORE-BICK LJ.

[**58**] I agree.

WARD LJ.

[**59**] I also agree.

Appeal dismissed.

Edward Cole Barrister.