

BREAK CLAUSE CONDITIONS AND
THE LAW OF ESTOPPEL

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1. During the economic downturn of the past few years, there has been lots of litigation concerning attempts by landlords to frustrate the exercise by tenants of rights to determine leases under break clauses. Usually, landlords have argued that one or other of the break clause conditions has not been satisfied.

2. In some of these cases in which tenants have lost, the outcome seems harsh. Break conditions are designed to achieve practical commercial objectives. For example, the (invariable) condition requiring the service of a break notice is designed to inform the landlord that the lease is to be broken. A condition requiring rent and other sums due under the lease to be paid is designed to ensure that, after the break date, the landlord need not chase the tenant for rent arrears. Yet, relying on the rule that option conditions must be complied with strictly¹, landlords have sometimes succeeded in establishing that break conditions have not been satisfied as a result of matters that, in light of the commercial purpose of the condition, are of no consequence.

3. There are other respects in which the law operates harshly on tenants. When a tenant is attempting to comply with a break condition requiring it to make a

¹ In other words, an option condition will not be interpreted as being capable of being satisfied by substantial compliance.

payment, the tenant, sensibly, will often err of the side of caution and pays a greater sum than he thinks is actually due. Yet, after the break date, it probably has no entitlement (under the law of restitution or otherwise) to recover any overpayment². Also, the cogs of the law work slowly. A dispute over whether a tenant has succeeded in determining a lease under a break clause may be tried many months, or even several years, after the tenant has vacated the premises in the belief that the lease has come to an end.

4. It is therefore welcome that two recent cases have added to tenants' (rather limited) legal armoury when faced with an unmeritorious attempt by a landlord to dispute that a break condition has been satisfied. Those cases raise the possibility that a landlord will be estopped from relying upon a tenant's failure to comply with a break condition.

MW TRUSTEES V TELULAR

5. In MW Trustees Ltd v Telular Corporation [2011] EWHC 104 (Ch), [2011] L&TR 19 a break clause permitted the tenant to determine the lease on giving 6 months' notice. The lease provided that any notice:

"...shall be valid only if...it is sent by special delivery post or delivered by hand".

6. The tenant delegated the task of serving the break notice, not to a lawyer, but to its Director of Administration (Ms Voltz). Ms Voltz overlooked that the freehold had changed hands. So, initially, she addressed and sent the notice to the landlord's predecessor in title. After the landlord's predecessor in title had responded by reminding Ms Voltz that it had sold the freehold, she sent

² See Woolwich Equitable BS v IRC [1993] AC 70, per Lord Goff at page 172 ("[The law of restitution] might have developed so as to recognise a *condictio indebiti* - an action for the recovery of money on the ground that it was not due. But it did not do so. Instead, as we have seen, there developed common law actions for the recovery of money paid under a mistake of fact, and under certain forms of compulsion"); Kleinworth Benson v Lincoln City Council [1999] 2 AC 349, per Lord Hope at page 410 ("Cases where the payer was aware that there was an issue of law which was relevant but, being in doubt as to what the law was, paid without waiting to resolve that doubt may be left on one side. A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong - and that is so whether the issue is one of fact or of law"); and the discussion in Marine Trade SA v Pioneer Freight Futures Co Ltd [2009] EWHC 2656 (Comm).

an email to one of the three current joint landlords. That email attached a copy of the notice addressed to the landlords' predecessor in title and stated: *"If you could let me know the necessary steps to appropriately terminate our Lease on the Break Date, I would greatly appreciate it."* That landlord forwarded the email, again attaching the notice, to the landlords' managing agents. Those managing agents sent an email to Ms Voltz which stated that:

"Dear Ms Voltz, We accept the attached letter and can confirm we are happy for you to break the Lease, however please could you re-address the letter to [the current landlord]".

7. The tenant did not re-address the letter. It did nothing more.
8. Accordingly, the tenant, not had only mis-identified the landlord in the break notice, but it had failed to comply with the condition that any notice must be served by special delivery post or delivered by hand. The misaddressed notice had been served only by email. Nevertheless, the tenant succeeded. The judge (Peter Smith J) held that the landlord was estopped from disputing that the notice had been served in the prescribed way because their managing agents had stated in the email to Ms Voltz: *"we accept the attached letter"*. That was held to amount to a representation that the managing agents (acting on behalf of the landlords) accepted the validity of the notice. The judge rejected the landlord's counsel's submission that, by stating that they "accepted" the letter, they were only acknowledging service (he described that submission as "ingenious").
9. The tenant had relied upon the managing agents' representation that the notice was valid by not serving a fresh notice. An estoppel was thereby created. So the landlord could not dispute that a valid break notice had been served.

AVOCET V MEROL

10. In Avocet Industrial Estates LLP v Merol Ltd [2011] EWHC 3422 (Ch), [2012] 14 EG 64 a break clause provided that:

“A Break Notice shall be of no effect if...at the Break Date any payment under this lease due to have been paid on or before that date, has not been paid...”

11. The tenant served a break notice under cover of a letter which stated that the tenant was not aware of any breach of the lease; and, in particular, that the tenant believed that it was up to date with the rent. The day before the break date the tenant sent the landlord a cheque to cover the sums that it believed had fallen due in the interim. A covering letter stated:

“We are not aware of there being any payments which are due to have been made under the Lease on or before the Break Date and which have not been paid...”

We reiterate that we are entitled to exercise our right to Break and to bring the Lease to an end in this way. We further reiterate that we believe that there are no outstanding sums due to you under the Lease...”

12. But the tenant had overlooked something. The lease required interest to be paid on late payments of rent. Over the years, some rent instalments had been paid late. There was a piddling amount of interest due - perhaps as little as £130. The landlord relied upon that fact to dispute that the tenant had broken the lease. That argument succeeded. The judge (Morgan J) pronounced the result harsh. But he said that the law had required him to find for the landlord.

13. Apart from the strikingly unjust outcome of the case, Avocet is of interest because the tenant, in fact, came very close to succeeding on the ground that the landlord was estopped from relying upon the tenant's failure to comply with the break condition.

14. The tenant acknowledged that, generally speaking, English law imposes no obligation to bring difficulties or defects to the attention of a contract partner or, for that matter, a stranger³. However, there are some circumstances in which a person is regarded as under a duty to speak out. In those situations, a failure to speak out may be interpreted as an implied representation capable of creating an estoppel. One such situation is where a man sees another proceeding under a mistaken view of his proprietary or legal rights. For example, if a man sees another building on his land in the mistaken belief that he owns that land, if he fails to say anything a proprietary estoppel may prevent him subsequently relying on his title.
15. An estoppel can also arise where a man sees another proceeding under a mistaken view, not of his proprietary rights, but of his contractual rights. Such as where a man sees his contractual partner proceeding under a mistaken view that he has complied with a contractual term.
16. In Tradax Export SA v Dorada Compania SA (the "Lutetian") [1982] 2 Lloyds Rep 140 charter-party provided that the owner could withdraw the vessel if the charterer failed to make a payment by a certain date. The charterer attempted to make that payment but, due to a mistake in calculating that payment, paid too little. From the communications between the owner and the charterer, the owner was aware of the mistake. Ordinarily, where a charterer has tendered too little hire, the owner will point that out. However, in this case, the owner kept quiet because he wanted to rely upon the underpayment to terminate the charter-party. That is what he purported to do. The attempt to terminate the charter-party failed. It was held that, by failing to speak out and correct the charterer's mistaken calculation of the

³ In ING Bank NV v Ros Roca SA [2011] EWCA Civ 353, [2012] 1 WLR 472 Rix LJ said at page 497 that: "*Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat emptor reflects a basic facet of English commercial law (the growth of consumer law has been moving in a different direction). Nor is there any general notion, as there is in civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion. In such circumstances, silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune*".

sum due, the owner had become estopped from relying on that underpayment. Bingham J said at page 158 that:

“The relationship of owner and charterer is not one of utmost good faith. One must be careful not to impute unrealistically onerous obligations to those who may choose to conduct their relations in a tough and uncompromising way. There is nonetheless a duty not to conduct oneself in such a way as to mislead. I have no doubt that that the owners knew that the charterers believed they had paid the right amount. It was their duty, acting honestly and responsibly, to disclose their own view to the charterers. They did not do so and indeed thwarted the charterers’ attempts to discover their views. Their omission to disclose their own calculation led the charterers to think, until a very late stage, that no objection was taken to the calculation. It would in my view be unjust in the circumstances if the owners could rely on the incorrectness of a deduction which they had every opportunity to point out at an earlier stage and which their failure to point out caused the charterers to overlook.”

17. In Avocet, Morgan J accepted the tenant’s submission that The Lutetian established that, when the tenant stated to the landlord that it believed that it had paid all that was due under the lease, the landlord was subject to a duty, if it knew that the tenant had miscalculated the amount, to correct that mistake. However, the judge held that the type of estoppel relied upon by the tenant (i.e. an estoppel by representation created through silence) could arise only if the landlord, at the time of the tenant’s communications, (subjectively) knew, or at least suspected, that the tenant had miscalculated. The judge made a finding that the landlord, at that time, did *not* know about the outstanding interest. So an estoppel could not arise.
18. The tenant in Avocet has been granted permission to appeal. In the Court of Appeal, might there be some other way in which the tenant might put its case on estoppel?
19. It might be thought that there is much to be said for a rule that an estoppel can arise by silence or acquiesce only in respect of things that the estopped

person knows about. However, in relation to waiver/equitable forbearance/promissory estoppel, there are several cases (mainly in a shipping context) in which an estoppel has been held to have been created as a result of passive acquiescence even though the estopped person did *not* know about the defect or contractual non-compliance that he became estopped from relying upon. Some of these cases date from the 1970s. For example, in Bremer v Mackprang [1979] 1 Lloyds Rep 221 sellers under a contract for the sale of soya bean meal served on the buyers a notice which they were not contractually entitled to serve. The buyers raised no objection to the notice. As a result, they were held to have waived the defect. Lord Denning MR said at page 225 that: *“If a buyer, who is entitled to reject goods or documents on the ground of a defect in the notices or the timing of them, so conducts himself as to lead the seller reasonably to believe that he is not going to rely on any such defect - whether he knows of it or not - then he cannot afterwards set up the defect as a ground for rejecting the goods or documents when it would be unfair or unjust to allow him to do so”*(my emphasis)⁴.

20. In Avocet the tenant’s case on estoppel could, perhaps, be reformulated. It might be said that the landlord’s failure to respond to the tenant’s assertion that it had paid everything that was due gave rise, constituted, not an implied representation that it agreed with that fact, but an implied promise that the landlord would not rely upon its strict legal rights to dispute that fact if it turned out not to be true. That would bring Avocet within the waiver/equitable forbearance/promissory estoppel line of cases.⁵

⁴ See also Bremer v Vanden [1978] 2 Lloyds Rep 109, Euro Brokers Holdings Ltd v Monecur (London) Ltd (2002) EWCA Civ 1068, and Flacker Shipping Ltd v Glencore Grain Ltd (“The Happy Day”) [2002] EWCA Civ 1068, [2003] 1 CLC 537.

⁵ There has been another recent break condition case in which an estoppel argument was considered. In PCE Investors Ltd v Cancer Research UK [2012] EWHC 884 (Ch) a tenant’s break clause provided that, as a condition of determining a lease, the tenant must have paid the rents reserved and demanded up to the break date. The break date fell on 11 October 2010. On the preceding quarter day (29 September 2010), the tenant, instead of paying the entirety of the rent for the forthcoming quarter (as it should have done), paid only the rent for the period between that date and the break date. However, just before that quarter day, the tenant had sent an email to the landlord’s managing agents, which stated *“please confirm that this is the correct basis for calculating the liability for the short period”*. The agents did not respond. The tenant contended that it was arguable that that landlord was estopped from disputing that the tenant had not complied with the

CONCLUSION

21. Avocet will, no doubt, increase the tactical manoeuvring between landlords and tenants before the break date. Tenants should state to landlords their belief that they have complied with any break conditions. They should explain that they are proceeding on that assumption. In response, landlords should probably inform tenants that they reserve the right to rely upon any non-compliance with any break condition; and that, in that regard, the tenant should place no reliance upon any failure by the landlord to point out any respect in which a condition has not been complied with.
22. The need for all this legalistic manoeuvring is obviously good for us. The law also works well for landlords looking for technical and unmeritorious ways of preventing the exercise by tenants of rights under break clauses to determine leases. However, does this not indicate that the law concerning break notice conditions is unsatisfactory? Whether a tenant succeeds in breaking a lease often depends, not on anything relating to the commercial purpose of a break condition, but on how successful his lawyers are in playing (what can have the appearance of) a rather legalistic and technical game. Is it time to change the law? In New Zealand and in some Australian states (New South Wales, Queensland and Western Australia) legislation confers on the Court jurisdiction to grant relief from a failure to comply with certain types of option condition. Perhaps, statute should confer on English Courts a similar ability to grant relief from a failure to comply with a break condition.

payment condition. Relying on Avocet, the tenant said that the landlord had a duty to speak out to correct the tenant's mistaken belief that it was only required to pay the rent for the period between the quarter day and the break date. And, given the landlord's failure to correct that view, the landlord was estopped from disputing that the payment condition had been satisfied. Peter Smith J rejected that argument. The landlord had sent the tenant an invoice demanding the full quarter's rent. So the landlord's silence in response to the tenant's email could not constitute an implied representation that it agreed with the tenant's view that a lesser sum was payable. The judge also said that the question whether all or only part of the quarter's rent was payable was, not to an issue of fact, but a legal question that was a matter of debate. That was not an appropriate subject matter for an estoppel.

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