No: HC02CO2862

Neutral Citation Number: [2003] EWHC 1479 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Strand
London WC2A 2LL

Wednesday, 14th May 2003

B e f o r e:

MR JUSTICE LEWISON

- - - - - -

ROYAL BANK OF CANADA

CLAIMANT

- v -

SECRETARY OF STATE FOR DEFENCE

DEFENDANT

- - - - - -

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MR THOMAS JEFFERIES (instructed by Messrs Nabarro Nathanson) appeared on behalf of the Claimant

MR WAYNE CLARKE (instructed by Messrs Simmons & Simmons) appeared on behalf of the Defendant

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J U D G M E N T
(As approved by the Court)

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Wednesday, 14th May 2003

J U D G M E N T

MR JUSTICE LEWISON:

1. On 11th November 2002 the defendant served a notice to determine a lease of sites Q, J2 and J3 and building 323 on the Westcott Venture Park Aylesbury premises on 18th November 2004. The claimant accepts that the notice was valid. However, it was the last in a series of four notices and was expressed to be without prejudice to those previous notices. I have to decide whether any of those previous notices were valid.

2. The premises were demised by a lease dated 31st January 1997 for a term of 20 years from 19th July 1993 at an initial rent of £59,000 per annum. The tenant was the Secretary of State for Defence. The lease provided that the expression "the tenant" should, where the context so admits, include the successors in title of the tenant. By virtue of a court order dated 13th November 1996, sections 24 to 28 of the Landlord and Tenant Act 1954 were excluded from the lease.

3. Clause 3.16 of the lease contained an alienation covenant in the following terms:

> "Not at any time during the term hereby granted to assign, underlet, charge or part with or share the possession or occupation of the demised premises or any part thereof provided that the tenant may, without consent, assign the whole of the demise premises to another government department in whom the relevant functions of the Secretary of State for Defence may hereafter be vested."

4. The lease contained three break clauses in clauses 5.5, 8 and 10 respectively. Clause 5.5 provided:

> "That if at any time during the term the tenant (in this sub clause 5.5 meaning the Secretary of State for Defence or another Government department in whom the relevant functions of the Secretary of State for Defence have become vested) shall award a Management Contract but for the avoidance of doubt excluding maintenance and servicing contracts, to any third party by which access to the demise premises is proposed to be given to such third party, or if the relevant branch of the tenant that is in occupation of the demised premises and carries on its activities therein, shall no longer be part of a government department as aforesaid, whether as a result of privatisation of that branch of the department or otherwise, then the landlord may, if it reasonably requires, and upon six months' prior written notice, determine this lease upon the expiration of such notice whereupon the present demise and everything herein contained shall cease and be void but without prejudice to the rights and remedies of either party against the other in

> respect of any antecedent claim or breach of any of the covenants or conditions herein contained."

Although the words "Management Contract" are spelt with capital letters, there is in fact no definition of that expression.

5. Clause 8 of the lease provided:

> "If either the landlord or the tenant shall desire to determine the term hereby granted at any time prior to the determination of the lease and shall give to the tenant or the landlord as the case may be not less than two years' previous notice in writing of such desire, then immediately on the expiration of such notice, the present demise and everything herein contained shall cease and be void but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of any covenants or conditions herein contained."

6. Clause 10 provided:

> "(a) If at any time during the said term, except during the last year thereof, any part or parts of the demised premises shall become surplus to the tenant's requirements, the tenant may give to the landlord, as often as such part or parts of the demised premises as aforesaid shall become surplus to his requirements, not less than six months' notice of his desire to surrender this lease, so far as it relates to such part or parts of the demised premises as aforesaid and shall be specified in such notice, and upon the expiration of such notice the landlord shall accept the surrender of this lease so far as it relates to that part or those parts of the demised premises so specified, but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of any of the covenants or conditions herein contained, and the following sub clauses of this clause 10 shall apply.
>
> (b) On and from the date after the day on which such a notice expires, the rents firstly reserved hereunder shall be reduced by a proportionate part, and the rent secondly reserved shall be reduced to a proportionate part of the amount incurred by the landlord attributable to those parts of the demised premises which are not the subject of the tenant's notice and the rent thirdly reserved shall be reduced to an amount equal to a fair and reasonable proportion of the total cost reasonably incurred by the landlord in respect of the services and expenses specified in part 2 of the third schedule to this lease, in relation to those parts of the demised premises which are not the subject of the tenant's notice. …
>
> …

> (d) Upon the day after the day on which such notice shall expire the parties hereto shall, at the tenant's cost, execute a Deed of Surrender and Variation in such form as may be requisite in order to give effect to the provisions hereof.
>
> (e) In the event of any dispute or difference between the parties as to the amount by which the rents hereby reserved shall be reduced in accordance with the provisions of sub clause (b) of this clause 10, or as to the form and content of the Deed of Surrender and Variation to be executed by the parties in accordance with the provisions of sub clause (d) of this clause 10, such dispute or difference shall be determined by a single arbitrator agreed between the parties, or in default of agreement appointed by the President for the time being of the Royal Institution of Chartered Surveyors upon the application of either party."

7. Although clause 10 operates by way of surrender rather than break, no difficulty arises under section 38(1) of the Landlord and Tenant Act 1954 because, as I have said, sections 24 to 28 of that Act were excluded by court order.

8. I have omitted the headings to the clauses because clause 12(b) of the lease provides that the head-notes are intended to facilitate reference only and are not in any way to affect the construction of the lease.

9. Until July 2001 the premises were occupied by the Defence Evaluation and Research Agency ("DERA") for rocket testing. On 1st July 2001 DERA transferred those activities to Cenetic as part of a public/private partnership. Amongst the properties transferred was the lease. Schedule 16 to the agreement contained terms dealing with transferred properties. Paragraph 20.6 of those terms provided as follows:

> "If the reversioner's licence cannot be obtained in relation to any transferred leasehold premises then -
>
> (a) the authority shall act in accordance with the lawful directions of Cenetic with regard to such transferred leasehold properties and their lease;
>
> (b) for the avoidance of doubt, subject to clause 8, the following provisions of this clause [20] shall continue to have effect until the expiration or other termination of the tenancy granted by the relevant lease, and the indemnities contained in this clause 20 shall apply to any liability arising upon or in consequence of the termination of the tenancy granted by the lease, including, without limitation, in respect of dilapidations and reinstatement works;

(c) Cenetic shall not be entitled to rescind this agreement in whole or part on account thereof."

10. Even before the transfer DERA's use of the premises had been winding down. As early as 25th January 2000, Mr Dodd, the business group manager, said in an email to Mr Simon Parkinson that he wanted to walk away from the current lease. Mr Parkinson prepared an exit strategy the following month. However, the position was not at that stage completely clear. In a letter dated 30th October 2000 to the Health and Safety Executive, Mr Dodd said that DERA was still somewhat unclear on its level of occupation of the premises. He said that DERA would continue to occupy buildings J2 and J3 for trials, but had no requirement for storage of explosives.

11. Following the transfer to Cenetic, on 23rd August 2001, Mr Hitchins, the business group manager, sent an email in which he said that the business case for continued occupancy of Westcott did not stack up. He proposed withdrawal from Westcott. Mr Price from the Centre for Defence Technology replied on the same day. He said that a trial was planned for the J site in the week beginning 3rd September 2001 but that after the trial he had no plans to make use of the site in the near term.

12. On 5th October 2001, Mr Hitchins gave instructions to Mr Waterman to serve notice under the lease. His email reads:

"Notice to Vacate

Please serve immediate notice that will surrender part of the site six months from now and the whole site two years from now. As we will not need the site at all in the near future, can we surrender the maximum amount with six months' notice? The problem I have is I do not have any plans that show what areas are associated with which buildings. Can we take an extreme line and say that we will vacate 99.9% of our holdings in six months and thus reduce our rent by a similar amount in six months' time."

13. Mr Waterman replied on 11th October 2001. He said:

"Notice to vacate

We have agreed that the MOD will serve the notice on Cenetic's behalf. As the lease has not been assigned, Cenetic cannot serve any notice. We will serve a six months' notice on as much of the site as possible and I will be taking legal advice on this. I understand that one Cenetic employee will remain on site and that he is located within building 323. I propose that we surrender everything apart from his office. Can you provide the room numbers for building 323 indicating which room will be retained? The details of all areas surrendered will need to be inserted into the notice. The surrender of part will not only

> reduce the rent but also the service charge. Following this, the two year notice to surrender the whole will be served."

14. At the end of October 2001 it appears that the last of the permanent employees at the site left.

15. Service of the notice was in fact delayed because of negotiations over the rent and the possibility of an assignment to Cenetic, despite the absolute prohibition on assignment contained in the lease. Those negotiations appear to have concluded in January 2002. On 1st February 2002, Mr Waterman sent an email to Mr Hitchins in which he said:

> "We are now in a position, having agreed the rent review and assignment, to suggest to the landlord that we will serve a six months' notice on everything apart from a small cupboard. This will make that office building more difficult to re-let, and we can therefore suggest that a mutual surrender of the whole occurs on six months' notice. This would remove the need to serve a two year notice to surrender the whole."

16. Although Mr Waterman had said that the rent review and assignment had been agreed, negotiations between solicitors were still continuing over the documentation necessary to give effect to that agreement. On 15th February 2002, Nabarro Nathanson for the landlord sent a draft licence to assign to Simmons & Simmons for the tenant. It was returned with amendments on 1st March 2002. By 25th March 2002, Nabarro Nathanson confirmed that the documentation was agreed and engrossments were sent for execution. Then, out of the blue, Simmons & Simmons on behalf of the defendant served the first of the disputed notices. It read as follows:

> "We act for the Secretary of State for Defence in relation to the lease of the above property dated 31st January 1997 between (1) Royal Ordnance Plc and (2) the Secretary of State for Defence ('the lease'). On behalf of our client we hereby give you notice in accordance with clause 10(a) of the lease that our client desires to surrender the lease so far as relating to all of the demised premises except for the store forming part of building 323 and outlined in bold on the attached plan and any rights and easements required for the use of such store with effect from 24th December 2002. We should be grateful if you could sign and return the enclosed copy as an acknowledgement of receipt."

That letter was indeed accompanied by a plan which showed the storeroom in question in bold.

17. On 10th July 2002, Mr Parkinson sent an email to Mr Commons. It read as follows:

> "As you know we have served notice on the landlord to determine the lease on all but a small part of Westcott. The lease allows a partial surrender of accommodation if surplus to requirements. It follows therefore that the retained premises are not surplus. We therefore need to show that the small retained store will be used beyond the six months' notice period but confirm that the use will not be a dangerous activity rendering the remainder of the building unusable by the landlord. Is there anyone on site at present? Do they need to be briefed? I need to respond this week to our lawyers. Could we discuss this tomorrow when we meet?"

18. The reply from Mr Commons said:

> "Talked to Chris Hitchins this morning. Basically he wants out asap [as soon as possible]. We have no staff on site and in reality will not use the store building but will retain ownership to suit the lease requirements. Do we need to arrange regular visits to the store to ensure compliance with the lease? Please advise."

19. Mr Commons and Mr Parkinson then appear to have spoken, because on 12th July 2002 Mr Commons sent an email to Mr Hitchins saying:

> "Talked to Simon. We need to ensure something is stored in the building and the site is clear of debris. Simon will then start negotiation to terminate the lease, hopefully by the end of the year."

20. On 29th July 2002 Simmons & Simmons sent the second of the disputed notices. It read:

> "We act for the Secretary of State for Defence in relation to the lease of the above property dated 31st January 1997 between (1) Royal Ordnance Plc and (2) the Secretary of State for Defence ('the lease'). On behalf of our client, we hereby give you notice in accordance with clause 8 of the lease that our client desires to determine the entire lease with effect from 2nd August 2004. This is without prejudice to our previous notice of 21st June 2002. We should be grateful if you could sign and return the enclosed copy as an acknowledgement of receipt."

21. On 11th November Simmons & Simmons sent the third of the disputed notices. It read:

> "We act for the Secretary of State for Defence in relation to the lease of the above property dated 31st January 1997 between (1) Royal Ordnance Plc and (2) the Secretary of State for Defence ('the lease'). On behalf of our client we hereby give you notice in accordance with clause 10(a) of the lease that our client desires to surrender the lease so far as relating to the store forming part of building 323 and outlined in bold on the attached plan and any rights and easements required for the

> use of such store with effect from 15th May 2003. We should be grateful if you could sign and return the enclosed copy as an acknowledgement of receipt."

22. Finally as I have said on 11th November 2002, Simmons & Simmons sent the fourth notice terminating the lease on 18th November 2004. The claimant accepts that this notice is valid.

23. On 15th November 2002 Mr Andrews carried out an inspection of the premises. He found that room 3 in building 323 contained five filing cabinets, two cupboards and a refrigerator; plus items of office furniture and other equipment; rooms 1, 2, 4 and 5 in building 323 contained sundry office furniture and equipment of the sort that he was familiar with in the context of other visits to the premises over the years; and J2 and J3 had some equipment in them, including tall instrumentation cabinets. He illustrated his findings by photographs.

24. He inspected again on 6th January 2003. The changes that he found were the following. Room 3 had been emptied of its contents with the exception of a broom and a mop; and some teacups and a kettle which were in the corner of the room. The other rooms had been substantially emptied of their contents. On 10th January he returned to the premises again and took some more photographs. Inside the J2 site control room he found a number of items which were illustrated by photographs to which I will return in due course.

25. The issues between the parties are as follow: (a) was the defendant entitled to serve a clause 10 notice in relation to part of the premises if the whole of the premises were surplus to his requirements? If the answer to this question is yes, then the first clause 10 notice was valid. (b) If the answer is no, were the whole of the premises surplus to the defendant's requirements? Mr Clark, appearing for the defendant, accepts that a requirement of Cenetic is not a requirement of the defendant. The requirement in question must be that of the defendant himself. It is common ground that that question must be answered as at the date of the notice. (c) Was the clause 8 notice served on 29th July effective? (d) Was the clause 10 notice served on 11th November effective?

26. Both Mr Jefferies appearing on behalf of the claimant and Mr Clark submitted that the three break clauses were part of a coherent scheme. Unfortunately they differed about what that scheme was. However, I have found it impossible to extract a fully coherent scheme from the lease. Both constructions advanced give rise to oddities and anomalies, but I do not think that a case such as this can be decided by a score of anomalies. While the context is of course important, in the end the question is: what do the words of clause 10 convey to a reasonable reader?

27. Mr Jefferies submits that the more generous provisions of clause 10 entitling the tenant to give only six months' notice only apply where the defendant continues to require part of the premises. Otherwise, he says, the longer notice

provisions of clause 10 could always be circumvented by service of a clause 10 notice in respect of all but a worthless part of the premises. If Mr Clark is right, says Mr Jefferies, clause 8 is otiose.

28. I think this over-states the position. A clause 8 notice may be served whenever the tenant wishes. It may well be that the tenant knows that although the premises are not currently surplus to requirements, they will become so within the following two years. In addition, as Mr Clark pointed out, the tenant may invoke clause 8 if he cannot afford to stay on in the premises, whether or not they are surplus to requirements. Mr Jefferies retorted that once the tenant decided to move out, whatever the reason, the premises became surplus to requirements. However, that answer does not seem to me to meet the point. A tenant who serves notice under clause 8 achieves certainty, whereas a tenant who waits until the premises have actually become surplus to requirements, may not be in a position to serve a clause 10 notice until much later in the time scale. In my judgment, Mr Clark's construction of clause 10 is not one which makes clause 8 otiose.

29. Moreover, the landlord may also serve a clause 8 notice. Since the lease is one which does not attract security of tenure under the Landlord and Tenant Act 1954, the service of a landlord's notice is final and will deprive a tenant of a chance of staying on. So on both sides there are good reasons for a lengthy period of notice.

30. Clause 10 may only be invoked by the tenant. The precondition for exercise of the right to serve a clause 10 notice is that any part or parts of the demise premises shall become surplus to the tenant's requirements. It is important not to confuse satisfaction of a precondition with the permissible contents of a clause 10 notice. As a matter of construction of clause 10, Mr Jefferies accepts, rightly, that the parts of the demised premises that are surplus to requirements may be greater than the parts that are specified in a clause 10 notice.

31. Mr Jefferies submitted that whereas clause 8 dealt with termination of the whole lease, clause 10 dealt with termination of part. He pointed to the provisions of clause 10(d) and (e) which contemplate that on each occasion that clause 10 is invoked; a Deed of Surrender and Variation would be executed. Mr Jefferies stressed that the Deed was a Deed of Surrender and Variation rather than a Deed of Surrender or Variation. He said that a Deed of Variation presupposed that the lease would remain in existence, and from that it followed that clause 10 could not be used in order to terminate the lease as a whole. It would also follow that if the lease had been surrendered as to part under clause 10, where part had become surplus to requirements, clause 10 could not be invoked so as to surrender the remainder once that became surplus to requirement. It is difficult to see a good reason for this, although I acknowledge the linguistic force of Mr Jefferies' submissions. However, it seems to me that clause 10(d) and (e) are relevant to the content and consequences of serving a clause 10 notice, rather than to the precondition which must be satisfied before such a notice can be served.

32. Mr Clark submits that if the whole of the demise premises becomes surplus to the tenant's requirements, then all parts of the demise premises have become surplus. The precondition is thus satisfied and the tenant is entitled to serve a clause 10 notice. In support of that submission he relies on Field v. Barkworth [1986] 1 All ER 362. That case concerned the interpretation of an alienation clause in a tenancy agreement. The clause read, "Not to assign or underlet any part of the premises without the consent in writing of the landlord, such consent not to be unreasonably withheld". The issue between the parties was whether that clause prohibited the assignment of a whole of the demise premises. Nicholls J said at page 364:

> "In my judgment, the relevant words of the covenant in clause 3.24 are clear and unambiguous and their meaning admits of no doubt. I agree with counsel for the defendant that if after an assignment or under letting of a whole of the premises one asks the question, 'Has there been an assignment of any part of the premises?', the answer plainly would be yes. The answer would be yes because what had been assigned or underlet would be every part of the premises, and this covenant against assignment or under letting of any part of the premises, in my view plainly embraces the assignment or under letting of every part. As I see it, that is the beginning and end of this case."

33. Mr Jefferies submits that in order to determine whether part of the demised premises are surplus to requirement, it is necessary to look to see whether the remainder is not surplus to requirements. I do not consider that the conclusion follows from the premise. In my judgment, what is to be looked at is the part of the premises specified in the notice. They may be the same as or lesser than the parts of the premises which have become surplus. I agree with Mr Clark that Mr Jefferies' construction involves imposing a precondition in relation to the parts of the premises which are not to be surrendered and that such a precondition does not appear on the face of the clause. In my judgment it is not necessary for the tenant to prove that part of the premises are not surplus to requirements.

34. In principle, therefore, I consider that the tenant was entitled to serve a clause 10 notice even though the whole of the premises had become surplus. The notice served by the tenant specified everything in the demise apart from one room. However that room had no access to the road over which the tenant had a right of way granted by the lease. The notice therefore also specified "any rights and easements required for the use of such store with effect from 24th December 2002". Was the tenant entitled to require the grant of easements, or is it implicit in clause 10 that no such easements can be required? If so, then it would mean that clause 10 can only be exercised on a building by building basis even though the clause is quite general in its reference to "any part or parts".

35. Mr Clark submitted that (1) clause 10 contemplated that a Deed of Surrender and Variation would accompany each exercise of clause 10. The reference to a variation shows that the parties contemplated that some variation of the lease

might be necessary in order to give effect to clause 10. Clause 10(d) envisaged there might be a dispute about the form or content of such a Deed of Variation in addition to a dispute about the apportionment of rent. (2) As with any conveyance, there would be reserved on a surrender of part any easements of necessity necessary to enable the retained part to be used. (3) An implication to the effect that new easements could not be created would be inconsistent with the tenant's apparent freedom to surrender any part of the premises.

36. Mr Jefferies said that the tenant could not realistically be said to surrender a part of the premises over which it was still asserting an easement. I see the force of this point, but in my judgment it does not outweigh the force of Mr Clark's submissions. Moreover, as Mr Jefferies accepted, this difficulty could be overcome if the tenant specified in his clause 10 notice a single room, plus a corridor leading to the road. Thus in my judgment clause 10 cannot be interpreted as confining its exercise to a whole building.

37. In my judgment, therefore, the clause 10 notice served by the Secretary of State on 21st June 2002 was validly served. I do not therefore have to consider whether the defendant in fact had a requirement for the store. I can therefore summarise my conclusions under this head briefly.

38. It is clear on the evidence that the defendant had no requirement for any part of the premises in the sense of wanting to occupy it himself or by government employees. The way Mr Clark put the case is that the defendant had a requirement to make the store available for Cenetic and that Cenetic was entitled to require the defendant to make the store available under the terms of the transfer agreement. For the reasons given by Mr Jefferies, I consider that this part of the defendant's case must fail.

39. First, Cenetic was only entitled to require the defendant to deal with the leased property if the landlord's licence could not be obtained. By 21st June 2002, the landlord's licence had, for practical purposes been obtained, so the precondition entitling Cenetic to direct the defendant how to deal with the lease had not been fulfilled. Second, there is no evidence that Cenetic ever did require the defendant to make the store available. On the contrary, the evidence shows that in reality Cenetic had no use for the store at all, and only used it for storage in order to bring itself within the terms of clause 10. Third, insofar as Cenetic decided to use the store, the decision was taken after the notice had been served. Fourth, the defendant could not allow Cenetic to occupy the store without a variation or waiver of the terms of the lease, since there was an absolute covenant against parting with or sharing possession or occupation. I agree with Mr Jefferies that a requirement for the purposes of clause 10 must be a requirement that is compatible with the terms of the lease.

40. Mr Jefferies submits that even if the clause 10 notice was validly served, as I have held it was, the defendant has committed a repudiatory breach of the contract which the notice brought into existence. The breach consists in a failure to give vacant possession on the date of expiry of the notice. The point

arises in this way. As I have said, in January 2003 Mr Andrews inspected the premises. In the control room forming part of J2, he discovered various abandoned chattels. The biggest item appears to have been a fitted bench. Mr Andrews described it as fitted in the same way as a kitchen unit. It had been there since before the grant of the lease. That seems to me to be a landlord's fixture and therefore something that the defendant was obliged to yield up.

41. In addition to the bench there was a camera tripod, two briefcases, a table covered with redundant equipment, a four drawer filing cabinet, a couple of boxes and a quantity of what appears from the photographs to be electrical cable. None of it looks unwieldy or difficult to move, although I heard no evidence about that.

42. Mr Jefferies relied on Cumberland Consolidated Holding Ltd v. Ireland [1946] 1 KB 264. In that case the plaintiffs agreed to buy from the defendant a warehouse. The property was sold with vacant possession on completion. The sale was indeed completed but it was discovered that a large part of the basement contained hardened concrete left in bags. The area of the warehouse was approximately 1900 square feet and underneath the whole area there were cellars below ground level. The height of the cellars was about nine feet and about two thirds of that height was filled with rubbish consisting mainly of bags of cement which had hardened and empty drums. It was all valueless, and its presence prevented the use of the cellars for any purpose. The buyer had the rubbish removed at a cost of £80 and brought proceedings against the seller for damages for breach of contract, the breach complained of being the failure to deliver up with vacant possession. The claim was upheld by the Court of Appeal. Lord Greene MR said this:

> "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."

He then refers to authority and continued:

> "The reason for this, it appears to us, is that the right to actual unimpeded physical enjoyment is comprised is a right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment to which a purchaser does not expressed or impliedly consent to submit should stand in a different possession 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 bargained 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."

43. The test according to this case is whether the obstruction is one that substantially prevents or impedes the enjoyment of the right to possession of a substantial part of the property. J2 is one of several buildings that were surrendered and the chattels could only be said to have impeded use of part of J2. Moreover, the ease and speed with which the chattels could have been removed is, in my judgment, relevant to this question. I consider that the quantity of chattels and their type left abandoned in the control room of J2 do not pass the test.

44. In addition, it seems to me that on the assumption that the defendant was contractually obliged to give vacant possession on the expiry of the notice, that obligation cannot be characterised as a condition of the contract. It was not expressly described as a condition, and since the obligation is one which can be broken in many ways, some of which would cause serious damage and others which would not, I do not consider that it can be characterised as a condition as a matter of necessary implication. It is, in my judgment, an inominate or intermediate term. That being so, the test for deciding whether a breach amounts to a repudiation of the contract, is whether the breach has deprive the injured party of substantially the whole benefit he was to receive under the contract. This breach, if breach it was, did not do so. Thus, in my judgment, it did not amount to a repudiation.

45. I conclude, therefore, that the clause 10 notice served on 21st June 2002 terminated the lease, save as to the storeroom, on 24th December 2002.

46. The second of the notices was the clause 8 notice served on 29th July. The defect in the notice on which Mr Jefferies relies is the statement, "This is without prejudice to our previous notice of 21st June 2002". It is common ground that the test is whether the notice was clear to a reasonable recipient of it. In my judgment it was. The notice followed clause 8 exactly. The meaning of the quoted sentence was that the giver of the notice was not to be taken to have withdrawn the earlier notice and was to remain free to argue that it had validly terminated the lease, save as to the storeroom, on 24th December 2002. In my judgment the second notice was also valid.

47. There was a third notice served under clause 10 on 8th November 2002. Mr Jefferies said that if I found that the first clause 10 notice was valid, as I have, he would take no point on the third notice. Since the validity of that notice would require me to decide some difficult questions of interpretation of the lease, I prefer to say no more about it.

48. In the result therefore the claim fails.

HC01C0280

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IN THE HIGH COURT OF JUSTICE
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B E F O R E:

MR JUSTICE LEWISON

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ROYAL BANK OF CANADA

Claimant

-v-

SECRETARY OF STATE FOR DEFENCE

Defendant

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MR THOMAS JEFFERIES (instructed by Nabarro Nathanson) appeared on behalf of the Claimant
MR WAYNE CLARK (instructed by Simmons and Simmons) appeared on behalf of the Defendant

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J U D G M E N T
(As approved by the Court)

1. MR JUSTICE LEWISON: I now have to deal with the costs of the action. under rule 44.3 of the Civil Procedure Rules the court has a discretion as to whether costs are payable by one party to another, the amount of those costs and when they are paid. Subrule (2) says:

> "If the court decides to make an order about costs --
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order."

2. Subrule (4) says:

> "In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including --
>
> (a) the conduct of all the parties; and
>
> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
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> (c) any payment into court or admissible offer to settle made by a party which is drawn to the Court's attention (whether or not made in accordance with Part 36)."

3. Subrule (5) says:

> "The conduct of the parties includes --
>
> (a) conduct before, as well as during the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue, or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
>
> (d) whether a claimant who has succeeded in his claim, in whole or in part, has exaggerated his claim."

4. Then subrule (6) provides:

> "The orders which the court may make under this rule include an order that a party must pay --
>
> (a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only."

(d) and (e) I think I can omit. (f):

"costs relating only to a distinct part of the proceedings."

5. Subrule (7) though says that:

> "Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c)."

That is to say, the court should not make costs relating to a particular issues, it should itself, if it can, make a proportionate costs order.

6. A number of issues arose in this case and Mr Clark rightly says that he won on the main issue, which was that of the construction of the lease and the various notices that had been served. He also says, quite rightly, that he won on the question of vacant possession, but he lost on the factual position, namely, whether there was a requirement for the purposes of the lease. It seems to me that the majority of disclosure and the majority of the evidence that I heard and read was directed to that issue. So my starting point is that it would not be right for the defendant to recover the whole of his costs.

7. I must, as I have said, take into account the conduct of the parties both before as well as during the proceedings, and it is the case that on a number of occasions the claimant expressed a willingness to mediate the claim. That request was refused by the defendant.

8. That refusal was surprising because on 23rd March 2001 the Lord Chancellor's Department issued a press notice in which it set out what was described as a formal pledge committing government departments and agencies to settle legal cases by ADR techniques whenever the other side agrees to it. The pledge began as follows:

> "Government departments and agencies make these commitments on the resolution of disputes involving them. Alternative dispute resolution will be considered and used in all suitable cases wherever the other party accepts it."

9. This dispute was, in my judgment, suitable for ADR even though the main issue was one of interpretation of a lease. Although technically that is a question of law rather than a question of fact, it is only so because traditionally the interpretation of documents has been said to be a question of law for a court rather than of fact for a jury.

10. In my judgment, the formal pledge given on behalf of all government departments is something which I must take into account and to which I ought to attach great weight.

What, as Mr Jefferies rhetorically asks, is the point of a formal pledge if those who give the pledge do not abide by it.

11. In Dunnett v Railtrack plc [2002] 1 WLR 2434 the Court of Appeal stressed the importance of ADR. In paragraph 15 of his judgment Brooke LJ said:

> "It is to be hoped that any publicity given to this part of the judgment of the Court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Part 1 and to the possibility that if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences."

Accepting, of course, that in that case alternative dispute resolution was suggested by the Court itself rather than by the other party to the dispute, it seems to me that a willingness to mediate is something which is significant in deciding where costs should lie.

12. As I have said, however, the most important feature to my mind is the formal pledge given on behalf of the government and its various departments to use ADR in appropriate cases. The government did not abide by that pledge in this case. I am not in a position to form any real view of whether a mediation would or would not have succeeded. It may well have done, but in my judgment a failure to abide by the formal pledge given on part of the government, coupled with the fact that the defendant did not succeed on all the issues and that the claimant is liable under an order of Chief Master Winegarten to pay the costs of Connectic involved in disclosure, justifies a decision that the defendant should not recover any further costs from the claimant.

13. I, therefore, make no order as to the costs of these proceedings.