**IN THE COUNTY COURT AT CENTRAL LONDON Claim No. B10CL499**

Thomas More Building

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday, 28th July 2016

Before:

**HIS HONOUR JUDGE DIGHT**

Between:

**SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**

Claimant

-v-

**SOUTH ESSEX COLLEGE OF FURTHER AND HIGHER EDUCATION**

Defendant

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Counsel for the Claimant: MR TOBY WATKIN

Counsel for the Defendant: MR STEPHEN MURCH

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**JUDGMENT APPROVED BY THE COURT**

Transcribed from the Official Tape Recording by

Apple Transcription Limited

Suite 204, Kingfisher Business Centre, Burnley Road, Rawtenstall, Lancashire BB4 8ES

DX: 26258 Rawtenstall – Telephone: 0845 604 5642 – Fax: 01706 870838

Number of Folios: 123

Number of Words: 8,866

JUDGMENT

HIS HONOUR JUDGE DIGHT:

1. The sole issue before me is whether on expiry of a break notice served under a lease vacant possession of the premises demised by the lease was given up in accordance with the terms of the break clause. It is accepted that the notice was valid and served in time.
2. The defendant is the tenant of commercial premises known as Part Ground Floor, Crown House, in Grays, Essex, which I will refer to as “the premises”, pursuant to an under-lease, which I will refer to as “the lease”, dated 20th September 2007 granted for a term commencing on 20th September 2005, expiring on 21st September 2016 subject to the break. The defendant provided educational services at the premises. The claimant contends that vacant possession was not given on expiry of the break notice and that the lease continues. The defendant contends that vacant possession was given and that the lease came to an end on the break date.
3. Crown House is a multi-let building used previously by other government departments. The part demised to the defendant was part of the ground floor only. I have been shown a quantity of plans and photographs which indicate the extent of the premises. The premises as originally let comprised a substantial room accessed through what has been called door F, from which there also led two fire exit doors which have been referred to as G and H. I have been shown photographs of all three doors. Between that room and the main entrance to the building is a corridor which forms part of the common parts of the building, which has doors at each end which have been referred to as doors A and B. Off that corridor there are four individual rooms which were demised as part of the premises. There are in effect, therefore, three separate parcels demised by the lease which had common parts running between them.
4. It is common ground that the doors to the four separate rooms leading off the common parts were not locked. The main part of the demise was locked, namely, at door F.
5. After grant of the lease the defendant, by erecting partitioning, divided up the larger part of the premises creating an admin area, a server room and six teaching rooms, one of which was called the induction room and the others have been described as rooms 1 to 5. I have been shown a plan, which appears at page 188 of the bundle, which identifies those rooms and the partitions which were erected to divide them.
6. The relevant provision of the lease relating to the right to break is contained in clause 9, which reads as follows:

“9.1 In this clause 9 the following expressions have the following meanings respectively:

 Break date means 20th September 2012;

 Break notice means a notice to terminate this lease served in accordance with clause 9.2;

9.2 The tenant may terminate this lease on the break date by giving notice in writing to that effect to the landlord not more than twelve months nor less than six months before the break date;

9.3 If a break notice is given in accordance with clause 9.2 by the tenant then the tenant shall up until the break date have paid the rent reserved by and given possession of the whole of the premises then upon expiry of the break notice this lease will terminate on the break date but without prejudice to the rights of either party in respect of any breaches occurring before the break date.”

1. The material expression in clause 9.3, which lies at the heart of the dispute before me, are the words “and given vacant possession of the whole of the premises”. It is the construction of that clause and compliance with it which I have to determine at this trial.
2. The parties are agreed that if the lease continues there are arrears of rent and if the lease was brought to an end then the tenant is in breach of covenants to repair, decorate, alter and reinstate.
3. There is a considerable degree of common ground between the parties relating to the events immediately before and just after the break date. First, that there is no correspondence in which the defendant effectively said to the claimant they were in the process of giving up possession of the premises.
4. Secondly, no meeting took place at which possession was given up, nor were any arrangements made to do so.
5. Thirdly, no keys, door codes or alarm codes were handed over by the defendant to the claimant. There is a dispute about whether the claimant could access the premises in any event. There is a dispute about whether the claimant had the alarm codes at one point. I should clarify the alarm code in question is for access to the larger part of the premises accessed through door F.
6. Fourth, there was a quantity of chattels left on the premises, including computer screens, a photocopier which is still paid for and owned by the defendant with a sign left on the top of it saying “do not move”, a box of student files which I was told the defendant was under a statutory obligation to preserve for audit purposes, and that neither of those items had been abandoned. In the individual rooms there is a certain quantity of cabling, wiring, trunking and electrical sockets relating to the IT equipment that had formerly been there and relating to the telephone system.
7. Fifth, there are the partitions that I have already described. Those were installed by the defendant to create separate spaces within the larger part of the premises. I have heard evidence about whether those partitions are freestanding or whether they are fixed to the building and for the reasons I will explain in due course I have come to the conclusion that they are not fixed to the building, that they have not become fixtures, but are effectively chattels. In paragraph 34 of her first witness statement filed in this matter Miss Butcher on behalf of the defendant explained that she did not know why these partitions had not been removed.
8. Sixth, the photographs show and the parties agree that in two rooms a type of reception desk was left behind after the break date.
9. Seventh, it is common ground that after the break date the defendant made two substantial payments of rent, but that is not relevant to the question of whether vacant possession was given up at the break date and I need not refer to it further. It does not colour my view of the events which occurred in this case.
10. As far as the law is concerned it is again common ground that conditions of break clauses have to be complied with strictly and I have been referred to the speech of Lord Diplock in *United Scientific Holdings v Burnley Borough Council [1978] AC 904* at 929 where he described the need for exact compliance with the requirements of a lease.
11. Likewise I have been taken to the decision of the House of Lords in *Mannai Investment Company Limited v Eagle Star Life Assurance Company Limited [1997] AC 749* at 776 of which between paragraphs A and B in a more graphic description Lord Hoffman said in his speech:

“If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease.”

1. As to the assessment of compliance my attention was drawn to the decision of Mr Justice Lewison, as he then was, in *Legal & General Assurance Society Limited v Expeditors International (UK) Limited [2007] 1 P&CR 5*, in paragraph 30 of which his lordship said that: “The test of compliance is an objective compliance. There is no room for general considerations of fairness or conduct.”
2. The first thing I have to do in applying the law is to consider what is required under the clause. As I have already mentioned that the tenant must have given vacant possession of the whole of the premises at the break date. Miss Katherine Holland, QC, for the claimant, submits that this means a positive act of giving of the whole of the premises, that in this case there was in fact no such positive act but what may be described as an abandonment of the premises and insofar as it may be arguable and found, contrary to her submission, that possession was given of part of the premises it was not given of the whole.
3. The question which arises is what constitutes vacant possession in this context? The parties are agreed that there are two tests. The first is, objectively viewed, has the tenant manifested a clear intention to effect a termination, and secondly, could the landlord, if it wanted, have occupied the premises without difficulty or objection at the break date? Those tests come from the decision of Mr Robert Hildyard, QC, as he then was, in *John Laing Construction Limited v Amber Pass Limited [2004] Estates Gazette Law Property 128*, where he had to consider what had to be done to yield up premises to comply with a condition contained in a break clause. In that case both the landlord and tenant had concerns about the security of the building and the risk of vandalism and of trespass by travellers if it were to stand empty.
4. In that case between paragraphs 21 and 23 Mr Hildyard explained that fencing and barriers were erected on the premises to ensure that the premises were safe from vandalism and other security risks, that the landlord was made aware of that fact and had effectively consented to those items remaining there. He dealt with the law from paragraph 42 onwards and reached his conclusions from paragraph 45. He said in paragraph 45:

“In my judgment the position adopted by the defendant is wholly artificial, that is the landlord, and its reliance upon the claimant’s efforts to provide for the security of the premises as negating any yielding up is misplaced.”

Pausing there, it seems to me that that sentence is an important sentence in understanding the basis upon which he reached his conclusions in that case.

1. In sub-paragraph 2 he said:

“There having been no prescribed process nor any requisite form I consider that the cases cited by counsel for the claimant do assist although, of course, they are not determinative. In particular, in my view, these cases support the conclusion that in adjudicating upon a claim of unilateral termination unless any special form or process is prescribed the task of the court is to look objectively at what has occurred and to determine whether a clear intention has been manifested by the person whose acts are said to have brought about a termination and to effect such termination and whether the landlord could, if it wanted, occupy the premises without difficulty or objection.”

Miss Holland submits that this is a generous test in the context of the facts of that case, but that nevertheless when the facts of the current case are assessed even against that generous test it can be seen that vacant possession was not given up and that the lease was not brought to an end.

1. Mr Hildyard went on to say in sub-paragraph 3:

“Where the termination is asserted to have been brought about by the exercise of a contractual right the validity or effectiveness of which is denied, a stand off such as has arisen is not surprising. Each side is likely to be wary of doing something that adds *[inaudible]* to the other’s case. Equally each may wish to take reasonable steps to ensure that if the court finds against it at the end of the day it has not worsened its exposure. In such circumstances it is necessary to assess whether there is to be extrapolated from such matters as the retention of keys or the continued presence of security staff a conclusion that the tenant has not yielded up the premises or whether alternatively such facts are explicable, and indeed it seems to me plain in this case explained by reference not to any desire to retain the premises but to a desire to avoid further financial exposure or to keep the premises safe, and a recognition on the part of the tenant that the landlord will continue to assert the lease’s continuance in any event.”

1. He dealt specifically in sub-paragraph 5 with the question of keys:

“The fact of retention of keys or the failure to return them may be significant, but equally it may not be. All it may signify is*,* as in *[Bompas?]*, an oversight or a desire to protect the premises both for the benefit of the defendant and in case the claimant might be found still to be liable without in any way signifying any assertion of rights in respect of the property or being inconsistent with an effective termination of such rights as *Relvok*.”

1. He concluded on that issue, at sub-paragraph 7:

“In this case, as it seems to me, it is plain that the continued possession of the keys to the premises did not signify any intention on the part of the claimant to assert any rights in respect of the premises. There is no doubt to my mind that had the defendant wanted the keys they would have been given to it. The claimant’s desire to be shot of the premises could scarcely be clearer and must have been well understood by the defendant. Although in his supplemental witness statement Mr *[Parks?]*, that is the landlord, stated that had the keys been offered he would have accepted them the defendant’s solicitor’s letter of 17th October 2003 makes it plain that the defendant would have continued to insist that the claimant had not validly exercised the break option. I am in no real doubt that even had the keys been proffered the defendant would have stuck to its line that the break clause had not been implemented and that such a gesture on the part of the claimant would have been futile except, of course, in removing the main plank to which, in the event, the defendant eventually resorted.”

1. Sub-paragraph 8:

“I accept the claimant’s argument that in all the circumstances and especially in the light of the obvious security problems evidenced from the photographs provided and the witness statements and other exhibits neither the continued instruction by the claimant of security personnel to protect the premises nor the presence of removable concrete barriers had created any hindrance to the defendant such as to support the conclusion that the claimant has failed to yield up the premises for the purposes of implementing the break clause.”

1. The learned editors of Hill and Redman doubt the correctness of the *John Laing* case and I have been referred to their commentary at paragraph A5160 and the notes 1 to 4. In the *Legal & General* case Mr Justice Lewison was reluctant to engage in a critique of that case, holding that it was very different on the facts. It is, in my judgment, very different to the facts of the present case where there were no such security concerns and no agreement with the landlord to maintain a presence on the property or protect it from vandalism or trespassers.
2. In the *Legal & General* case one of the issues before Mr Justice Lewison was whether vacant possession had been delivered up of the whole of the premises in compliance with the terms of the break clause. In that case also the tenant had retained all the keys to the premises, had an employee on site and used the warehouse part of the premises for the storage of material.
3. Having reviewed *Cumberland Consolidated Holdings v Ireland [1946] 1 KB 264*, a decision of the Court of Appeal on the question of vacant possession in the context of performance of a contract for the sale of land, Mr Justice Lewison held that the correct analysis of the tests to be applied as discerned from the *Cumberland* case were the two that he sets out in paragraph 41 of his judgment. He said:

“41. It seems to me that the difference between the two tests, that is the *Cumberland* 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 in *de minimis*, he will be held not to have given vacant possession. Thus in the *Norwich* case the *[inaudible]* continues 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.”

1. In seems to me that the second test which the parties are agreed on as coming from the *John Laing* case has to be viewed in the light of what Mr Justice Lewison said in paragraph 42. When one when is looking at the question of occupation of the property one has to have in mind the requirement that there has to be substantial impediment to the use of a property, or a substantial part of it, before the court can come to the conclusion that vacant possession had not been given.
2. Pausing there, Miss Holland in her closing submissions sought to introduce a distinction between the *Cumberland* case and the decision of Mr Justice Lewison on the one hand and the present situation on the other by reference to the construction of the clause in this case, which refers to vacant possession being given of the *whole* of the premises. In my judgment that is not an argument which is consistent with the authorities. It is an alien concept, it seems to me, in the context of a conveyancing transaction, whether that is sale of land or bringing to an end a demise by service of a break notice, to talk of vacant possession of *part* of a property. Vacant possession is required by a contract for the sale of land and on the proper construction of a break clause of “the premises”, where that phrase is used, and the addition of the word “the whole” of the premises does not add anything to it. If the clause specifically said possession need only be given up of part of the premises then one assumes that there would only be a termination in respect of that part only. But where it is a termination of the whole of the demise it follows, in my judgment, that the addition of the word “vacant possession of the whole of the premises” adds nothing to the proper construction of the clause. The decisions in *Cumberland* and in *Legal & General* relate in the first case to the sale of a whole of a parcel of land and in the second to the termination of the lease of the whole of the premises demised by it. The senior judges in those cases would have had the relevant concepts well in mind and the fact that they formed the view that a substantial impediment to a substantial part only of the property was sufficient to prevent vacant possession being given up is, in my judgment, the same test that needs to be applied in the current case notwithstanding the addition of the word “whole”.
3. The most recent decision on vacant possession is contained in the judgment of Lord Justice Rimer in *NYK Logistics (UK) Limited v Ibrend Estates BV [2011] EWCA Civ 683* where the Court of Appeal had to consider whether a tenant had given vacant possession of a warehouse in compliance with the terms of a break clause where the tenant had retained a security guard at the premises, stored a small quantity of goods there and caused contractors to carry out repairs after the termination date.
4. In paragraph 44 of his judgment, after having referred to the authorities that I have already mentioned, Lord Justice Rimer said:

“I would not, with respect, regard the judge *[that is the judge at first instance]* 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 3rd 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.”

1. In paragraph 49 his lordship reached the conclusion that:

“...so far as I can see, it had done nothing *[that is the tenant]* 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 4th April *[2013 in that case]* exactly the same control of the warehouse that it had maintained on and before 3rd April. It remained in occupation of it on and after 4th April in the like manner as it had on 3rd April; and it manifested that occupation by bringing its workmen to the warehouse on 6th April in order to continue with the works *[those are works of repair which it was obliged to do on delivery up]*. 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 3rd April, it had no right to carry out such works.”

1. Paragraph 50:

“I cannot accept that on these facts NYK delivered vacant possession of the warehouse to Ibrend on 3rd 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 3rd 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.”

1. Applying that law to the facts of the instant case I have to look at the evidence that was given by the witnesses. First I heard from Mr Wheeler, an asset manager employed by a company called Trillium Property Services Limited, who were managing agents for the claimant. He oversaw the break notice process. Secondly, I heard from Miss Sutterby, a senior commercial estates manager employed by Trillium. On the part of the defendant I heard from Miss Butcher and Miss Thaxter.
2. Miss Butcher gave evidence which was, through no fault of her own, unsatisfactory for the following reasons. She was not until immediately before the break date a person who had been involved in the dealings relating to it and does not appear to have been briefed on what was going on in any proper way. She was thrust into the problem and expected to handle it. Equally, for reasons that have not been explained, she is the person who has been put forward to give evidence about matters in respect of which she has limited knowledge whereas the two other persons, Mr Geoff Steadman and Mark Harding, who she described to me as dealing with the exit, have not been called to give evidence. I am told that Mr Steadman no longer works for the defendant, that is as much as I know, and that Mr Harding no longer works in the same part of the business, but I do not understand why he, who appears to be the person who mainly handled the issue, could not have been called to give evidence when presumably he might have had direct knowledge of the issues which I have to look at.
3. Miss Butcher told me that she made limited, irregular visits to the premises and none in the period between June and October 2012. For good reason she could not give detailed knowledge of the contents or use of the rooms. It appears that Mr Harding had not briefed her in any substantial way in advance of her being asked to involve herself in the exit process. There were no briefing notes and she accepted that she had not undertaken a review of any of the documents on the file at the time that she was asked to become involved in the break notice issues on around 19th September 2012. In cross-examination she candidly and properly accepted that at that point she did not focus on all the items which it is now agreed remained on the premises at the break date. Her evidence was, with the greatest of respect and through absolutely no fault of her own, of limited value in those circumstances.
4. I also heard from Miss Thaxter, who was on the premises on a daily basis. She was able to give more direct evidence about the premises themselves but in fact she was not on the premises at the time immediately before the break date, the defendant’s business having, I am told, moved elsewhere to a place at which she was working at the break date.
5. Another curious feature about the way in which the defendant’s case has been presented is that notwithstanding the reference, for example, in Miss Butcher’s witness statement to a number of emails passing between her and Mark Harding, those emails have not been produced. I have seen no records of the steps taken to deliver up vacant possession. There are no logs, no notes and no documents have been disclosed about the items that have been left on the premises. So, for example, there are no documents relating to the presence of the photocopier which has the sign “do not move” on it. Miss Butcher told me that the arrangements in respect of that were for Konicka, who owned it and hired it to the defendant, to come to collect it, and that was being dealt with by the defendant’s IT department. But for reasons which had not been explained they did not do so and the photocopier has remained on the premises.
6. That is not the end of it. Miss Butcher told me, and I accept, that the defendant continued to pay the hire charges in respect of the photocopier and probably now owns it. The photocopier, she told me, has not been abandoned and it is therefore either owned by the defendant or hired to the defendant but kept on the premises demised by the lease. There are no documents to explain the true situation in respect of the photocopier and that is again, in my judgment, surprising.
7. I was taken to the lease and a schedule of dilapidations which was served and to chains of emails passing between Mr Wheeler, Miss Sutterby and others on the claimant’s side. In it Mr Wheeler quite carefully says to his colleagues that he considered that there was a chance that vacant possession would not be given by the break date and that he did not want to take any steps to disturb that situation. He was cross-examined about that. The basis upon which the cross-examination was put was that it set the scene and it is in that context that I should look at the assertion by the claimant that it was impeded in its subsequent use of the premises.
8. It seems to me that Mr Wheeler was entitled as the asset manager to look at whether the break clause conditions were going to be complied with and to advise his client whether to take the stance that they had not been complied with and that the lease continued, if it commercially suited them. It was a strategy he was entitled to form.
9. It was not suggested directly that the nature of those emails had any adverse impact on his credibility and in my judgment it does not have any impact on his credibility. I accept his evidence at face value. Nor does it have an impact on the way in which I view the evidence as to what was left on the premises and the impact of it, which has to be viewed and analysed objectively having regard to the authorities that I have already mentioned.
10. The items which are on the premises now are said to have been there since the break date. It would appear that nobody went to the premises for some considerable time after the break date. The first evidence I have of a visit to the premises is that of a Mr Wilkins, who provided a witness statement which was not challenged. He was asked to prepare a survey in respect of the whole building. He had been told that there might be difficulties with accessing the whole of the building.
11. He describes in his witness statement how he had obtained a key fob from a G4S security guard to obtain access to the main entrance doors to the building and found that some keys in a cabinet on the ground floor gave him some access to some of the rooms in the building not demised to the defendant. In order to complete his survey he obviously wanted to look through the demised premises and survey them. He attempted to contact Miss Sutterby but without success. He says in paragraph 17:

“As we continued work we came across a door with a digilock. This door is marked H on the attached plan.”

Pausing there, that is one of the fire escapes in the main part of the demised premises.

“The door is located in the corner of the stairwell. There was also a small vision panel into an empty room. The door was flush and had no signage. The room appeared to be empty. Due to the nature of our job we are used to coming across locked doors in vacant buildings. We therefore usually try simple codes on such locks. I therefore tried to open the door marked H with a simple 321 code. The door unlocked and as I pushed open the door an alarm started to immediately sound. I immediately closed the door again.

I immediately went to JobCentre Plus on Derby Road, Grays, to inform Brian at G4S I wanted a code. Brian immediately rang his manager to obtain permission to send *[inaudible]* investigate what had happened and to ascertain which door had been involved. Brian obtained permission from his manager, we attended the building together. I showed Brian the door. By this time the alarm had stopped. Brian asked how I had opened the door. I explained I had just tried a simple 321. Brian tried the lock with his code and the door opened. The alarm started sounding again. We both entered the room to try and locate the alarm panel to see if we could stop the alarm. Brian had assumed that the panel would have been directly next to the door but it was not.

The panel was actually located down the corridor in the reception area marked F on the attached plan. Brian tried the alarm code he knew for the building, but this did not work. We therefore quickly realised that the alarm was a separate system to the rest of the building. We therefore both immediately left through the door marked H.”

1. Mr Wheeler was the next person who gave evidence about going into the premises in July 2016. He referred to the need for the alarm to be deactivated. He had formed the view that those who accompanied him from the defendant had deactivated it. Miss Butcher explained that in fact they had taken the fuse out of the alarm system and disconnected the wires because they had forgotten what the codes were.
2. I will come back to some of the other relevant evidence in due course. The essence of the claim in submissions is, first, that the defendant did not give up possession because it did not manifest any objective intention to do so. Secondly, that vacant possession was not given up because the defendant continued to make use of the premises by storing the items on it that I have referred to. Thirdly, vacant possession was not given up because of the substantial impediment to, or interference with, a substantial part of the premises because of the continued presence on the premises of the items I have described. Miss Holland submits that her clients are entitled to succeed on any one of those grounds, each one of them being satisfied from her client’s perspective, and that I should find that the lease has not been terminated.
3. The defendant submits, first, that I should remind myself that giving up a vacant possession is fact specific and that each case has to be looked at individually. Secondly, I am reminded, as Mr Hildyard said in the *John Laing* case, that although the keys were not given up in this case that while that is a relevant factor it is not determinative of the issues before me and does not, as Mr Murch submitted, sound the death knell for the defendant’s case. Thirdly, he submits that the defendant has done nothing in this case, when one views the evidence objectively, to show that it is retaining possession. Fourth, in any event, the small amount of material left on the premises, much of which is portable, presents no substantial interference with the claimant’s use of the premises and that the evidence of Mr Wilkins and Miss Thaxter in particular shows that the claimant could get into the premises when it wanted to. So far as the partitions are concerned Mr Murch says that that is really a reinstatement point and does not go to the issues of vacant possession.
4. So far as the keys are concerned it is right that the claimant could have gone into the open rooms that lead off the corridor between doors A and B because those are not locked. But they could not have gone into the main area behind door F unless they had access to one of the two doors to that part. There is a dispute about various of the doors, including a dispute about whether there was a keypad on door A. That dispute does not seem to me really to assist in determining the other issues and door A being part of the common part has no real part to play in the determination of whether the premises accessed through door F were given up.
5. Door F was really the only important door. It was protected by a key and an alarm. The key was not delivered up. I find, notwithstanding the assertions of the defendant, that the claimant was not in possession of a key to that door. The highest that Miss Thaxter put it in her original evidence was that she assumed that the managing agents had a key, a position which she reiterated in her oral evidence in the course of cross-examination. She also referred to an exchange of emails in 2010 when there had been a leak to one of the radiators in that part of the building which she had reported to Mr Harding, who had reported it turn to Trillium, and she had been told that if the matter could not be dealt with during working hours that Trillium would let themselves in out of hours, from which she infers that they had a key. She gave an example of a gentleman called Damien, a security guard, letting himself in through one of the fire exits at some point.
6. However, none of those pieces of evidence satisfy me that at the expiry of the break notice in September 2012 the claimant had keys to doors F, H or G, or insofar as an alarm or access code was needed that they knew what the codes were for those doors. As Mr Wilkins’ evidence made plain, he was able to access one of the fire doors as a result of a guess, but he was obstructed in access because he did not have the code to the fire alarm. True it is that the defendant’s officers were able to disable the security alarm by taking out the fuse and removing the wires, but that is a far step, it seems to me, from handing over the alarm codes and I cannot infer from it that the claimant would have had access to the premises and would have thought about, if indeed they had to, disabling the alarm in the same way. Mr Wilkins plainly did not consider that possibility and I am not surprised that he did not do so.
7. So far as the other items on the premises are concerned I am satisfied that the photocopier and the box of files are still owned by the defendant or are under their control, had not been abandoned for the reasons that have been explained and had been left on the premises. I am satisfied that the cabling, wiring, trunking and sockets have been left. I am satisfied that the partitions are freestanding and that they have been left, together with the reception desks in the two rooms.
8. Mr Wheeler was cross-examined about whether those items created an impediment. Taken through the items one by one he properly accepted that most of them were quite portable and that none of them, alone, with the exception of the partitions, prevented use of the rooms. But he made it plain that before the landlord could use the premises they would have to do works to remove the partitions, the desks, the trunking, the cabling and the sockets, to bring the premises into a state whereby they could be used. He accepted that after the works had been carried out the rooms would have been available for the landlord to use or re-let.
9. Going back therefore to the two tests, first, was there an objective manifestation in the sense that the authorities describe to effect a termination of the lease, particularly in light of the word “given” in the phrase “given vacant possession of the whole of the premises” in clause 9.3 of the lease? In my judgment there was not. There was no positive step taken by the defendant to demonstrate to the outside world that it had given up vacant possession of the property, whether they intended to do so or not. Their subjective intention is not the key issue, it is the objective manifestation of it. Going back to the factual common ground there was no correspondence saying they were giving up possession, no hand-over meeting, no delivery of keys or codes, items were left on the premises, including items that they continue to own. It was really, in my judgment, more akin to an abandonment of the premises rather than a delivery up of them.
10. Secondly, I accept Miss Holland’s submission that by leaving the photocopier and the files in the room and the various pieces of cleaning equipment, which I make no findings about the particular ownership or use of, the defendant continued to store goods there and was therefore continuing to make use of the premises after expiry of the break notice. How did they think, one asks rhetorically, that the company which owned the photocopier and had rented it to the defendant was going to obtain access to collect it after the time that the lease had come to an end if they did not let them in? They were, in my judgment, still making use of the premises.
11. Lastly, could the landlord, if it wanted, occupy the premises without difficulty or objection or was there a substantial impediment to use of a substantial part of it? In my judgment, the landlord could not, for the reasons given by Mr Wheeler. At the very least the partitions would have to be removed, what appear to be the relatively substantial desks would have to be removed, the photocopier and the other chattels, the trunking and cabling. So therefore Miss Holland is right, in my judgment, on each of the three grounds that she relies on.
12. For those reasons I have come to the conclusion that vacant possession was not given up and the lease therefore continues.

THE JUDGE: Yes?

MR WATKIN: May it please your honour, as your honour will have detected I am here in place of Miss Holland this morning. Can I make *[inaudible]* firstly for that, secondly for appearing half dressed. Nobody informed me that your honour was not robing today so...

THE JUDGE: I did not inform anybody either.

MR WATKIN: I am half way between. That said, there are some consequential matters. I believe your honour said that if there was an order which was not agreed we could come back, but the matters should be very short.

THE JUDGE: Yes.

MR WATKIN: I am going to try and invite your honour to deal with them now, if your honour is willing.

THE JUDGE: It depends.

MR MURCH: I will hear what is said and I will respond, yes.

THE JUDGE: Absolutely, yes.

MR WATKIN: Your honour, first of all judgment. Does your honour still have Miss Holland’s skeleton argument?

THE JUDGE: Yes.

MR WATKIN: The last paragraph of that sets out a judgment sum and an interest sum which is claimed. The interest sum is calculated at eight percent. I understand it was calculated to the day before yesterday.

THE JUDGE: Is that in accordance with a provision in the lease?

MR WATKIN: No, the eight percent rate is under the County Court powers. There is in fact a rate under the lease also specified. Your honour finds the lease—

THE JUDGE: Four percent above base.

MR WATKIN: Yes, so four and a half percent.

THE JUDGE: Yes, that is your deal. That is what you are entitled to.

MR WATKIN: Your honour, four and a half percent, the rate is somewhat lower therefore. I calculate the interest to date to be £22,753.56. I can take my learned friend through my maths in relation to that. I have actually got a schedule setting all of that out.

THE JUDGE: Yes, when you draft the order you can *[inaudible]*.

MR WATKIN: Very well.

MR MURCH: Your honour, indeed, yes.

MR WATKIN: Your honour, the second point is that the counterclaim for repayment of sums which were said to have been paid by mistake needs to be dismissed. The third point is that I ask your honour to order that the defendant pays the claimant’s costs on the standard basis to be the subject of a detailed assessment.

The fourth is an interim payment. Your honour will no doubt be aware that CPR 44.2(8) says that unless there is good reason your honour should order it. The White Book points to a case called *Thomas Pink* in relation to that. In *Thomas Pink* 90 percent of the budgeted costs figure was awarded. There are a series of cases in relation to that which I will have with me if your honour is interested in going through them, but can I say this in relation to the budget, which your honour finds in the bundle. If your honour wishes to refer to it, it is in the first volume of the bundle and it is behind tab 11. The total budgeted figure...

THE JUDGE: This was approved or agreed, was it?

MR WATKIN: It was agreed, I believe, your honour. Is £125,752.90.

THE JUDGE: Is that for this preliminary issue?

MR WATKIN: Yes. Yes, I believe so, your honour, and it was updated by reference to a further agreement following the PTR. There are some aspects of it which need adjustment downwards because, for example, there was no mediation. The budgeted figure for trial prep was not reached, neither was the figure for experts. The total of the budgeted sums which was in fact incurred is £110,952.20.

THE JUDGE: At what point was this approved?

MR WATKIN: Your honour, as I understand it there was an original budget approval and then at the PTR His Honour Judge Gerald ordered further budgets to be agreed or approved and further budgets were then approved. So this budget is very up to date in the sense that it was produced after the PTR.

THE JUDGE: I understand that, but what I was really getting at was I assume that the pre‑action costs and the CMC costs would not have been approved because they would have been incurred before your first costs *[inaudible]*.

MR WATKIN: Oh, I see, your honour. There was a budgeting process at the CMC so there would have been some pre-action costs before that which were not approved. Yes, your honour is correct.

THE JUDGE: And the CMC costs would have been incurred by then presumably?

MR WATKIN: Yes. Whether or not the CMC costs get approved in the budget or not, sometimes they seem to get approved, or they get discussed, in any event but I am not sure, for example, since the CMC occurs after the budgets are served they may well have been agreed before the CMC costs are incurred.

THE JUDGE: With the budget agreed.

MR WATKIN: I do not think the...

MR MURCH: The budgets were agreed at the CMC last November, yes.

MR WATKIN: And again after the PTR. So I think they have always been agreed.

THE JUDGE: Yes, all right.

MR MURCH: *[Inaudible]* basis going forward, as your honour says.

MR WATKIN: So, your honour, on that basis I say that your honour can have a high degree of certainty that these costs in that sum will be recovered. To that has to be added the costs of today because this is a further date, which I am instructed amount in total to £2,113, and to all of that needs to be added VAT. So I take the matter without VAT to be £113,065.20.

THE JUDGE: Can the department not recover the VAT?

MR WATKIN: I gather not. I have asked for that to be checked and it has been checked and I am informed that we do in fact have to claim VAT in these costs.

THE JUDGE: Right.

MR WATKIN: It was a matter which I thought to check, your honour, and I am told it has been checked. It has gone up the line and come back down again.

THE JUDGE: Right. So total including VAT is?

MR WATKIN: Your honour, I have not put VAT onto it. The total without VAT is £113,065.20.

THE JUDGE: So VAT would be about another £23,000.

MR WATKIN: Yes, your honour.

THE JUDGE: So what is your total figure? £136,000? No.

MR WATKIN: £135,678.24 I get.

THE JUDGE: Yes. Anything else?

MR WATKIN: No, your honour.

THE JUDGE: Mr Murch, what do you say?

MR MURCH: Your honour, obviously I accept that costs follow the event in this case. I accept also that the claimant is entitled to a payment on account. What I say, I make two observations, is obviously it is not written in stone the amount that should be awarded by way of on account payment. I also make the point that the budgeted costs, of course, were those going forward and there was not agreement, or any determination, as to the pre-issue costs and that there could well be scope for reduction there on the assessment. I accept it has got to go for detailed assessment. I invite your honour to award 60 percent of the costs by way of the on account payment taking into account those factors.

THE JUDGE: What does that come to?

MR WATKIN: Did you say 70 percent?

MR MURCH: 60 percent.

MR WATKIN: That would be £81,406.95.

MR MURCH: Indeed.

THE JUDGE: I had in mind £90,000.

MR WATKIN: Your honour, may I say in response to what my learned friend says about that. The first point he says is that the costs cannot necessarily be directed towards the preliminary issue. I would remind the court that this budget was agreed for a two day trial after the preliminary issue had been directed. So these are the costs of the preliminary... forgive me, I may be arguing a point my learned friend is not making, but this costs budget is the budget for the costs which have been incurred—

MR MURCH: Yes, it was the preliminary costs I referred to. I am sorry I was not clear. I am sorry, Mr Watkin, very sorry.

MR WATKIN: So, your honour, this is the correct budget. The thrust of the authorities, which I will take your honour to if necessary, is that by virtue of costs budgeting if those costs have actually been incurred, unless there is some good reason to think otherwise, the court can be reasonably certain that costs at or around the budgeted figures will be recovered and in those circumstances it is right to award a sum approaching the budgeted figure.

THE JUDGE: Yes.

MR WATKIN: And 90 percent has been awarded in a number of cases which I can take your honour to, or indeed above 90 percent in some cases.

THE JUDGE: Yes. I am going to take off the pre-action costs and the issue costs and a bit relating to the CMC and the VAT payable on that and give you a substantial proportion of the rest and that comes to about £90,000.

MR WATKIN: Your honour, in my submission if you awarded me a substantial proportion of the rest of the costs and nothing in relation to pre-action costs then your honour is assuming a zero recovery in relation to the pre-action costs.

THE JUDGE: £95,000.

MR WATKIN: I am grateful, your honour.

MR MURCH: I would ask for 21 days, your honour.

THE JUDGE: Yes.

MR WATKIN: Yes, your honour.

THE JUDGE: Thank you very much. Can you agree a minute between you and email it to Mr *[DeMenzies?]* please? Can I thank you both and Miss Holland and your respective solicitors and clients for this and all your assistance? Thank you.

MR WATKIN: I am grateful.

THE JUDGE: I will keep the files for a month. If no one seeks permission to appeal or a transcript I will throw them away. Thank you.

*[Hearing ends]*