

## A break from reality?



*Capitol Park Leeds plc v Global Radio Services Limited*

### Not another case involving a disputed break clause in a commercial lease?

Yes, although this one comes with a twist, which should be of interest to all landlords and tenants in the current climate.

### Ok, so what happened?

Global Radio Services (“Global”) was the tenant of commercial premises in Leeds, which it was using as a commercial radio studio. Capitol Park Leeds plc (“Capitol”) was the landlord. The term of the lease was not due to end until 2025, but it had a fixed break option. To take advantage of it, Global would need to give between six and nine months’ notice. The break option had some typical conditions attached to it. All rent due on or before the break date would have to be paid. And Global would have to return vacant possession of the premises (as defined by the lease) to Capitol on the break date. Global went ahead and served a break notice on Capitol on 15 February 2017. If effective, it would bring the lease to an end on 11 November 2017.

### I thought you said this would be interesting?

Stick with it. Those are just the background facts. In March 2017, Capitol served a schedule of dilapidations on Global. In response, Global began a programme of reinstatement and repair works. By 20 June, many of the fixtures and fittings had been removed from the premises. But then the work paused. The parties’ surveyors were going to meet to try and agree a potential settlement of the dilapidations claim. Global’s thinking was that it



would make no sense to go beyond a strip-out of the premises if Capitol would be happy to accept a cash settlement instead.

## No prizes for guessing what happened next then.

Indeed. Global's surveyor didn't make a settlement offer to Capitol's surveyor until 10 August 2017. By then, Global had less than 3 months in which to complete the works they had started. Capitol's surveyor indicated that his client was unlikely to accept the offer. On 15 September 2017, Capitol's solicitors sent a letter to Global. It would have had quite an unsettling effect. It reminded them that the break option would be conditional on the return of the premises in the condition required by the lease. It also questioned whether the work described in the schedule of dilapidations would be completed. Global then put the remaining works out to tender. But it was too late. They would not be able to complete the work before the break date.

## Ouch. But the premises were an empty shell. Surely that would mean the tenant could still give back vacant possession, terminate the lease, and carry on arguing over the dilapidations claim?

So you would think. And that's exactly what Global tried to do. But here's the catch. The break condition required them to return the "Premises" to Capitol – i.e. the specific definition given to that term by the lease. And that definition included: "... All fixtures and fittings at the Premises whenever fixed (except Tenant's fixtures) ...". The issue there, of course, was that numerous fixtures and fittings were missing. Global had removed them as part of its strip-out works and never got around to replacing them. On that basis, Capitol argued that a condition of the break option had not been met. The lease would continue as a result. Faced with the unappetising prospect of paying 8 years' worth of rent for premises it no longer wanted, Global sought a declaration from the court to say that the break option had been properly exercised.

## Well the landlord can't have won that argument can they? Most people would understand a tenant handing back vacant possession of premises to mean handing them back empty.

Actually, the court did find in favour of Capitol. The focus on vacant possession turned out to be a bit of a red herring. The judge found that the obligation of the break right was to return the premises to the landlord as described by the lease. Nothing more and, crucially, nothing less. The break clause had been drafted in that way, he reasoned, to reflect the parties' intention that the tenant would not be permitted to present the landlord with "an empty shell of a building which was dysfunctional and unoccupiable".

## Not good news for tenants then! What tips would you recommend to avoid ending up in a similar situation?

The judge did remark that the circumstances of this case were quite exceptional (ie fact specific). And permission has been given for an appeal to the Court of Appeal, so the principle it sets may not be a lasting one. But here are some pointers:

- If any alterations have been carried out during the term of the lease which have resulted in the **adaption or removal of the landlord's fixtures and fittings, give careful consideration to the way in which the lease defines the premises**. Is some reinstatement work needed to return them to the landlord in a compliant condition?



- More generally, once a break notice has been served, **work out what has to be done to comply with any conditions on the break option well in advance and don't be side tracked by negotiations with the landlord.** It often makes good commercial sense for both parties to agree on terms for a dilapidations settlement, or an early surrender. But the landlord is unlikely to waive a break condition simply by negotiating terms (that argument was tried in this case and failed) and if a deal isn't reached there may not be enough time left to comply with it.
- If the landlord is willing to agree a settlement in exchange for the waiver of break condition, **make sure that agreement is documented in writing.** The lack of any written evidence (even a chain of emails) referring to an agreement not to enforce the break condition in this case led the court to prefer the landlord's position: no such agreement was entered into.