Break Notices after Avocet—A Landlord's Duty to Speak?

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One feature of difficult economic times is a rash of break notice battles. The tenant wants to find cheaper accommodation elsewhere. It gives notice to the landlord, knowing that a failure to operate the break provision correctly will be expensive. But the loss of the tenant will be expensive for the landlord and so the landlord will look to defeat the exercise of the break. This article examines the latest position on break notices—is there a duty on landlords to point out errors in such notices?

Lewison L.J. described the current problem in these words:

> "… the change in economic conditions will be precisely the reason why the landlord will fiercely resist the tenant's attempt to break the lease. He will pick over the tenant's notice exercising the break looking for any possible error; and he will examine minutely whether the tenant has fulfilled any conditions on which the validity of the break notice depends. Does it specify the right date? Was it served by the right person? Was it given to the right person? Was it given in accordance with any stipulated timetable? Did the tenant comply sufficiently with his obligations under the lease? Has the tenant given vacant possession? If any one of these questions elicits even a plausible negative answer the stage is set for a full scale battle."(see Foreword to *Break Clauses*, by M. Warwick and N. Trompeter, (London: Sweet & Maxwell, 2011).

The landlord wields an often decisive weapon in these battles; the principle of strict compliance. As a break clause is in the nature of an option, the conditions for its exercise must be strictly complied with. "Even a day's delay in giving vacant possession or a shortfall in the payment of rent of a few pounds would be fatal": see, *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2007] EWCA Civ 7; [2007] 2 P. & C.R. 10; [2007] L. & T.R. 16.

But the recent decision in *Avocet Industrial Estates LLP v Merol Ltd* [2011] EWHC 3422 (Ch); [2012] 1 E.G.L.R. 65 suggests a new weapon for the tenant in these battles; a duty on the landlord to speak. In that case, the break notice was defeated by a failure to pay a small sum due as default interest. But Morgan J. indicated that, had he found that the landlord knew at the break date of the tenant's mistaken failure to pay that sum, he would have held that the landlord was under a duty to speak, to point out the mistake, and that its failure to do so would have given rise to an estoppel.

Is there a duty to speak?

Another first instance case suggests not. The case of *PCE Investors Ltd v Cancer Research UK* [2012] EWHC 884 (Ch); [2012] 2 P. & C.R. 5 involved a break notice where Peter Smith J. rejected an argument that there was a duty on the landlord to point out an error by the tenant.

So which view is to be preferred? It is thought that the better view is that in *PCE Investors*, namely, that there is no duty to speak in break notice cases. The starting point lies in the general principle that silence is no representation. The case of *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 1 W.L.R. 1485 was decided in presumably happier economic times, being a case about a notice to renew, rather than break, a lease. But the principles are the same. Both a right to break and a right to renew are in the nature of options. In this case, there was a failure to decorate in the last year. The principle of strict compliance meant that the notice would be ineffective, absent an estoppel. The landlord, however, had visited the property and not complained about the failure to decorate. The judge found an estoppel on those facts but that conclusion did not survive on appeal. The Court of Appeal allowed the appeal on the basis that mere silence cannot amount to a representation. This continues to be the general principle. So, in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353; [2012] 1 W.L.R. 472, Rix L.J. said this:

> "Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat emptor reflects a basic facet of English commercial law … Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion. In such circumstances, silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune. If, however, the contractor speaks, then he may have to live up to what he says; so also where what is unsaid is sufficiently closely connected with what he has said to render what has been left unsaid misleading. In general, however, there is no duty of disclosure."

The related idea, seen in that passage, that there is no duty to point out defects to the other side also crops up in break notice cases. In *Dun & Bradstreet Software Services (England) Ltd v Provident Mutual Life Assurance Association* [1998] 2 E.G.L.R. 175, for example, a failure to pay penalty rent defeated a break notice. Peter Gibson L.J. was very clear that: "it cannot be said that the landlord was under some duty to alert the plaintiffs, advised as they were by reputable solicitors, to the obligations under the break clause which they themselves had sought to operate."

The principle that silence is no representation is, therefore, alive and well and the cases also support the related idea that there is no duty to point out defects to the other side. So what about the duty to speak cases? How are they to be explained? The answer, it is suggested, is context. They seem to be cases where the context meant that a failure to speak was positively misleading.

Context is the key

The decision relied on by Morgan J. in *Avocet* was a charterparty case, namely, *The Lutetian* [1982] 2 Lloyd's Rep. 140. Here, Bingham J. considered the effect of a failure by the owners to point out to the charterers that they had paid the wrong amount. He held that such failure meant that the owners were estopped from relying on the error in payment to withdraw the vessel. But, importantly, the charterers seem to have been misled by the owners' failure and, further, the duty was expressed as a duty not to mislead:

> "One must be careful not to impute unrealistically onerous obligations to those who may choose to conduct their relations in a tough and uncompromising way. There is nonetheless *a duty not to conduct oneself in such a way as to mislead*. I have no doubt that the charterers believed they had paid the right amount. I have no doubt that the owners knew that the charterers believed they had paid the right amount. It was their duty, acting honestly and responsibly, to disclose their own view to the charterers. They did not do so and indeed thwarted the charterers' attempts to discover their views. Their omission to disclose their own calculation *led the charterers to think*, until a very late stage, that no objection was taken to the calculation."(emphasis added).

The context seems to be key. As explained in *ING Bank NV* , the context of *The Lutetian* is one of co-operation; an owner and charterer co-operate on what is hoped to be the success of their maritime adventure. In *ING Bank NV* , it was the context which meant that, in the view of Rix L.J., there was a duty to speak. His Lordship emphasised that, both as a matter of contractual obligation and as a matter of business, there was a closeness between ING as advising bank and Ros Roca as client: "the relationship between an advising bank and its client is closer, and more professional, than that between an owner and a charterer of a vessel".

Context in break notice cases

So, if context is crucial, it is necessary to reflect on the context in break notice cases. The context here is certainly not one of closeness or cooperation. It is probably better described as adversarial. The tenant is expecting a distinct lack of co-operation from the landlord. In that context, it seems unreal to talk of the tenant being misled by silence. The tenant expects the landlord to be looking for arguments that the break clause has not been validly exercised. So the tenant who gives his notice and hears nothing of substance back from the landlord before the break date is not assuming from the silence that all is well. Instead, he will be bracing himself for the almost inevitable battle over validity. The context of break notice battles should, therefore, mean that there is no duty to speak.

But, as already noted, the position on the authorities remains uncertain for the moment. The case of *Avocet* points one way, but *PCE Investors* the other. The Court of Appeal ended up being denied the opportunity to bring any clarity in *Avocet*; the appeal settled after argument on this point but before judgment. The Court of Appeal, however, is set to be given that opportunity in *PCE Investors*. The appeal from the decision of Peter Smith J. is due to be heard in February. In the meantime, tenants can expect landlords to continue to act on the basis that silence is golden.

The law is stated as at December 14, 2012.