

Dreams analysis; sale contracts, completion and vacant possession

Andrew Walker QC analyses the recent decision in Dreams v Pavilion Property Trustees, and considers the nature of obligations to be complied with on completion of a contract of sale and purchase.

The case

In Dreams Ltd v Pavilion Property Trustees Ltd [2020] EWHC 1169 (Ch) (judgment handed down on 12 May 2020), Miles J had to consider two preliminary issues relating to an agreement to surrender a lease.

The situation

The agreement had been structured as a conditional agreement by the tenant to transfer an estate in land to the landlord, conditional on notice being given by either the landlord or the tenant. On completion, the tenant and the landlord were to execute a form of transfer and counterpart by way of surrender.

It was an express “*condition of completion*” that the tenant was to pay any money due on completion by direct credit transfer. Another clause provided simply that, “*The surrender is with vacant possession.*”

Notice was given by the tenant. On the due date for completion, the landlord refused to complete. The core reason given which the judge had to consider was the tenant’s alleged failure to provide vacant possession, due to having failed to remove a lift and a mezzanine floor. In response, the tenant sued for specific performance and damages.

From what can be gathered in the judgment (and the preliminary issues themselves), the crux of the claim seems to be an argument over the tenant’s alleged dilapidations liabilities, including liabilities to remove the items which the landlord argues are tenant’s fixtures. Presumably the tenant is looking to minimise the works it must do in order to achieve a surrender and/or the compensation it must pay, and the landlord is seeking the opposite.

As this judgment deals only with preliminary issues, we will have to wait for a further decision on the interesting question of whether the failure to remove the lift and mezzanine floor mean that the tenant was (and presumably still is) unable to give vacant possession: see, e.g., Riverside Park Ltd v NHS Property Services Ltd [2016] EWHC 1313 (Ch) and Goldman Sachs International v Procession House Trustee Ltd [2018] EWHC 1523 (Ch).

The first preliminary issue

The first preliminary issue raised a question of interpretation as to whether the tenant had to pay damages for dilapidations as a condition of completion. The judge held that it did not.

The second preliminary issue

The second preliminary issue was whether, on the true construction of the agreement, the tenant was obliged to give vacant possession “before” the landlord could be obliged to accept a surrender.

The question of conditionality: (1) a pre-condition?

The first strand of the argument concerned whether the tenant’s obligation to give vacant possession of the premises was a condition precedent to the landlord’s obligation to complete.

In this connection, the judge referred to a passage in Lewison, ‘The Interpretation of Contracts’ (6th ed., para.16.02). That section starts by identifying different ways in which the term ‘condition precedent’ is used:

“A condition precedent is a condition which must be fulfilled before any binding contract is concluded at all. The expression is also used to describe a condition which does not prevent the existence of a binding contract, but which suspends performance of it or an obligation under it until fulfilment of the condition; or to describe a contractual obligation that must be performed by one party before another contractual obligation of the counter-party arises.”

The landlord’s argument seems to have been that the requirement to give vacant possession was a condition precedent in the last of those senses. That is not the case under an ordinary contract for the sale of land, and it is difficult to see why the contract in Dreams should be any different. In the end, the judge does not seem to have reached his decision on this basis.

The question of conditionality: (2) a condition?

The second strand of the landlord’s argument emphasised that the contract was for the conveyance of an estate in land.

It argued that the general law in sales of land is that the purchaser’s duty to complete is conditional on the property being delivered with vacant possession where this has been promised in the contract, and that this should apply to the contract in Dreams.

Two cases were relied on in support of this: an unreported decision of the Court of Appeal (Lambeth LBC v Lexadon Ltd (14.6.2000)) and Cook v Taylor [1942] 1 Ch 349. Unfortunately, neither analyses the relevant contractual principles, and the judge may have given the Lambeth case rather too much weight in treating it as authority for the (broadly accurate) proposition that “a buyer is not required to complete a purchase of property where a seller has failed to fulfil its promise to deliver vacant possession on completion”.

Having considered the arguments, the judge concluded (at [83]) that: “*in general a buyer who has bargained to obtain vacant possession may refuse to complete until such possession is delivered.*” That is right, but the judgment does not explain why.

At [85], though, he reached the nub of the point:

“adopting [the words of Flaux] in Astrazeneca UK Ltd v Albemarle International Corp [2011] EWHC 1572 (Comm), I consider that the performance of the [tenant’s] obligation to give vacant possession is a direct quid pro quo of its entitlement to complete the surrender. The bargain involved (among other things) the transfer of the Premises with vacant possession in return for the acceptance of the surrender and the release of all liabilities under the Lease. The two things are to my mind properly to be regarded as conditional obligations, with one being needed to earn performance of the other.”

In that final passage, the judge gave the right answer, but what legal analysis might he best have given to explain it?

The underlying analysis

It is no surprise that the judge took the view that the contract imposed an obligation on the tenant to deliver vacant possession, in a similar way that a seller is obliged to do so under an ordinary contract for the sale of land.

Having taken that view, there could have been a more direct way for the judge to reach his answer. He might have considered simply whether the landlord’s completion obligations and the tenant’s completion obligations (including the obligation to give vacant possession) were dependent or independent obligations.

In other words, were the obligations of each party dependent on the other party performing its obligations? Or did each party have to perform its own obligations whether or not the other party did so?

The answer to this would have been clear: the obligations were dependent on each other.

The reason can be seen by considering the consequences of each approach:

- 1) If the obligations were independent of each other, the tenant could have insisted on the landlord providing a release without itself giving vacant possession (or being ready, willing and able to do so). The same would also have applied the other way around: the landlord could have insisted on the tenant making a surrender with vacant possession, without itself providing any release (or being ready, willing and able to do so). It is difficult to see how that could have been right, legally or commercially.
- 2) If, on the other hand, the obligations were dependent on each other, then the landlord was entitled to refuse to provide a release unless and until the tenant complied with all of its significant completion obligations (including providing vacant possession), and *vice versa*. This is the position under an ordinary contract of sale.

A conclusion that the obligations were dependent on each other would have led the judge to decide that the landlord was not obliged to complete the surrender on the completion date if

the tenant was not able to deliver vacant possession. In substance, that was the answer that he gave at [85].

Dependent and independent obligations

The general law on dependent and independent contractual obligations is summarised in Lewison (6th ed., para.16.15) as follows:

“A contractual obligation may give rise to a liability which may only be enforced by a party to the contract if he has performed or offered to perform his own obligations under it (“a dependent obligation”); or it may be capable of enforcement whether or not the party seeking to perform has performed or offered to perform his own obligations (“an independent obligation”). Which species of obligation has been created is a question of interpretation, but if the obligation constitutes the whole or a substantial part of the consideration for the contract, the court is likely to interpret it as a dependent obligation.”

Completion obligations in a contract for the sale of land

Lewison gives an ordinary contract for the sale of land as an example: *“the vendor’s obligation to convey and the purchaser’s obligation to pay the purchase price are dependent obligations”*.

This has long been clear. In Heard v Wadham (1801) 1 East 619 at 629, Lord Kenyon CJ said:

“... it is as clear that these are dependent covenants. I never expected to hear it said that these were independent covenants; where one man agrees to pay a certain sum of money on a given day, and another covenants to convey an estate to him on the same day; can it be contended for an instant, that though the one has not conveyed he may call upon the other to pay the money. Common sense revolts at such a proposition.”

Rather more recently, Nicholas Strauss QC explained in Ministry of Sound (Ireland) Ltd v World Online Ltd [2013] EWHC 2178 (Ch) at [51]-[52] that:

“The distinction is between a right to payment which is dependent on performance, and one which is supported only by the other party’s promise to perform: see per Dixon J in the Australian case of Automatic Fire Sprinklers Proprietary Ltd v. Watson (1946) 72 CLR 435 at 464 ...

“It is clear that, at least in common contracts such as the sale of goods and sale of land, there is a presumption that promises are mutually dependent, so that the right to payment arises simultaneously with transfer of property ...”

In essence, what is required is performance on both sides at the same time. This is fundamental to conveyancing law and practice.

So, where the seller’s obligation is to convey property with vacant possession, the seller must do that – or be willing and able to do that – if it wishes to insist on the buyer performing its obligations on completion.

In the ordinary case, the buyer’s key obligation will be payment. In Dreams, the landlord’s obligations included executing the counterpart transfer and providing a release to the tenant, but that should make no difference in principle. If the tenant was unable to give vacant

possession on the due date, then the landlord was entitled to refuse to complete the surrender.

Doherty v Fannigan Holdings

These principles are of general application, as is well illustrated by a recent case concerning a sale of shares: Doherty v Fannigan Holdings Ltd [2018] 2 BCLC 623, [2018] EWCA Civ 1615.

In Doherty, the sale was in tranches. The buyer did not pay a particular tranche of the price. As a result, the seller refused to transfer the related tranche of shares. Instead of seeking specific performance against the buyer, the seller then served a statutory demand on the buyer for the unpaid tranche of the price.

The court held that the seller could not do so, on the ground that “Neither party was entitled to enforce the performance of the other’s [obligation] except against a performance of his/lits own” (see [42]). As a result, there was no enforceable debt that could be the subject of a statutory demand or support a bankruptcy petition.

In the course of his judgment, Sir Colin Rimer commented (at [41]) that:

“it is ... not the particular practical arrangements that the parties or their solicitors make for the performance of their completion obligations that govern whether their obligations are dependent or independent. That turns on the interpretation of their contract. The parties’ mutual obligations in a contract for the sale of land incorporating the Standard Conditions of Sale are dependent obligations.”

The right result in *Dreams*?

Yes. Although the judge approached the issue by reference to ‘conditionality’, an approach based on dependent obligations should have led him to the same result.

Andrew Walker QC

11 June 2020



This paper is provided free of charge for educational purposes only. It is not intended to, and does not, give or contain legal advice on any particular issue or in any particular circumstances. Its contents should not be relied on as a basis for taking any course of action, nor should it be relied on to give legal advice. Members of Maitland Chambers are continuing to work remotely during the current pandemic and are well placed to provide legal advice and representation to clients on matters concerning commercial and property contracts. For contact information please see our website: www.maitlandchambers.com.