Case No: A1/2005/2588

Neutral Citation Number: [2006] EWCA Civ 329
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT
HHJ THORNTON QC
HT-04-291

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 31st March 2006

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE JACOB
and
LORD JUSTICE MOORE-BICK

- -

Between :

FITZROY HOUSE EPWORTH STREET (NO. 1) LIMITED **FITZROY HOUSE EPWORTH STREET (NO. 2) LIMITED**	**Appellants/ Claimants**
- and - **THE FINANCIAL TIMES LIMITED**	**Respondent /Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Mark Warwick (instructed by **Kanter Jules**) for the Appellants/Claimants
Paul Morgan QC (instructed by **Wragge & Co LLP**) for the Respondent/Defendant

- -

Judgment

The Chancellor :

1. By a lease dated 31st August 1994 ("the Lease") the predecessors in title of the appellants ("the Landlords") demised to the Financial Times Ltd ("the Tenant") a three storey office block situate and known as Castle House, Paul Street, London, EC2 for a term of 16 years commencing on 1st April 1994. By clause 3(4) of the Lease it was provided that

> "The Tenant (here meaning the Financial Times only and not its successors in title) may give not less than thirteen months previous notice to the Landlord of termination of this Lease on 1 April 2004. If:
>
> (a) The Tenant has materially complied with all its obligations under this Lease down to the date for which notice of termination has been given;
>
> [(b)...
>
> (c)...
>
> (d)...]
>
> then the Term shall cease on that date and (subject as mentioned below) no party has any further rights or obligations under this Lease.
>
> Termination of this Lease shall not affect any of the Landlord's rights in connection with any breach by the Tenant or its successors in title or the Guarantor of their obligations under this Lease which may have occurred before the date on which this Lease terminates."

2. On 5th February 2003 the Tenant gave notice under clause 3(4) to terminate the Lease on 1st April 2004. The Tenant was then and on 1st April 2004 up to date with the rent of £595,000 per year. Between 14th January and 26th March 2004 the Tenant undertook a substantial repair programme in order to comply with the various tenant's covenants contained in clause 5. They offered facilities for inspection to the Landlords before, during and after the works were carried out but the Landlords did not take them up. On the termination of the works the Tenant duly vacated Castle House.

3. Immediately after 1st April 2004 the Landlords claimed that the Lease was still subsisting because on that date the Tenant had "materially failed to comply with" its repairing and other obligations under the Lease. It commenced proceedings in the Technology and Construction Court seeking declarations to that effect on 29th September 2004. The Tenant contended that it had materially complied with all its obligations under the Lease. The proceedings were heard by HH Judge Thornton QC from 15th to 21st September 2005. By his order made on 4th November 2005 he

declared that the Lease had been terminated on 1st April 2004 pursuant to the notice dated 5th February 2003 given by the Tenant to the Landlords.

4. This is the appeal of the Landlords from that order. They contend that the judge misdirected himself as to the test of material compliance to be applied by reference to the judgment of HH Judge Rich QC in **Commercial Union Life Assurance Co Ltd v Label Ink Ltd** [2001] L & TR 29 ("**Label Ink**"). They accept the judge's findings of primary fact but contend that the evidence did not warrant some of the inferences he drew as to the immateriality of the breaches of the tenant's covenants which he found.

5. It is convenient to start with the decision of HH Judge Rich QC in **Label Ink**. In that case an industrial warehouse was let for a term of 15 years from November 1993. Clause 7.8 contained an option for the tenant to determine the lease on 1st January 1999 on one year's written notice on condition that:

> "There shall not be any material breach of the covenants on its part herein contained."

But

> "Without prejudice to any remedy available to the landlord in respect of any breach of covenant on the part of the tenant or the conditions herein contained."

6. It was common ground that a breach could not be material if it was not a subsisting breach on the termination date. Judge Rich then considered various authorities, including the decision of the Court of Appeal in **Finch v Underwood** [1876] 2 Ch. 310 and continued in paragraphs 12 and 13:

> "12. In qualifying clause 7.8 that the breach must be material, it is clearly intended to mitigate that rule as an otherwise trifling breach would disqualify the tenant from exercising the option even though the court might be slow to find such a breach, where it would be unfair to do so.
>
> 13. The intention must be to modify that rule to an extent that is reasonably fair to both landlord and tenant. The tenant is given by clause 7.8 the right to break, providing he complies with his covenants to the extent of avoiding any material breach. In my judgment, in that context, the breach is material if, but only if, having regard to all the circumstances, and to the proper efforts of the tenant to comply with his covenants, as well as the adverse effect on the landlord of any failure to do so, it will be fair and reasonable to refuse the tenant the privilege which the lease otherwise grants. The extent of any breach, the practicality of quantifying any damage arising out

> of it, the efforts made by the tenant to avoid it, the genuine interest which a landlord had in strict compliance are, in my judgment, all material factors in determining materiality."

7. Counsel for the Landlords contends that the interpretation put upon the words "material breach" is wrong in law, creates uncertainty and unnecessarily extends the range of issues thereby increasing the evidence required. He suggested that the decisions of Judge Rich and Judge Thornton in the instant case had been widely publicised and, in some quarters, criticised. He referred us to a number of authorities in an attempt to satisfy us that the approach of Judges Rich and Thornton was inconsistent with previous authority and wrong. I will deal with them in chronological order.

8. In **Finch v Underwood** [1876] 2 Ch. 310 the landlord had covenanted with the tenant, on receipt of notice from the latter, to renew the lease "in case the covenants and agreements on the tenants' part shall have been duly observed and performed". Notice was duly given but the landlord refused to renew the lease because the interior of the property needed repairs at a cost of £13. Vice-Chancellor Malins decided that the landlord was obliged to renew the lease because the want of repair was "trifling". The Court of Appeal disagreed. James LJ considered that the case was one of compliance with a condition precedent. He held that the tenant had lost his right to a renewal of the lease by breach of the covenant to repair. He added (p.315):

> "No doubt every property must at times be somewhat out of repair, and a tenant must have a reasonable time allowed to do what is necessary: but where it is required as a condition precedent to the granting of a new lease that the lessee's covenants shall have been performed, the lessee who comes to claim the new lease must shew that at that time the property is in such a state as the covenants require it to be. He can easily send in his builder, get a report of what repairs are necessary, and do them before he applies for the lease. There is no hardship in requiring this of him, and I think he is not entitled to excuse himself by saying that the want of repair is trifling. The answer to that is, "No matter; your bargain was to leave the property in thorough repair." If he has not fulfilled his legal bargain, which is also his bargain in equity, he cannot sustain his claim for a lease."

Mellish LJ was of the same view. He pointed out that equity could not relieve the tenant from the consequence of failing to comply with the condition precedent. He added (p.316):

> "In a case like this, if a tenant wishes to claim the benefit of such a covenant he should send in his surveyor to see what repairs are needed, and should effect the repairs which the surveyor certifies to be requisite. The Court would be inclined

> to give credit to a survey thus honestly made, and would lean towards holding the condition precedent to have been complied with. But in the present case it is admitted that there was an existing breach of the covenant to repair."

Baggallay LJ agreed because the condition had not been performed.

9. In the light of certain submissions, to which I shall refer later, I do not understand Mellish LJ to be suggesting that reasonable conduct of the tenant can justify a finding that a condition precedent has been satisfied notwithstanding the existence of a relevant breach of covenant. Rather he is pointing out that in the circumstances he postulates the court would be likely to accept the evidence of the surveyor for the tenant to the effect that the covenant had been duly performed by the material time.

10. The second authority to which we were referred is **Simons v Associated Furnishers Ltd** [1931] 1 Ch. 379. In that case buildings had been demised for a term of 17 years on terms that the tenant might terminate the lease at the expiration of the first five or ten years of the term if it gave notice to that effect and if it "shall up to the time of determination...perform and observe the covenants...but without prejudice to the remedies of either party against the other in respect of any antecedent claim or breach of covenant". The tenant duly gave notice to terminate. The tenant admitted that there was some want of repair at the time he gave notice. Clauson J found that at the time the notice expired the covenants had been duly performed. The issues were whether compliance was required at the time the notice was given as well as at its expiry and whether the provision was a condition precedent notwithstanding the concluding words. Clauson J answered the first question in the negative and the second in the affirmative. He observed (p.384):

> "That clause is in an exceedingly familiar form. Such a form - or one so closely resembling it as to be practically indistinguishable - has been in common use for more than a century past. It has been before the Court many times, and it would be dangerous to depart a hair's breadth from decisions upon it in former cases."

As counsel for the Landlords pointed out this case was not cited to either Judge Rich or Judge Thornton. He suggested that they wrongly failed to observe the dictum of Clauson J.

11. In **Bass Holdings Ltd v Morton Music Ltd** [1988] 1 Ch. 493 the tenant had the option to take a further lease on giving written notice of their desire "if it shall have....performed and observed the several stipulations on its part to be performed and observed up to the date of [the notice]". The question was whether the form of condition imported that past or spent breaches of covenant would preclude the exercise of the option. The Court of Appeal reviewed the authorities extensively. Kerr LJ summarised the position in a series of propositions. The first two were (p.518):

> "(1) The first question is whether, on the true construction of the proviso in question, the absence of any material breaches of covenant by the defendants is a *condition precedent* to the exercise of the option, as well as the giving of the requisite notice purporting to exercise the option. Generally, and admittedly in the present case, the proviso contains a double condition precedent, viz. (i) the absence of any material breaches of covenants and (ii) compliance with the requirement as to notice.
>
> (2) That, however, leaves the crucial question whether the condition precedent (i), that there must be no material breaches of covenant by the defendants, applies to spent as well as to subsisting breaches. This question is covered by dicta in numerous cases, going back in particular to *Grey v. Friar* (1854) 4 H.L.Cas. 565, and by the decision of Clauson J. in *Simons v. Associated Furnishers Ltd.* [1931] 1 Ch. 379. The upshot of these authorities is that spent breaches will not destroy the tenant's right to exercise the option, but subsisting breaches will. As shown by the passages to which I refer below, the reasoning is in effect as follows. First, it must be accepted that absolute and precise compliance by the tenant with every single covenant throughout the period of the lease prior to the operative date is virtually impossible of attainment. If this were required as a condition precedent, then the option would in practice be worthless or merely at the mercy of the landlord. Therefore the parties cannot have intended that the absence of spent breaches should be a condition precedent. Secondly, however, it is natural and sensible that the landlord should require the tenant not to be in breach of any covenant on the operative date and that all outstanding claims for breach of covenant should have been previously satisfied, so that the lease is then effectively clear. The proviso is therefore to be construed as intended to apply to subsisting breaches, with the result that the relevant condition precedent is the absence of any subsisting breach."

12. Later (p.524) Kerr LJ quoted with approval from the judgment of Coleridge J in **Grey v Friar** 4 HLC 565, 608

> "...the covenants must have been strictly kept, or, if broken, must have been satisfied for. So understood, the words import a condition precedent neither impossible nor unreasonable; and where that is clearly the case, the mere difficulty of performance, from the number or nature of the covenants to be performed, - a fact which must have been perfectly within the knowledge of the party contracting, - seems to me a very unsatisfactory reason for holding it to be otherwise."

13. Both Nicholls and Bingham LJJ, as they then were, commented on the commercial purpose of break clauses. Nicholls LJ (p.531) observed that:

> "With such a clause the commercial purpose achieved by a condition construed as meaning "no subsisting breach" is readily apparent: before the lease can be ended prematurely all the rent due must have been paid, the property must have been put into a proper state of repair, and the other covenants must have been observed and performed in the sense that all liability in respect of any previous breaches must be at an end. What commercial purpose, in such a case, would be served by the "never any breach" construction of the condition precedent is not so readily apparent."

Bingham LJ commented (p.538):

> "Where a tenant wished to take advantage of a break clause, the landlord was not greatly concerned with the history of the tenant's performance before the break. The worse the tenant's performance, the readier the landlord might reasonably be to get rid of him. But whatever the tenant's defaults in the past, the landlord would be very much concerned that at the time of the break the rent should be fully paid (because he could no longer distrain) and the covenants fully observed (so that the property could be re-let or sold without delay or additional expenditure)."

14. Four years later the Court of Appeal had occasion to consider the matter again in **Bairstow Eves (Securities) Ltd v Ripley** [1992] 2 EGLR 47. In that case a lease conferred on the tenant a right to renew on notice "if the tenant shall perform and observe all the covenants and obligations herein on the tenant's part contained". Counsel for the tenant submitted that the condition precedent should be regarded as satisfied unless at the relevant date there were breaches of covenant for which substantial damages would be recoverable. For that proposition he relied on the decision of the Court of Appeal in **Bass Holdings Ltd v Morton Music Ltd** [1988] 1 Ch. 493. That submission was rejected. Scott LJ (p.49M) said:

> "There is no authority that permits the court to rewrite the condition precedent so as to exclude from account a subsisting breach on the ground that only nominal damages are recoverable."

Later (p.50C) he observed that:

> "The court is not entitled to rewrite that covenant [to paint the premises in the last year of the term] or to presume to inform Mr Ripley that the breach of the covenant was only trivial and should be ignored for the purposes of the condition precedent."

Sir Michael Kerr and Parker LJ agreed.

15. Counsel for the Landlord contended that this case brought home to those concerned that conditions precedent to a break clause were indeed absolute in the sense that even trivial breaches would prevent its operation. He suggested that the draftsman of the lease in this case, executed two years after the decision in **Bairstow Eves (Securities) Ltd v Ripley** [1992] 2 EGLR 47 must have inserted the word "material" to avoid the severity of a condition in the unqualified form. Accordingly, so he submitted, the word "material" was intended to permit trivial breaches but no more. I shall return to that submission in due course but first I should return to the decision of Judge Rich QC in **Label Ink**.

16. I have quoted the material passages from his judgment in paragraphs 5 and 6 above. I can agree that the insertion of the word "material" must have been in order to mitigate the requirement for absolute compliance with all covenants at the relevant time then to be found in conventional break clauses. Other variations, now common, are "reasonable" and "substantial". But I cannot agree that it must have been the intention to modify the rule to the extent that it is reasonably fair to both landlord and tenant. The word "material" is susceptible to a number of nuances but what is fair and reasonable between landlord and tenant is not one of them.

17. It may be that Judge Rich had in mind the observations of Mellish LJ in **Finch** when suggesting that the efforts made by the tenant to avoid a breach could be relevant. If so, for the reason I have already given, I consider that he misunderstood the import of the observation. In my view the test imported by Judge Rich is not only not warranted by the wording but ignores the recognition in **Finch** that such provisions have to be strictly complied with because equity has no power to relieve a party in breach, the warning in **Simons** of the need for consistency and the insistence in **Bairstow Eves** that the court should not rewrite the parties' contract.

18. I turn then to consider the judgment of HH Judge Thornton QC in this case. After describing the facts and circumstances of the case, the terms of the Lease, and the relevant law as to repairing covenants he turned in paragraph 15 to the question of "material compliance". He considered that the relevant provision in this case is to all intents the same as the relevant provision in **Label Ink**. He quoted paragraphs 12 and 13 of the judgment of Judge Rich. He referred to an argument for the Landlords based on the decision of the Court of Appeal in **Bairstow Eves** which he rejected on the grounds that the construction of the Lease depends in its wording not some preconception of what the draftsman must have thought of the decision of the Court of Appeal. In paragraphs 19 and 20 Judge Thornton said:

> "19. In my judgment, Judge Rich's reasoning is to be followed since it cogently gives meaning to the expression "material" in the context of a breach of covenant and its effect on a break or option clause. In asking whether a breach or compliance is material, it is necessary to ask: "material to what"? The obvious answer is: "material to the landlord and to the obligations of the tenant". The purpose of a clause limiting the right to exercise a break clause is to enable a landlord to preserve his legitimate interest in ensuring compliance with all the tenant's covenants by the tenant before he departs. The landlord has an interest in ensuring compliance so that he can relet speedily, that the value of his reversion is not jeopardised and in preserving his income stream from the property by way of further rent. Thus, a breach of the repairing covenant will only be material if these interests are jeopardised by that breach.
>
> 20. I also follow Judge Rich's reasoning because it gives effect to the word "material". If Fitzroy's interpretation is correct, this word is to be given the meaning of "all but insignificant or minor" whereas it in fact means: "in context and taking all relevant considerations into account".

19. Judge Thornton then considered the repair programme and the offer by the Tenant to the Landlords to permit inspection of the premises. In that context he considered that the objectivity of the surveyor for the Landlords had been "clouded". In paragraphs 26 to 80 he considered the various breaches of repairing covenants the Landlords alleged to have existed at the relevant date. Some he rejected altogether. Others he found proved. In those cases it is necessary to have regard to his description of them. Thus in the case of roof repairs he said (para 31)

> "I conclude that only a few inexpensive patching repairs at most were required to put the roof into a condition which enabled compliance with the repairing covenant at the break date and that nothing further was required to repair or reinstate the paint covering. No substantial defect or breach of covenant was established."

The removal of certain residual traces of asbestos was described in paragraph 67 as a "minor item" which would cost £2,800 to remedy. Complaints in respect of mechanical or electrical items were described in paragraph 80 in the following terms:

> "There were a further 12 items which were agreed in a total sum of £1,650 and a further 35 minor items which were all disputed and which totalled, on Fitzroy's figures, £9,590. These items were, in the main, overstated or not breaches of the repairing covenant but even if they were accepted in full, they

> constituted no more than insubstantial breaches of the repairing covenant."

20. Judge Thornton's overall conclusion on the alleged breaches of covenant was expressed in paragraph 81 in these terms:

> "The overall effect of my findings is that, taking Fitzroy's approximate figures and applying them to the relatively few and insignificant items which I have found proved, Fitzroy has established a maximum value of defects amounting to breaches of the repairing covenants of no more than £20,000 including supervision fees. This overall figure covers all claimed items including the external, internal and mechanical and electrical items."

21. Judge Thornton then turned to the evidence before him as to the letting market. I shall have to refer to this in greater detail later. Both parties called an expert. The expert for the Landlord was Mr Michael Baker, the expert for the Tenant Mr Colin Manders. Each of them made an expert witness report. The two of them provided a joint report. Both were cross-examined. Judge Thornton's conclusions on this evidence were expressed in paragraph 82 of his judgment in the following terms:

> "Each party called a lettings and valuation surveyor with a detailed knowledge of the City of London lettings market. These two experts reached substantial agreement as to the relevant factual background. In the light of the relatively limited value of outstanding defects, the two experts' evidence was broadly agreed. The letting market was almost at its bottom in April 2004, which is why Fitzroy was so keen to hold the Financial Times to its lease if at all possible. At that time, there was a vacancy rate of about 16% of the total stock. If a tenant was found, that tenant might well have negotiated up to a two year rent-free period and might have attempted to secure a longer rent-free period if there were significant defects in the building. However, if the total value of the defects was no more than about £20,000, the effect of their evidence was that there would not have been any substantial effect on the ultimate terms agreed. These defects would not have deterred a potential tenant but it might have taken some months to find one and then there would have been a substantial rent-free initial period."

22. The judgment of Judge Thornton took two forms. The first handed down on 4th November did not have paragraphs 84 to 86 both inclusive in the version subsequently sent to the parties on 7th November. These three paragraphs were added

in the light of submissions made to the judge by counsel for the Landlord seeking permission to appeal on 4th November. It is not suggested that the judge was not entitled to do so but the history explains certain inconsistencies and misnumbering of paragraphs. The conclusions of Judge Thornton and his reasons are contained in the following paragraphs taken from the final version:

Conclusion – Material Compliance

> 83. I conclude that the Financial Times had materially complied with all its obligations on 1 April 2004 and it therefore succeeded in breaking the lease and determining it on that date. I reach that conclusion for these reasons:
>
> (1) The number, nature and value of the outstanding defects was insubstantial.
>
> (2) The Financial Times had taken all reasonable steps to put and keep the premises into repair, had spent nearly £1 million for that purpose and had followed professional advice as to what was required.
>
> (3) The Financial Times made all reasonable efforts to secure the agreement of Fitzroy to what was needed to ensure compliance and it is clear that it would have incorporated any reasonable requirement of Fitzroy into its remedial programme if asked.
>
> (4) Fitzroy unreasonably declined to involve itself in the Financial Times's attempts to agree a remedial programme and adopted an attitude of waiting and seeing whether it could catch the Financial Times out on a technicality so as to prevent it from determining the lease because the market was so soft.
>
> (5) The outstanding defects had no effect on the ability of Fitzroy to obtain a further tenant nor on any terms that it could reasonably expect to negotiate. In particular, these defects would not have deterred prospective tenants nor have led to a longer rent-free period or to a lower rent being agreed.
>
> (6) It would be most unreasonable to the Financial Times if it was unable to determine the lease and it would also be most unreasonable if Fitzroy, given its behaviour, was able to prevent such a determination from occurring.
>
> 84. Fitzroy contended that the effect of the condition that there should be material compliance with the terms of the lease meant that there would not be material compliance unless the only breaches in existence on the break date were trivial and of

the kind that would occur if a screw was missing or loose in a particular location.

85. In my view, that interpretation of the condition is unduly narrow even if the expression "materially complied" has a narrow meaning of the kind contended for by Fitzroy. In other words, whatever meaning is given to this phrase, it was applicable so as to allow the Financial Times to operate the break clause successfully.

86. I reach this conclusion for these reasons:

(1) Each breach that I have found to have existed was, in itself, either minor or trivial. When taken together, the breaches still amounted to minor or trivial breaches of the repairing covenant.

(2) The repairing covenant has two components: namely, firstly, to require the tenant to perform the remedial works so as to put the premises in repair and, secondly, to leave the premises in a repaired state. The Financial Times used all reasonable endeavours to perform its obligations, as is inevitable in a building of any size so it performed and was not in breach of the first part of the covenant. At worst, it left a residual but limited number of limited breaches at the conclusion of the repair programme and was in breach only to that extent.

(3) It is clear from the expert valuers' evidence that the limited nature of the remaining breaches was such that the overall damage to the reversion was negligible or nil. Thus, no recoverable damages, or only trivial damages, resulted from the breaches. If so, the overall effect of the breaches must itself also be minimal or trivial.

Overall Conclusion

85. The lease was determined on 1st April 2004 and the Financial Times is entitled to be repaid its claimed overpaid insurance premium in the sum of £19,058.30. Furthermore, Fitzroy is not entitled to the declarations it seeks nor to the claimed unpaid rent or insurance premiums. I leave for further argument whether it is entitled to any damages for the breaches of the repairing obligations that I have found to exist."

23. In addition to the submission to the effect that the principle enunciated by Judge Rich in **Label Ink** is wrong in law counsel for the Landlords submitted that the introduction of what he called a subjective element in paragraphs 83(2)-(4) and (6) and 86(2) was not justified by the relevant provision in the Lease. He relied on the

decision of the Court of Appeal in **Chapman v Honig** [1963] 2 QB 502 for the proposition that a contractual right may be exercised for any reason good, bad or indifferent and the motive with which it is exercised is irrelevant to its validity. Thus Pearson LJ (p.520) said:

> "There is a special difficulty in the present case. The act complained of, the service of the notice to quit, was on the face of it a lawful exercise of a contractual right, duly implemented in accordance with the provisions of the tenancy agreement and effective to terminate the tenant's estate and to convert the landlord's interest from an estate in reversion to an estate in possession. Common experience is that, when the validity of an act done in purported exercise of a right under a contract or other instrument is disputed, the inquiry is limited to ascertaining whether the act has been done in accordance with the provisions of the contract or other instrument. I cannot think of any case in which such an act might be invalidated by proof that it was prompted by some vindictive or other wrong motive. Motive is disregarded as irrelevant. A person who has a right under a contract or other instrument is entitled to exercise it and can effectively exercise it for a good reason or a bad reason or no reason at all. If the rule were different, if the exercise of such a right were liable to be overthrown, in an action brought at any time within the limitation period, by proof that the act was done with a wrong motive, there would be a great unsettlement of property titles and commercial transactions and relationships."

Davies LJ agreed with Pearson LJ.

24. I did not understand counsel for the Tenant to submit that the test was subjective, though he did suggest that the conduct of the parties may have some evidential value in determining the issue. It cannot, I think, be seriously disputed that the issue of "material compliance" whatever it involves must be determined on an objective basis. This was the view of the Court of Appeal in **Fortman Holdings Ltd v Modem Holdings Ltd** [2001] EWCA Civ 1235 per Judge LJ (para 26) and Pill LJ (para 7) when considering a similar provision in a loan note.

25. It follows from my rejection of the principle enunciated by Judge Rich QC in **Label Ink** and my conclusion that the test of material compliance must be an objective one that I would accept the contentions of counsel for the Landlord to which I have referred in paragraph 23 above. In my view, therefore, the matters referred to in paragraphs 83(2)-(4) and (6) and the second sentence in paragraph 86 (2) of the judgment of Judge Thornton are irrelevant to the question of whether the Tenant had materially complied with the tenant's covenants in the lease on 1st April 2004.

26. Counsel for the Landlords also contended that the finding of Judge Thornton in paragraph 83(5) that the "defects would not have led to a longer rent-free period...being agreed" was not supported by sufficient evidence. To deal with that

submission it is necessary to consider what the evidence on that point was. I have already referred in general terms to the evidence given by the experts. Their Joint Report is dated 18th August 2005. They were asked six questions. The sixth question was:

> "If a prospective tenant discovered any deficiencies in the Property how would these have been dealt with?"

The answer was:

> "A prospective tenant would have commissioned both structural and mechanical and electrical surveys. If the reports disclosed deficiencies these would have been the subjects of further discussion with the landlord. The number and nature of any deficiencies, together with the anticipated cost and time of remedying these, might have resulted in renegotiation of the terms, depending on their extent. If an adjustment was agreed to be appropriate this would probably have been by way of an extension to the rent free period, which would have been granted as part of the heads of terms already agreed."

27. Mr Baker, the expert letting agent for the Landlords, assumed for the purposes of his report dated 26th August 2005 that the cost of rectifying the defects specified in the Scott Schedule provided to both experts would be in the order of £211,000. He expressed the view in paragraph 4.3 that the state of the market at the relevant time was such that rent free periods were being allowed to tenants of 12 months for a five year term and 24 months for a ten year term. In paragraphs 4.10 and 4.11 of his report he stated:

> "4.10 In my experience, the extent to which the Landlord would be prepared to acknowledge these deficiencies and meet the cost would be dependent on the strength of the market, the seriousness of the negotiations and the status of other interest in the building at that time. As previously stated, the market as at 1st April 2004 was extremely weak and it is my view that the tenant would have been in a strong negotiating position and would have probably been able to negotiate a contribution by the Landlord of in the order of 75% of the cost. It is likely that this cost would be passed on to the tenant rather than the landlord carrying out the work himself and this would have resulted in an extension of the rent free period already agreed to take this into account.
>
> 4.11 In summary therefore I do not believe that the deficiencies listed in the Scott Schedule would have had an effect on the rental value or the time taken to let the building but I do believe approximately 75% of the cost would have been met by the Landlord as a result of further negotiation which would have been reflected by an extension in the rent free period."

28. In cross-examination by counsel for the Tenant Mr Baker confirmed his opinion whether the cost of compliance was £211,000 or £14,000. In each case he considered that 75% of such cost would be allowed by way of an increase in the rent free period. But he accepted that in the context of this building worth about £12m and a rent of £750,000 dilapidations of about £50,000 would be regarded by the Landlord as "pretty insignificant".

29. Mr Manders, the expert witness for the Tenant, made his written statement dated 31st August 2005 in response to a request to deal with the sixth question in more detail. In paragraphs 4.19 and 4.20 he indicated that the landlord would have had to concede a rent free period having regard to the length of the tenant's commitment and to permit him to carry out his own fitting out works. He considered that in the market conditions prevailing at the relevant time a prospective tenant for a fifteen year term would expect a rent free period of at least three years. In paragraph 4.26 he concluded that:

> "The landlord would be keen to re-let his building but there were no reasons for him to concede significantly in order to achieve a letting at a building on which a substantial sum of money had been spent and the result of which produced a product, which would have been attractive to the market. The signs for an improving market were evident and the landlord's willingness, or otherwise, to conclude a deal would have been tempered by an expectation that delay or a lost deal would not ultimately be detrimental."

30. Mr Manders was cross-examined by counsel for the Landlord. He considered that the market was weak so that a prospective tenant was in a reasonably strong position at the relevant time. If the prospective tenant was a very strong covenant then he would expect him to use the existence of defects to his advantage in negotiations with the landlord, but if he was a weak covenant he might not. But there comes a point at which reliance on a number of small points can be counterproductive. He considered that in the context of this building a defects bill of £25,000 was trivial. The views of Mr Baker expressed in cross-examination, which I have summarised in paragraph 28 above, were put to him. He replied:

> "It would depend on the overall balance of the parties' positions in negotiations. I come back to the length of commitment, whether there is a break clause, the tenant's covenant that is being offered, all these factors. In those circumstances if it got down to a sum of maybe £5,000/£10,000, I am not sure it would be raised at all. If the sum was, I think the figure has been mentioned of £211,000/£216,000, and that was proven...and related to major factors, possibly a percentage of that would be given. It would

still, I reiterate, depend on the overall mix so it is not a straight yes or no."

31. Given that evidence I do not agree that the conclusion to which Judge Thornton arrived in paragraph 83(5), which I have quoted on paragraph 26, was not one to which he was entitled to come. On any view 75% of £20,000, namely £15,000, when expressed as a rent free period for this building comes to a matter of days. In the context of the opinions of the experts as to the length of the rent free period being measured in years it is a perfectly tenable view that the prospective tenant would not have raised the point in the first place for fear of creating the wrong impression. Mr Baker thought that a defects liability of £50,000 would be "pretty insignificant". Mr Manders described one of £25,000 as trivial. Their opinions are clearly made out by the calculation of a rent free period appropriate to 75% of a defects liability of £20,000 in respect of a passing rent of £595,000, it is 9 days.

32. Counsel for the Landlords also criticised the judge's conclusions expressed in paragraphs 86(1) and 86(3). The first was said to be inconsistent with the earlier paragraphs I have quoted. The latter was criticised as not being supported by the experts' evidence. I do not accept either submission. The various descriptions given by the judge in paragraphs 31, 67 and 80 of his judgment, which I have quoted in paragraphs 19 and 20 above, are in broadly similar terms to those used in paragraph 86(1) of his judgment. The latter is certainly not inconsistent with them. Similarly the evidence of experts, which I have quoted in paragraphs 27 to 30 above, did suggest that the damage to the reversion was negligible or nil. Thus the first sentence in paragraph 86(3) is justified by the evidence. The second and third sentences are inferences or conclusions of the judge arrived at from his decisions on the primary facts. I see no ground for criticising either of them.

33. Accordingly I come back to the central question on this appeal. Given the conclusions of the judge as expressed in paragraphs 83(1) and (5), supplemented if necessary by his further comments in paragraph 86(1), (2)(except the second sentence) and (3), had the Tenant "materially complied with all its obligations under the Lease" as at 1st April 2004? Counsel for the Landlord submits that the meaning of material compliance is something less than 'substantial' or 'reasonable' compliance. He suggests that the qualification to the absolute rule indicated by the authorities to which I have referred denoted by the word "material" enables the court to ignore trifling or trivial breaches but no others. He submits that the conclusions of Judge Thornton in paragraph 83(1) and (5) are only consistent with breaches which are more than trifling or trivial.

34. Counsel for the Tenant accepts that in the absence of the word "material" the strict rule would apply because of the breaches of covenant found by the judge. He points out that the word "material" has at least two senses, namely relevance and substantiality. The first sense prompts the question 'material to what?', the second 'material to what extent?'. He suggests that the test propounded by counsel for the Landlords is inconsistent with the wording of the Lease and illogical. Why, he submits, should a breach of covenant which is more than trivial but has no effect on the landlord's ability to relet the premises fail to meet the standard of material compliance? In the end the difference between counsel was slight because counsel

for the Landlords appeared to accept in his reply that so long as the breach had no effect on the landlord's ability to relet the premises then there was material compliance.

35. The point is a short one. In my view the commercial context in which the provision is to be interpreted and applied is that described by Bingham LJ in **Bass** at page 538, quoted in paragraph 13 above. Materiality must be assessed by reference to the ability of the landlord to relet or sell the property without delay or additional expenditure. Where the provision is absolute then any breach will preclude an exercise of the break clause. But I see no justification for attributing to the parties an intention that the insertion of the word 'material' was intended to permit only breaches which were trivial or trifling. Those words are of uncertain meaning also and are not the words used by the parties.

36. Nor is it, in my view, of any assistance to consider whether the word 'material' permits more or different breaches than the commonly used alternatives 'substantial' or 'reasonable'. The words 'substantial' and 'material', depending on the context, are interchangeable. The word 'reasonable' connotes a different test. The issue here is whether, notwithstanding the breaches found by the judge the Tenant had, nevertheless, "materially complied" with its obligations. The application of an ordinary English word to a set of primary facts is itself a question of fact, see **Cozens v Brutus** [1973] AC 854, 861. As Lord Reid warned in relation to the construction of a statute

> "The meaning of an ordinary word of the English language is not a question of law.....It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision. Were it otherwise we should reach an impossible position. When considering the meaning of a word one often goes to a dictionary. There one finds other words set out. And if one wants to pursue the matter and find the meaning of those other words the dictionary will give the meaning of those other words in still further words which often include the word for whose meaning one is searching. No doubt the court could act as a dictionary. It could direct the tribunal to take some word or phrase other than the word in the statute and consider whether that word or phrase applied to or covered the facts proved. But we have been warned time and again not to substitute other words for the words of a statute. And there is very good reason for that. Few words have exact synonyms. The overtones are almost always different."

37. The judgment of Judge Thornton cannot stand because, for the reasons I have already explained, in adopting the principle enunciated by Judge Rich in **Label Ink** he applied the wrong test. In addition he took into account the irrelevant considerations to which I have referred. But the consequence is that this court must apply what it conceives to be the right test to the facts as found by Judge Thornton. Thus the question is quite simply whether in the light of the findings of Judge Thornton set out in paragraph 83(1) and (5) supplemented as necessary by his further observations in paragraph 86 (1) to (3)(excluding the second sentence of paragraph 86(2)) the Tenant had on 1st April 2004 materially complied with its obligations. As Lord Reid pointed out in **Cozens v Brutus**, that is a question of fact. I would answer it in the affirmative. If the other members of the court agree, the consequence is that the appeal is dismissed.

Jacob LJ

38. I agree.

Moore-Bick LJ

39. I also agree.