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Case No: HC-2015-005022

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London. WC2A 2LL
27 February 2017

B e f o r e :

TIMOTHY FANCOURT QC
(sitting as a Deputy Judge of the High Court)

Between:

Vivienne Westwood Limited	**Claimant**
- and -	
Conduit Street Development Limited	**Defendant**

Mr Mark Wonnacott QC (instructed by Mishcon de Reya LLP) for the Claimant
Mr Julian Greenhill (instructed by Dentons UKMEA LLP) for the Defendant

Hearing dates: 7, 8 February 2017

HTML VERSION OF JUDGMENT APPROVED

Mr. Fancourt QC:

1. This case concerns the effect of a side letter, made between a tenant and a landlord at the same time as the grant of a lease, and the payment and acceptance of rent pending a review of rent payable under the lease. The issues are whether a review of the rent payable was impliedly agreed by the payment and acceptance of rent at an increased rate, and whether the terms of the side letter entitling the landlord to terminate its effect are unenforceable as a contractual penalty. If the Claimant succeeds on either issue the yearly rent payable from November 2014 to November 2019 is £125,000 p.a.; if the Defendant succeeds on both issues the rent payable for that period is agreed to be £232,500 p.a.

2. The Claimant has at all material times been the tenant of the basement and ground floor of 18 Conduit Street, London W1 ("the Premises") under a lease made by deed executed on 18 November 2009. The Premises are a retail shop. DER Travel Service Limited ("DER") was the lessor. The Premises were demised for a term of 15 years from 18 November 2009 at an initial Yearly Rent of £110,000 p.a., subject to 'upwards only' rent reviews to the open market rent on 18 November 2014 and 18 November 2019. The Yearly Rent was to be paid quarterly in advance on the traditional quarter days. Further rents for insurance and service charge were also reserved.

3. The lease required the lessee to use the Premises for sale of men's and women's clothing and fashion accessories during the normal trading hours for the locality. It included tenant covenants to pay the rent, to pay interest on

unpaid rent at *4%* above base rate, to pay the landlord's costs of recovering or attempting to recover arrears of rent on an indemnity basis, and to indemnify the landlord against all liabilities, costs and claims arising from any breach of covenant.

4. The rent review provisions in Schedule 6 to the lease require landlord and tenant to try to agree on the open market rent two months before the review date, failing which the rent can be decided by an independent valuer appointed by the parties jointly or by the President of the R.I.C.S. on the application of either of them. Para 2.4 of Schedule 6 provided:

> "If the yearly Rent is not ascertained by the Relevant Review Date the Tenant is to continue to pay Yearly Rent at the previous rate until the next Rent Payment Date after the Yearly Rent is ascertained ...."

and then for any accrued arrears and interest to be paid. Time was expressed to be not of the essence of these provisions.

5. By letter dated 18 November 2009 from DER to the Claimant ("the Side Letter"), DER agreed, conditionally, that notwithstanding the terms of the lease it would accept yearly rent at a lower rate from the Claimant. The reduced rent was stepped from £90,000 p.a. in year 1 up to £100,000 p.a. in year 5; it was then capped at £125,000 p.a. for the next 5 years of the term if a higher open market rent was determined upon the first rent review. The agreement to accept a lower rent was expressed to be personal to the Claimant and not by way of variation of the lease. The exact terms of the Side Letter are of central importance to both main issues and I therefore annex a copy of the letter to this judgment. Although the version annexed is not signed on behalf of the Claimant, it is common ground that its terms were agreed at the same time as the grant of the lease.

Factual context

6. In 2013, DER sold its reversion, a long leasehold interest in the Premises, to B&AY Properties Limited. B&AY's managing agents later sent the Claimant on 15 January 2015 a rent account that apportioned the (apparently) unpaid rent payable in September 2014 between the periods before and after the rent review date of 18 November 2014. When the Claimant queried the calculation of the rent apportioned to the period after that date, they were told "without prejudice to rent review" that it represented 37 days at a daily rate equivalent to an annual rate of £110,000 p.a. Although rent had been payable by the Claimant at the rate of £100,000 p.a. previously, pursuant to the Side Letter, the reduction was expressly limited to the period up to 17 November 2014; so technically the then landlord was right to claim rent at the rate of £110,000 p.a. pending the determination of the rent review. The Claimant paid the September and December 2014 rent on that basis.

7. Before the rent review could be determined, B&AY sold its leasehold reversion to Marisilver Investissement S.A. on 20 February 2015. The Claimant was informed of this by Marisilver's agent, Aldo d'Aponte, on 28 February 2015. On 17 March 2015, Mr d'Aponte sent the following email to the Claimant:

> "In view of the next quarter rent payment, I attach a draft invoice (and side letter) ... pls do not consider this a final invoice because I wanted to first discuss this with you when we meet on Friday."

The invoice was for a quarter's rent in the sum of £31,250 (which is equivalent to an annual rate of £125,000) and a further sum by way of service charge. The invoice did not identify the rent as being the quarter's rent due on 25 March 2015 but it did say that the rent should be paid by that date. The side letter referred to in the email and attached to it is agreed to be a copy of the Side Letter. Ms Benini, the Claimant's finance director, accepted that she received the invoice and the copy of the Side Letter, which were forwarded to her and others by Mr Khan of the Claimant on 20 March 2015. Ms Benini could not recall whether or not she saw Mr d'Aponte's email at that time, which does not appear to have been forwarded by Mr Khan.

8. The meeting referred to in Mr d'Aponte's email took place on 20 March, and it is common ground that nothing was said on that occasion about either the invoice or the outstanding rent review. Mr d'Aponte was described in a

subsequent internal email of the Claimant as being very accommodating and not expecting payment straight away. It is apparent from the contemporaneous documents and it was clear from Ms Benini's evidence that the Claimant's principal concern at the time was not the amount of rent that had been demanded but ascertaining the correct identity of its landlord before making any further payment. Hyo-Jin Williams of the Claimant's accounts department did however ask Mr d'Aponte to confirm the period to which the invoice related. Mr d'Aponte replied on 26 March 2015 that the invoice was for the quarter starting on 25 March 2015. No further or 'final' invoice was sent by Mr d'Aponte to the Claimant. Payment in full was made by the Claimant on 31 March 2015.

9. It is on the basis of the draft rent invoice and its enclosed copy of the Side Letter, Mr d'Aponte's confirmation that the invoice related to the March 2015 quarter's rent and the Claimant's payment of £31,250 that the Claimant contends that the open market rent for the rent review due on 18 November 2014 was agreed at £125,000 p.a. Before turning to that issue, I need to complete the factual story, so far as it is relevant.

10. A further transmission of the landlord's interest was notified to the Claimant by a letter from Benson Mazure LLP dated 15 May 2015. This time, Marisilver had granted a concurrent lease of the Premises to the Defendant, making the Defendant the immediate reversioner and landlord of the Claimant. What might otherwise have been accepted without question by the Claimants was thrown into doubt by two matters. First, the Claimants - rather remarkably - received a rent invoice from B&AY's agents for the June 2015 rent in the sum of £27,500; second, they received an invoice from Mr d'Aponte in the sum of £31,250, in the same form as the previous invoice, without making it clear that he was now acting as agent for the Defendant rather than for Marisilver.

11. Confusion was eventually allayed by further communications on 2 July. On the same day, Mr d'Aponte notified Carlo Fior of the Claimant that Luke Holland, a surveyor at CBRE, had been asked to assess the market rent for the Premises for an overdue rent review. Mr Fior's response was not that the rent review had been agreed but that it was fine for Mr Holland to visit the store any day. This was the first time that the Defendant had referred to the outstanding rent review.

12. The Claimant still did not pay the June rent to Mr d'Aponte's company as agents for the Defendant, and consequently, by letter dated 17 July 2015, Dentons UKMEA on behalf of the Defendant wrote to the Claimant asserting a breach of the terms of the lease. They said that, without prejudice to the validity of the Side Letter, notice was given on behalf of the Defendant terminating the agreement in the Side Letter with immediate effect. The Claimant then paid the rent arrears in full, and Dentons accepted this as part payment only, on the basis that a rent review was in course of being arranged.

13. On 29 July 2015, Mr Holland wrote to the Claimant proposing a reviewed rent of £300,000 p.a. In August, the Defendant applied to the President of the R.I.C.S. to appoint an expert surveyor to determine the amount of the reviewed rent. In response to notification of the application, the Claimant's solicitors wrote to the case officer at the R.I.C.S. that their client did not consider that any rent review was due; that the review date was not agreed, and that the passing rent was £125,000. That email was not copied to the Defendant or its agents. It was sent 8 days after the same solicitors had written to the Defendant contending that the termination of the Side Letter was in the nature of a penalty (which if correct would mean that the rent could be no higher than £125,000 p.a.).

14. Notwithstanding the objection sent to the R.I.C.S. an expert was appointed and the rent review progressed. Ultimately it was determined by agreement in the amount of £232,500 p.a. At that stage, 2 December 2015, the Claimant expressed its agreement on the new rent as being subject to its position that the rent review had already been determined. This was the first time that the Claimant had intimated to the Defendant or its agents that it considered that the rent review had been determined previously.

The evidence

15. The Claimant called its finance director, Ms Benini, to give evidence. The Defendant called Mr d' Aponte and Mr Holland, but nothing in their witness statements was challenged on behalf of the Claimant.

16. Ms Benini said, persuasively, that she understood that the amount of the invoice related to the annual rent of £125,000 stated in para 2 of the Side Letter. She further said that she understood at the time, in the spring of

2015, that the rent review had been agreed at £125,000, without the need to do anything else, as a result of the Claimant's payment in response to the invoice for £31,250. She was not able to explain why she understood that, other than by reference to the Side Letter. Nor was she able satisfactorily to explain why, if she understood then that the rent review had been agreed, no one on behalf of the Claimant (including its solicitors who were instructed in July 2015) said to the Defendant before December 2015 that the rent review had already been agreed. The only reason she gave was that she didn't want to complicate matters; but it would be conducting a rent review while privately considering that it had already been determined at a much lower figure that would be liable to complicate matters, not asserting a prior agreement. The Defendant's agent was the same as Marisilver's agent, who had sent the draft invoice, so the change of landlord did not add complication on the question of the rent review.

17. I do not consider that Ms Benini's recollection of her state of mind and her understanding in spring 2015 can be accurate, unless all that she means is that it was agreed that rent would be paid at the rate of £125,000. In August 2015, the Defendant sought to activate formally the process to determine the 2014 rent review. Ms Benini accepted that she was aware of this. Had she really understood at that time that the rent review had been determined previously by agreement, it is in my judgment inexplicable that neither she nor Mishcon de Reya (who were instructed by the end of July 2015) said so, in terms, to the landlord or its solicitors (see Mishcon's letter to Dentons UKMEA dated 20 August 2015 and email dated 28 August 2015 to the RICS).

18. Instead, the Claimant went uncomplainingly through the rent review determination process, which involved the appointment of an expert surveyor. Having been advised by its own surveyor in March 2014 that the market rent was in the region of £200,000 p.a., the Claimant could not have benefited from such an expert determination. The Claimant only raised the issue about a prior rent agreement at a much later stage. The obvious inference to be drawn is that, by December 2015, lawyers acting for the Claimant had identified the possible argument of law that, objectively, the rent review had been settled in March 2015.

19. In my judgment, it is inherently more likely that the Claimant when paying the rent recognised from the Side Letter that rent was being charged at what would be the rent payable by it in any event, regardless of the (higher) amount at which the rent review was in due course determined. From its point of view, that made the rent review largely academic (assuming that the concession in the Side Letter continued to apply) but that is not the same point as agreement on the open market rent having been reached. I consider that Ms Benini is mistaken in now saying that she understood in and after April 2015 that the rent review had been settled by agreement as a result of payment of the March 2015 rent.

Issue (1): binding compromise of rent review at £125,000?

20. The Claimant's case is that the demand, payment and acceptance of rent for the March 2015 quarter, at a rate that was not otherwise payable under the lease or the Side Letter, must be taken as agreement by the Claimant and the Defendant that the yearly rent was reviewed to an annual sum of £125,000 p.a. Mr Wonnacott Q.C., who appeared for the Claimant, argued that payment and acceptance of rent not otherwise due can only be explained by an agreement relating to payment at that rate; it cannot be that the money was paid and accepted without there being implied from that conduct some agreement as to its payment.

21. He says that there are only two possibilities. First that the parties were agreeing that rent was payable on an interim basis, pending rent review, at a rate of £125,000 p.a., rather than at £110,000 p.a. stipulated by the lease; or second, that the parties were agreeing that the open market rent at the review date of 18 November 2014 was £125,000, so that rent at that rate was payable by the Claimant pursuant to the terms of the Side Letter and under the lease. Mr Wonnacott contended that by demanding money not contractually due, the Defendant was necessarily, objectively, making an offer capable of acceptance, which was accepted by the Claimant's making payment in accordance with the demand. The only circumstances, he says, in which rent was payable under the lease and the Side Letter at a rate equivalent to £125,000 p.a. were if the rent review had been agreed or determined.

22. Mr Greenhill, who appeared for the Defendant, was inclined to agree that some agreement was to be spelled out

of the conduct of the parties, though he pointed out that it was not necessary to the Defendant's case to establish that there was agreement on a revised interim payment. The onus, he rightly said, was on the Claimant to establish that there was a binding agreement on the 2014 rent review. Mr Greenhill submitted that in view of various facts the invoice sent by Mr d'Aponte on 17 March 2015 and clarified by him by email of 26 March 2015 was not, objectively, an offer to settle the 2014 rent review capable of acceptance by the Claimant. These facts are; the invoice was sent as a draft only by the managing agent of the Defendant, for discussion; it does not refer to an annual rate of rent but only to a quarter's rent in the sum of £31,250; a copy of the Side Letter was sent with the invoice, and nothing about the rent review was discussed between the parties at the 20 March 2015 meeting or otherwise.

23. Mr Greenhill submits that the significance of the Side Letter being sent with the draft invoice is that the reasonable reader of the documents would have understood (as Ms Benini did in fact understand) that the demand for £31,250 of rent related to the annual sum of £125,000 that was expressed to be the *maximum* payable by the Claimant in the event that the revised rent was determined in a higher amount. Both parties were aware that the market rent for the Premises on the review date was likely to be in excess of £200,000 p.a. Although the open market rent for the Premises did not matter to the Claimant (as Ms Benini confirmed), because it had the benefit of the rental cap, it did matter to the Defendant, as the cap might fall away in any of the circumstances specified in the Side Letter, in particular on an assignment of the lease, a sub-letting, or a sale of the shares in the Claimant. Accordingly, objectively, the invoice was no more than an offer to accept payment at the capped rate at which rent would be likely to be payable with retrospective effect following the determination of the rent review, and was not an offer to agree the open market rent in the sum of £125,000. Mr Greenhill points out that there was good commercial sense in agreeing that - in that both parties must have realised that the Claimant would in due course become liable for the arrears at that rate and interest on them - but no commercial sense in the Defendant offering to settle the rent review at the capped level at which the Claimant would pay, given that the open market rent, which might later become payable, was at a much higher level.

24. I prefer the arguments of Mr Greenhill. I accept Mr Wonnacott's point that the demand and deliberate payment at a different rate from that due demonstrates an intention to create different legal relations from the terms of the existing contract, but I am unable to accept his submission that the conduct of the parties by demanding and paying a quarter's rent in the sum of £31,250 objectively amounts to a binding agreement that the reviewed rent under the Lease is £125,000 p.a.

25. It is common ground that for the Claimant to succeed on its argument it must be possible to identify, objectively, an offer by the Defendant to settle the rent review for the purposes of the lease at the rate of £125,000 p.a. and an acceptance of that offer. It is not sufficient to conclude that some agreement was reached and then infer that it must have been agreement on the amount of the open market rent because otherwise rent would not have been due at the rate of £125,000 p.a. That overlooks the possibility that the parties could have agreed to pay rent at a different rate on an interim basis, even though they were not obliged to do so.

26. In my judgment, there is nothing in the conduct of Mr d'Aponte that can be said objectively to amount to an offer to settle the outstanding rent review at £125,000 p.a. The rent review had not been mentioned by the current landlord, the Defendant, though it had been by the agents of the previous landlord but one, B&AY, when they apportioned the September 2014 rent. No step had been taken, formally or informally, to activate the rent review. Rent reviews are not negotiated by submitting otherwise unexplained rental invoices for quarterly rent. This invoice was not even a formal demand for rent, but a draft invoice, which Mr d'Aponte had intended to discuss, but for whatever reason did not do so subsequently.

27. Most significantly, there is another sensible explanation for why rent was being invoiced at a rate that was not strictly due, namely that it was inevitable that in due course (and with retrospective effect to 18 November 2014) the Claimant would become liable to pay rent at the maximum rate of £125,000 p.a. This was clearly the reason for Mr d'Aponte's inclusion of a copy of the Side Letter with the draft invoice, and it is how any reasonable recipient of the draft invoice would have understood it. There is therefore no reason to interpret the invoice as an offer to settle the rent review. Given the terms of the Side Letter and given the extreme unlikeliness of a landlord offering to settle a rent review in that way and in those circumstances, the natural interpretation of the

invoice is that the Defendant was offering to accept rent at a higher rate than was strictly payable pending the rent review because it was inevitable that the Claimant (and only the Claimant) would be liable to pay at that rate following the rent review. That is very different from an offer that, for all the purposes of the lease, the reviewed rent is to be £125,000 p.a.

28. Since the agreement that each side contends for is an agreement arising by the conduct of the parties, it is permissible to look at the subsequent conduct of the parties to identify whether agreement was reached and if so what the terms of the agreement probably were. That is of course not permitted where the terms of the contract are in writing and the issue is only one of the meaning of the known words: *James Miller & Partners Ltd v Whitworth Street Estates (Manchester)* [1970] A.C. 583, *per* Lord Reid at 603 and Lord Wilberforce at 615. Mr Wonnacott submitted that recourse to subsequent conduct was not permissible where the facts that give rise to the agreement are undisputed and where the only question is, objectively, what agreement is to be inferred from the conduct.

29. In my judgment, that distinction is not borne out by authority and is an unsatisfactorily fine distinction in principle. In *Great North Eastern Railway Ltd v Avon Insurance plc* [2001] EWCA Civ 780; [2001] 2 All ER (Comm) 526, the issue was whether a policy of insurance contained one or other exemption clause in relation to defective workmanship, and this depended on the effect of an exchange of proposals, quotations and different terms before the premium for the insurance year in question was paid. The Court of Appeal concluded that the contract fell to be interpreted as a written contract, not a contract partly in writing and partly by conduct, as the appellant railway company contended (para 22); even so, on the question of which exclusion clause was incorporated as a term of the policy, Longmore LJ was clear that the Judge had been right to have regard to subsequent conduct of the company's brokers:

> ".. .the judge was correct to find it very telling that, when Mr Aylett was asked by his colleagues to obtain the terms of the contract, he sent them the Fenchurch terms. If the question is whether a term was incorporated into a contract, the subsequent conduct of the parties may be very relevant to the inquiry whether such a term was or was not agreed. Mr Flaux's submissions to the contrary were, with respect, a misapplication of the principle that the subsequent conduct of the parties cannot be relied upon as an aid to the construction of the contract No such principle exists in relation to the question whether an alleged term of a contract was, in fact, agreed." [para 29]

30. It is to be noted that in that case the question of whether the alleged term was agreed was not a matter of disputed oral evidence, but only a dispute as to the correct conclusion to be drawn from various undisputed documentary communications. The subsequent conduct was therefore not used as an aid to evaluate what was said or what happened, but as an aid to drawing a factual conclusion from undisputed primary evidence as to what terms were agreed. In the instant case, where conduct is relied on as the basis of the contract, the conduct is not itself in dispute but the question is what conclusion is to be drawn from that conduct as to what it was that was agreed. The position here is therefore on all fours with the principle explained by Longmore LJ.

31. The subsequent conduct relied on by the Defendant is the fact that the rent review was later progressed by the Defendant, with the cooperation of the Claimant: see paras 17 and 18 above. Participation in the rent review process would have occasioned the Claimant some expense. If the rent review had previously been settled by agreement, it is inconceivable that the Claimant would have proceeded as it did, without at the very least bringing to the Defendant's attention, at a much earlier stage, the contention that agreement had been reached. In view of my conclusion that objectively there was no offer to settle the rent review, it is unnecessary to rely on subsequent conduct; but that conduct shows clearly that the Claimant did not understand, in March, June or August 2015, that the rent review had been agreed. Its subjective understanding is not determinative of the issue of whether an offer to settle the rent review was made, but it makes it less likely that the provision of the draft invoice for rent of £31,250 should be construed in context as such an offer — an offer that would have been very favourable to the Claimant given the level of market rents - because even the Claimant did not understand it that way.

32. Accordingly, I conclude that there was no offer by the then landlord capable of acceptance and that the

November 2014 rent review was not determined by agreement at the rate of £125,000 p.a. It was subsequently determined by agreement, following the appointment of an expert surveyor, at the rate of £232,500 p.a.

Issue (2): Penalty?

(a) **Introduction**

33. The Side Letter confers on the Claimant the benefit of a lower rent than that reserved by the lease, for the first 5 and possibly the first 10 years of the term. The lower rent is conditional on various matters, and terminable by the lessor in specified circumstances. Although expressed to be personal to the Claimant, it is not expressed to be personal to the lessor. Accordingly, it was (rightly) common ground that the landlord covenants in the Side Letter would bind successors in title to the lessor: see *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 and, now, section 3(3)(a), (6)(a) of the Landlord and Tenant (Covenants) Act 1995.

34. The Side Letter makes provision for the lessor to terminate the agreement it contains with immediate effect in the event of breach by the Claimant of any of the terms and conditions in the Side Letter, any term of the Lease or any term of a document supplemental to the lease. In the event of termination, "the rents will be immediately payable in the manner set out in the Lease as if this agreement had never existed".

35. The principal issue is whether or not the right for the lessor to terminate the Side Letter upon any breach of contract by the Claimant, thereby rendering the rents payable (without reduction) in accordance with the reservation in the lease, is a penalty and therefore unenforceable. This is a question of the true interpretation of the Side Letter as at the date on which it was signed and does not depend on the factual consequences that termination has on and from the date on which the Defendant purported to terminate the Side Letter. This apparently straightforward question is complicated by three subsidiary issues, namely:

    i) Does "any breach" mean any breach or any material breach?

    ii) In the event of termination, are the rents payable at the full reserved rate with retrospective and prospective effect or only prospective effect?

    iii) If with retrospective and prospective effect and the retrospective effect is what makes the termination provision penal, can the retrospective element be severed so that what is left is not penal?

36. At the heart of the issue of whether the termination provision is a penalty clause is the question of the effect of the Side Letter alongside the lease. The Side Letter purports to alter the incidence of the rights and obligations that the parties have, as lessor and lessee, but it expressly states that it does not vary the lease. What, therefore, is the obligation of the Claimant as lessee, for so long as the conditions of the Side Letter are satisfied? Is it to pay the rent reserved by the lease or is it to pay the lower rent specified in the Side Letter? If the obligation remains to pay the reserved rent, the Side Letter confers a conditional collateral right and an obligation on the lessor to accept less than the full rent in certain circumstances, but the primary obligation of the Claimant is unchanged. On the other hand, if the obligation is to pay rent at the lower rate for so long as the conditions are satisfied, the termination provision imposes a secondary obligation in the event of breach of contract, namely to pay rent at the higher rate, and the question is then whether such secondary obligation is by its nature punitive.

37. Mr Wonnacott contends that the lease and the Side Letter, being entered into between the same parties on the same day as part of the same transaction, must be read together as if they were a single document. The parties have physically separated the rights conferred by the Side Letter from the lease. This was deliberately done, doubtless in order that the right granted to the Claimant would not appear on the face of the lease itself, for which there might have been a number of reasons so far as the lessor was concerned. However, in substance there was but one transaction. I accept that argument. What it amounts to, beyond the terms of the lease being admissible on the true interpretation of the Side Letter, is that it would be wrong to consider the legal effect of the Side Letter in isolation: see per Fletcher Moulton LJ in *Manks v Whiteley* [1912] 1 Ch 735 at 754. Indeed, it is impossible to do so, since the Side Letter depends on the terms of the lease. This does not however answer the question of the true nature of the primary rental obligations of the Claimant as lessee under the terms of the lease

and the Side Letter.

(b) **Penalties in the Supreme Court**

38. The law of penalties has been comprehensively reviewed recently by the Supreme Court: *Cavendish Square Holding BV v Makdessi* [2016] UKSC 67; [2016] A.C. 1172. The several judgments of the Justices reveal differences of approach on the application of the main principles to the facts of that case, however the main principles are clearly restated. These are that:

i) Whether or not a contractual provision is a penalty is a question of interpretation of the contract, and the real question is whether it is penal or punitive in nature (paras 9, 31, 243).

ii) In English law, a penalty clause can only exist where a secondary obligation is imposed upon a breach of a primary obligation owed by one party to the other. It is to be distinguished from a conditional primary obligation, which depends on events that are not breaches of contract (paras 14, 32, 258).

iii) Whether a clause imposes a secondary liability upon a breach of contract is a question of substance and not of form (para 15)

iv) A provision that in substance imposes a secondary liability for breach of a primary obligation is penal if it imposes on the party in default a detriment out of all proportion to any legitimate interest of the innocent party in the performance of the primary obligation (para 32), or (using traditional language) which is exorbitant, extravagant or unconscionable in comparison with the value of that legitimate interest (paras 152,255).

v) The onus lies on the party alleging that a clause is a penalty to show that the secondary liability is exorbitant, extravagant or unconscionable (para 143)

vi) Since the penalty rule is an interference with freedom of contract, it is not lightly to be concluded that a term in a contract negotiated by properly advised parties of comparable bargaining power is a penalty (paras 33, 35).

39. One of the principal issues in the *Cavendish* case was whether a clause that disentitled the seller - if in breach of his contractual obligations - to receive payments from the buyer that were otherwise due was capable of being a penalty or fell outside the scope of penalty clauses. Such a clause is different in kind from one imposing an obligation to pay a liquidated or ascertainable sum upon a breach of contract. The Justices held that a clause of that kind could be a penalty but that it would not necessarily be a penalty. It might instead be a provision varying the price payable under a contract in specified circumstances, that is to say a term that defines the extent of the primary obligations of the buyer. Whether it was such a clause rather than a penalty clause would depend on the nature of the right of which the contract breaker was being deprived and the basis for his being deprived of it (para 73).

40. In that case, three of the Justices held that the clause in question was a price adjustment clause that was in no sense a secondary provision and was therefore not a penalty. Another three Justices held that there was a strong argument that the penalty jurisdiction was not engaged at all but decided the case on the basis that the specified consequences were not exorbitant or unconscionable in all the circumstances. The seventh Justice (Lord Mance) only expressed a concluded view on the latter issue, giving his reasons for reaching the same conclusion.

41. The *Cavendish* case shows clearly that, in considering whether a contractual stipulation is or is not a penalty, one must address first the threshold issue - is the stipulation in substance a secondary obligation engaged upon breach of a primary contractual obligation; then identify the extent and nature of the legitimate interest of the promisee in having the primary obligation performed, and then determine whether or not, having regard to that legitimate interest, the secondary obligation is exorbitant or unconscionable in amount or in its effect.

(c) **The threshold test**

42. Mr Greenhill, for the Defendant, argues that the adjustment of the rent payable by the Claimant as a result of the

termination of the concession in the Side Letter is comparable to the adjustment in the price payable by the purchaser to Mr Makdessi upon the latter's breach of his obligations. It is, he says, a contingent variation in the price payable by the Claimant for the benefit of the lease, depending in this case on the quality of performance of the Claimant's obligations. The Claimant had a conditional right to a discount to which it was not otherwise entitled (see e.g. *Euro London Appointments Ltd v Claessens International Ltd* [2006] EWCA Civ 385 and *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB)). Mr Wonnacott, on the other hand, argues that in substance the primary obligation of the Claimant is to pay rent at the lower level specified in the Side Letter, as well as performing the other obligations in the lease. Upon breach of any of those primary obligations, the Claimant is obliged to perform a secondary obligation, namely to pay rent at the higher level. (For the purpose of assessing whether or not the termination provision is capable of being a penalty, it matters not whether the secondary obligation is prospective only or prospective and retrospective in effect.)

43. In my judgment, Mr Wonnacott's argument is to be preferred. The true bargain concluded by the lessor and the Claimant was that, in return for having a tenant of the reputation of the Claimant, the lessor would accept a reduced level of rent, below the market rent that it would otherwise have obtained (the Premises had been marketed by the lessor at a rent of £120,000 p.a. and the lease reserves a yearly rent of £110,000). The obligations of the Claimant under the lease and the Side Letter together were to pay the lower amount of rent and otherwise comply with all the obligations of the Lease. The rental obligation was conditional, in the sense that the rent reverted to the full rent reserved by the lease if the Claimant assigned the lease or ceased itself to trade from the shop, but subject to those matters *if the Claimant complied with its obligations* the rent would remain payable at the lower rate specified in the Side Letter.

44. Given the terms of the Side Letter, there was no primary obligation on the Claimant to pay rent at the higher rate reserved by the lease (other than contingently, depending on non-satisfaction of the conditions). The Side Letter obliged the lessor to accept the lower level of rent and therefore gave the Claimant the right to pay at that lower rate, so it cannot at the same time have been obliged to pay rent at the higher rate. The primary obligation was therefore to pay rent at the lower rate. That only changed if one of the conditions was no longer satisfied (e.g. if the shares in the Claimant changed hands) or in the event of a breach of contract by the Claimant. The term of the Side Letter stating that it was not a variation of the lease means that the obligation of any tenant under the lease is to pay the reserved rent. It reflects the agreement that the benefit of the lower rent agreement was personal to the Claimant, and so would not benefit any other tenant or be taken into account on a rent review. But it does not mean that the Claimant's personal contractual rights and obligations in relation to the rent were not changed.

45. It is true that the conclusion of Lords Neuberger, Sumption and Carnwath on clause 5.1 of the contract in *Cavendish* gives the Defendant some support for its argument, in that there the loss of a valuable right to money as a result of a breach of contract was held not even to engage the penalty jurisdiction. But that was said to be dependent on the nature of the breach in question (competition with the company's business), its close relationship to the value of the shares for which the seller was being paid and the consequences of breach for the seller. In that regard, it is telling that the alternative basis for the decision - preferred by Lords Mance, Clarke, Toulson and Hodge, was that in any event, given the importance of the non-competition term, the very substantial reduction in the purchase price was not extravagant or unconscionable.

46. In my judgment, care needs to be taken when applying the reasoning of Lords Neuberger, Sumption and Carnwath to the very different facts of this case. In this case, the rent payable is increased because of any failure by the buyer (the Claimant) to perform any one of its obligations as tenant, regardless of the particular impact of the breach. That is a different case from a reduction of price payable for a shareholding in a company upon breach by the seller of a centrally important noncompetition obligation.

47. As to the conditional right argument, it is easy to envisage a case in which a primary obligation to pay is then qualified by an agreement to accept a lesser payment, conditional on various matters including the due performance by the payor of the obligation. If the conditions are not satisfied, the discount does not apply. That was the ratio of the decision of the Court of Appeal in the *Euro London Appointments* case. Or the right to pay less may be an *ex gratia* concession. But where the obligation is from the outset in substance an obligation to

pay the lesser amount, the conditional right analysis does not apply and the primary obligation is to pay at the lesser rate.

48. What amounts to the primary obligation in any given case is a question of interpretation: what is the meaning of the document (in this case the transaction effected by the lease and the Side Letter together)? In my judgment, the substance of the transaction in this case was that the Claimant's obligation was to pay rent at the lower rate, with a default to the higher rate in the event of (among other things) any breach of contract. The lessor was agreeing to a lower rent - for the Claimant only - because the Claimant was an attractive tenant to have trading from its property. It is notable that the lower rent ceased not only if the Claimant was not the tenant but if it ceased to trade from the Premises or allowed someone else to trade from or occupy them. The reduced rent was therefore attributable to the benefit to the lessor of the visible presence of the Claimant in the Premises. Further, the rent could be increased in the event of any breach of covenant by the Claimant, not just if the Claimant paid the rent late. This was therefore not a discount for prompt payment.

49. For the reasons given above, the provisions of the Side Letter in this case amount to a change in the primary obligation with which the Claimant must comply, while it continues to trade from the Premises. To the extent that the Side Letter purports to permit the lessor to impose a greater obligation upon the happening of any breach of any obligation of the lease, that secondary obligation is capable of being a penalty. The threshold test is satisfied. Whether or not it is a penalty depends on the legitimate interest of the lessor in having the Claimant comply with its obligations in the lease and whether the burden of the secondary obligation is exorbitant or unconscionable compared with any loss likely to flow from breach. In other words, does the legitimate interest extend beyond pecuniary compensation for any loss caused by the particular breach, so as to justify the extent of the secondary obligation?

(d) **Legitimate interest in performance**

50. The Defendant submits that the lessor had a substantial legitimate interest in having the Claimant perform all its obligations promptly. Apart from the obvious cash flow benefit of prompt payment for any landlord, the investment value of a landlord's reversion is, generally, the product of the annual rent and an appropriate yield reflecting various factors: the location and quality of the demised premises; the prospect for rental growth, and the covenant strength and quality of the tenant. A tenant in default of its obligations will be seen as being of lesser quality and value than a performing tenant. This is capable of increasing the yield to be applied to the rental income and reducing the capital value. Accordingly, argues Mr Greenhill, the lessor had a legitimate interest in seeing the rent revert to the full market rent for the Premises (thereby maintaining the investment value) in the event of the Claimant being in breach of its obligations under the lease.

51. The Claimant, on the other hand, argues that the lessor's legitimate interest does not extend to being paid a higher rent by the Claimant, which it agreed to forgo when accepting the Claimant as its tenant. The achievement of a higher rent from the Claimant upon any breach of the lease, however minor or short-lived it might be, was not part of the true bargain that was made by the lessor.

52. This question must be approached in the light of my conclusion on the threshold issue, namely that the reduction in rent payable by the Claimant is not simply a conditional right to which it was not otherwise entitled but a substantial term of the bargain it struck with the lessor in consideration of its taking the lease. The Defendant therefore cannot argue that it had a legitimate interest as such in seeing the rent revert to what it calls the market rental level. That would be a legitimate interest in non-performance of the Claimant's obligations, not a legitimate interest in their performance. The Defendant must establish that it had a greater interest in seeing the Claimant perform all its obligations promptly than would be compensated by interest, damages and costs otherwise recoverable for a breach of covenant. In relation to nonpayment of rent in particular, it is pertinent to note that the lease provides for interest to be payable at *4%* above base rate on any overdue rent, and for the landlord's costs to be paid on an indemnity basis.

53. The Claimant did not really dispute the general nature of a landlord's financial interest in having a performing tenant, rather than a defaulting tenant, and one can see that, in theory, failure to perform the obligations of the

lease is capable of impacting on the value of the reversion in a way that may go beyond cash flow benefits and financial compensation for delayed performance. However, this is only likely to be so in the case of serious breaches of covenant. The main difficulty that the Defendant faces here is that uncompensated loss or harm would hardly be likely to flow from minor, one-off breaches of covenant (e.g. late payment of rent, compensated by interest; delay in repairing part of the interior of the Premises, and such like), as compared with sustained or more serious breaches, yet the financial adjustment stipulated by the Side Letter is substantial. It is also the case that the consequences of non-performance will be less significant, or possibly of no significance, if the lessor is not intending to sell its investment. It follows that, under the Side Letter, the same substantial financial adjustment applies whether a breach is one-off, minor, serious or repeated, and without regard to the nature of the obligation broken or any actual or likely consequences for the lessor. Although it is far from being conclusive, that has long been recognised as one of the hallmarks of a penalty.

(e) **Exorbitant or unconscionable**

54. At this point it is necessary to consider how onerous is the secondary obligation arising as a result of a breach of contract. There are two subsidiary issues here. First, what kind of breach gives the lessor the right to terminate the benefits conferred by the Side Letter? Second, if and when the benefits are terminated, are they terminated with retrospective and prospective effect or only with prospective effect? These are both relatively straightforward issues of interpretation of the Side Letter and the lease.

55. The relevant clause of the Side Letter states:

> "If you breach any of the terms and conditions contained in this agreement or any term of the Lease and/or any document supplemental to it (for example a licence to alter), we may terminate this agreement with immediate effect and the rents will be payable in the manner set out in the Lease as if this agreement had never existed...."

56. The lessor therefore apparently has the right to terminate the Side Letter in the event of *any* breach of the Side Letter or lease. The Defendant submits that it is necessary to imply the word "*materially*" before the word "*breach*" in order to prevent the Side Letter from having a wholly uncommercial and unintended effect, namely to take away the value of the Side Letter.

57. Terms are only implied into professionally drafted contracts where it is necessary to do so in order to give the contract business efficacy and/or it is obviously what the parties meant to provide: *Marks and Spencer plc v BNP Paribas Securities Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742; *Nazir Ali* v *Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 at [7]. I am doubtful whether it can ever be right to imply a term that will cause uncertainty or difficulty in the operation of a contract that is otherwise unambiguous in its terms. It is unclear to me how the suggested criterion of "materiality" would be applied to determine whether the lessor has the right to terminate the Side Letter. How is the materiality of any breach to be judged, bearing in mind the consequences that flow from the existence of a material breach? Where parties use such express terms in a contract the Court must do its best to interpret them, however problematic that may be: see, e.g., *Fitzroy House Epworth Street (No.l) Ltd v The Financial Times* [2006] EWCA Civ 329; [2006] 1 WLR 2207. But that is a different matter from implying a term that is not there on the basis that it is necessary to give business efficacy to the contract.

58. However, as the Claimant has argued, the reduced rent enshrined in the Side Letter is properly to be regarded as part of the substantial bargain made by it and the lessor. It does therefore seem that the parties cannot have meant that a trivial breach of contract by the Claimant would entitle the lessor to put an end to the Side Letter. Among all the obligations arising from the terms of the lease and documents supplementary to it, there is bound to be a trivial breach of some obligation from time to time. That is particularly so where, as here, there is an obligation to keep the Premises in good and substantial repair and condition. I therefore agree with the Defendant that some qualification is necessarily implicit in the terms of the Side Letter, otherwise the bargain for the Claimant to be entitled to pay a reduced rent becomes little more than a concession at the whim of the lessor. If the terms of the Side Letter are to have any sensible commercial effect, it is necessary to exclude a trivial (or

de minimis) breach of covenant from triggering the lessor's right to terminate the Side Letter. But in my judgment it is not necessary that any breach would have to be "material" or "substantial" in a colloquial sense (as opposed to the more legalistic sense of a breach that is more than trivial) before the termination provision could be activated. Although there may be a dispute about whether a particular breach is trivial, there is no real difficulty in applying such a test, whereas the test of materiality is fraught with conceptual uncertainty.

59. It follows that the lessor's right to terminate the Side Letter arises on the occurrence of any non-trivial breach by the Claimant of its obligations.

60. The second question is whether the termination of the Side Letter has retrospective effect. If it does then termination at any time during the period of reduced rent (maximum 10 years) would have the consequence that the Claimant would have to pay additional rent for all the preceding years of the term that had passed, as well as paying it for the future. The Claimant contends that that is the natural reading of the words "*and the rents will be immediately payable in the manner set out in the Lease as if this agreement had never existed*" in the relevant paragraph of the Side Letter, as set out above. It points also to the contrast in the language used where the conditions of the agreement in the Side Letter cease to be satisfied - "This agreement ends immediately if....", which reads naturally as a termination of the benefit of the Side Letter for the future. It also suggests that the words "*will be immediately payable*", in the same sentence as the words *"with immediate effect*", are used because - regardless of the obligation to pay rent at the higher rate with effect from the next quarter day - there is an immediate obligation to pay the shortfall relating to previous quarters.

61. I am conscious of the artificiality of the Claimant arguing in favour of such an onerous obligation, which but for the penalty issue it would not be doing. I am also conscious that, in case of genuine ambiguity, an interpretation of a contract should be preferred which 'saves' the contract rather than rendering it unlawful and ineffective *('ut res magis valeat quam pereat*'). However, it is clear that this canon of construction only applies where there is real ambiguity as to the meaning of a provision, and not as a means of re-writing the contract: see *Tindall Cobham 1 Ltd* v *Adda Hotels* [2014] EWCA Civ 1215; [2015] 1 P&CR 5 at [30]-[32], citing *Re Baden's Deed Trusts* [1969] Ch 388, per Harman LJ. In my judgment, the Claimant is clearly right in its interpretation of the paragraph of the Side Letter, for the cumulative reasons that it has given and to which I have referred above. There is not, in ray view, a realistic alternative interpretation of that paragraph that provides the meaning that the Defendant seeks to extract from it, namely that upon termination of the Side Letter the higher rent is only payable prospectively.

62. Having determined those issues of interpretation of the Side Letter, the remaining issues are the following. First, on the basis of the true interpretation of the Side Letter, are the specified consequences of its termination for any non-trivial breach exorbitant and unconscionable, having regard to the disparity with the loss likely to flow from any breach? Second, if so, is it possible to sever those parts of the Side Letter than produce the penal effect? In this regard, the Defendant argues that the words *"as if this agreement had never existed*' can be severed, leaving the paragraph in question as one that has prospective effect only.

63. On the first question, I am in no doubt that the obligation to pay rent at a higher rate as from the rent commencement date of the lease, regardless of the nature and consequences of the breach and when it occurs, is penal in nature. I have regard to the proposition that one should not lightly infer a penalty in a contract freely negotiated by two advised parties of equal bargaining power. However, the higher rent is payable here, with retrospective effect as well as for the future, in addition to the other remedies the landlord has for breach of any tenant obligation of the lease. The breach of the primary obligation does not discharge the Claimant from its liability to pay compensation for the breach, and the lease specifies two types of compensation (interest and costs) in generous measure, in addition to common law damages. The additional rent of between £10,000 and £20,000 p.a. for the first 5 years and a potentially higher amount for the next 5 years is what is payable on the occasion of any non-trivial breach *in addition to* full measure of compensation for any loss caused by the breach. In my judgment, that consequence is out of all proportion to the legitimate interest of the lessor in having the Claimant comply with every one of its obligations rather than pay full compensation for any breaches.

64. The issue would be less clear-cut if the consequences of termination of the Side Letter were prospective only. I

remind myself that it is for the Claimant to prove that the obligation to pay increased rent for the future is exorbitant or unconscionable having regard to the harm capable of being caused by the breach of contract.

65. Two factors tip the balance in favour of the Claimant, notwithstanding the equality of bargaining power between the two well-advised parties. First, the rent increase applies for whatever remains of the first ten years of the term regardless of the nature and seriousness of the non-trivial breach of contract and when it has occurred. Second, the increased rent is payable in addition to interest on any overdue payment, any costs incurred by reason of the breach, and damages for losses caused by the breach. The obligation to pay increased rent is therefore a blunt instrument that, depending on when the Side Letter is terminated, may give rise to a very substantial and disproportionate financial detriment. The additional rent may be payable for much or most of a period of 10 years as a result of a minor breach of covenant that does no harm to the lessor's legitimate interests in preserving its cash flow and the value of its reversion. The extra financial detriment to the Claimant does seem exorbitant and unconscionable in comparison with any legitimate interest in full performance that will not otherwise be compensated by interest, costs and damages. On that basis, I would have reached the conclusion that the termination provision is penal in nature even if it has only prospective effect.

(f) **Severance**

66. That conclusion makes it strictly unnecessary for me to decide whether the words of the termination provision that give it retrospective effect would be severable, but in case this matter goes further and another court takes a different view I shall express my reasons for accepting the severance argument.

67. There is clear authority that a term of a contract can be severed in certain circumstances if it is unlawful in its effect: see *Marshall v N.M. Financial Management Ltd* [1995] 1 WLR 1461 at 1466, citing *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388. The conditions are that:

i) The unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains (the 'blue pencil' test);

ii) The remaining terms continue to be supported by adequate consideration;

iii) The removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all', and possibly also

iv) The severance must be consistent with the public policy underlying the avoidance of the offending part.

68. Mr Wonnacott submits that the test for severance is not satisfied because there is only one unenforceable penalty clause, not two or more separate ones, and that there is therefore no separate obligation to pay additional rent retrospectively that can be severed. I do not accept that argument. It seems to me to depend on a discredited former test for severance. The old statement of the test, which depends on identifying whether there is one or more obligations one of which could be severed, was regarded as unsatisfactory and has been overtaken by the new formulation set out above: see the *Marshall* case at p.1466D-E. Moreover, it is evident from the facts of the *Marshall* case that there was in substance one clause providing entitlement to future commission, which depended on one of two or more conditions being satisfied. The Court severed the offending conditions leaving the unconditional obligation to pay commission. Had it been necessary to identify a separate unenforceable obligation that decision could not have been justified.

69. There seems to me therefore to be no error in seeking to identify the particular words of a single or composite obligation that result in the obligation being unenforceable and severing them if the conditions for severance are otherwise satisfied. If I am wrong in my conclusion about the penal nature of the obligation to pay increased rent prospectively, it is only those words of the termination provision that give it retrospective effect that are objectionable. With the omission of the words *"as if this agreement had never been made*", the termination provision could not be construed as having any retrospective effect. The words "*will be immediately payable*" could not then be interpreted as referring to rents falling due before the date of termination. The offending words can be severed without requiring any further amendment to the remainder of the words preceding or following

them.

70. The consideration for the lessor's conditional agreement to accept the lower rent is the Claimant's entry into the lease, not only its agreement to pay additional rent for past quarters when the Side Letter is terminated. So the deletion of that term does not mean that the reduced rent agreement is unsupported by consideration. The next question is whether the character of the contract is wholly changed by the removal of the term in question. It is plainly not: it remains the grant of a lease at market rent with an agreement that the Claimant itself can pay a reduced rent for so long as it satisfies specified conditions and does not breach its obligations under the lease. Only (on the assumed basis on which this issue arises) the unlawful penalty element is removed. The severance is wholly consistent with the public policy underlying the unenforceability of penalties, namely that the courts will not support the punishment of a party for his breach of contract.

71. Accordingly, were the termination provision in the Side Letter only a penalty because of the retrospective effect of the specified increase in rent, I would have held that the words of the Side Letter giving it that effect could validly be severed, leaving the other terms enforceable and (in the circumstances of this case) effective as from 17 July 2015 going forwards.

Conclusion

72. Since I have held that the termination provision in the Side Letter is in any event penal in nature, the purported termination of the benefit of the Side Letter by Dentons' letter dated 17 July 2015 is unenforceable and the Claimant remains liable and entitled to pay rent at the capped rate of £125,000 for so long as it satisfies the conditions in the Side Letter.

DER Travel Services Limited
18 Conduit Street
London
W1S 2XN

Date: 18 November 2009

Vivienne Westwood Limited
Westwood Studios
9-15 Elcho Street
London
SW11 4AU

Dear Sirs

Basement and Ground Floor Shop Premises 18 Conduit Street London W1S 2XN ("the Shop")
Lease dated 18 November 2009 (Lease)

We agree that (subject to the following conditions):-

1 Notwithstanding the rent reserved by clause 1.25 of the Lease, we will accept a reduced yearly rent from you as follows -

From 30 April	2010 to 17 November 2010	£90,000 per annum exclusive
From 18 November	2010 to 17 November 2011	£95,000 per annum exclusive
From 18 November	2011 to 17 November 2012	£95,000 per annum exclusive
From 18 November	2012 to 17 November 2013	£95,000 per annum exclusive
From 18 November	2013 to 17 November 2014	£100,000 per annum exclusive

2 In the event that the amount of yearly rent payable under the lease pursuant to the rent review on 18 November 2014 exceeds £125,000 we will accept a reduced yearly rent from you of £125,000 exclusive up to and including 17 November 2019.

3 The annual rental figures stated above are exclusive of rates, outgoings, service charge, VAT and all other payments arising from time to time under the Lease.

The conditions of this agreement are:

(a) This agreement is personal to you Vivienne Westwood Limited (Co Regn No 2682271) and does not extend to any other person.

(b) This agreement ends immediately if you:

- assign the Lease or
- allow someone else to trade from or occupy the Shop or
- cease trading from the Shop yourselves or
- become insolvent (as defined by the Insolvency Act 1986), are the subject of a petition or resolution for winding up, have an administrator or receiver appointed or enter into an arrangement or composition under the Insolvency Act 1986.

(c) Any dealing with the legal and/or beneficial interest in the shares of the tenant company is to be treated as an assignment of the Lease for the purposes of this agreement.

(d) You must not disclose the provisions of this letter to any third party either while the agreement is in force or at any time after it has ended.

Subject to compliance with the terms of this agreement, we agree not to take any action in respect of any breaches of the Lease that may arise due to the concessions set out in this agreement.

If you breach any of the terms and conditions contained in this agreement or any term of the Lease and/or any document supplemental to it (for example a licence to alter), we may terminate this agreement with immediate effect and the rents will be immediately payable in the manner set out in the Lease as if this agreement had never existed. If we terminate this agreement, we will serve written notice to that effect on you at your registered office.

It is agreed that this agreement is not a variation of the Lease.

No term of this agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to it.

Yours faithfully

For and on behalf of/authorised signatory
DER TRAVEL SERVICES LIMITED

We acknowledge our agreement to the terms of this letter.

For and on behalf of/authorised signatory
VIVIENNE WESTWOOD LIMITED