

What is Vacant Possession?

Introduction

The term “vacant possession” is one frequently used in contracts for the sale and purchase of property and also in leases. For example, it is a common requirement that on completion the seller gives the buyer vacant possession. Also it is commonly a condition of a tenant’s break clause in a lease that it gives vacant possession of the property to the landlord on the break date.

There is some uncertainty as to exactly what vacant possession means in this context. In the case of tenants exercising break clauses, this can lead to difficulties. In a market where tenants are hard to find the landlord may seek to argue that the tenant’s exercise of the break clause is ineffective owing to it having failed to provide vacant possession. A recent Court of Appeal decision in *NYK Logistics (UK) Limited -v- Ibrend Estates BV* [2011] illustrates this.

The Code for Leasing Business Premises (2007 Edition) recognises the difficulties the term vacant possession can cause in the context of a break clause. The issue of when a property is vacant for the purposes of determining vacant possession is a difficult one, not least because of the chattels versus fixtures distinction. This is the reason for the Code’s recommendation that the tenant only has to give up occupation and leave behind no continuing subleases. It recommends that disputes about the state of the property or what has been left behind or removed should be settled later, as in contractual expiry of a lease.

What Happened in NYK Logistics (UK) Limited and Ibrend Estates BV?

This case concerned a break clause in a lease. The tenant, NYK, served notice to terminate the lease on **3rd April 2009**. One of the conditions attached to the exercise of the break right was that the tenant had, on the break date, delivered up vacant possession of the property.

NYK had taken a decision to carry out dilapidations work itself in order to save money. It believed it could carry out the works more cheaply than settling financially with the landlord.

Completing these works was not a condition of the break clause. Accordingly, NYK did not need to do the

work, but simply wanted to for its own purposes.

As the break date approached, it became clear to NYK that they were not going to have time to complete the various repairs. They contacted the landlord a few days before the break date to set out the position, including a proposal that NYK funded the existing security at the property for a further week, during which time they could finish off the dilapidations works. During this time, they would not pay any rates or rent but would, if requested, hand over the keys and give the landlord full access to the property.

Despite several chasing e-mails by NYK, the landlord did not respond to this proposal prior to the break date. NYK did not return the keys to the landlord before the break date and it maintained its existing security at the property until it finally vacated.

On Monday 6th April, NYK’s contractors entered the warehouse to finish off the works. When they finally finished the works a few days later, and sought to hand back the keys, the landlord contested the successful exercise of the break right on the grounds that NYK had not given vacant possession on 3rd April, as required by the terms of the break clause.

Decision

The judge in the Sheffield County Court found for the landlord. NYK appealed.

The Court of Appeal upheld the initial decision and found that NYK had not given vacant possession on 3rd April, as required by the terms of the break clause. The Court clearly stated that in order to give vacant possession the property had to be empty of people and the landlord had to be able to assume and enjoy immediate and exclusive possession, occupation and control of it.

It must also be empty of any items belonging to the tenant, although the obligation in this respect is only likely to be breached if any such items left substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property. In other words, there is a *de minimis* rule which is applied.

What to Do?

It is difficult not to have some sympathy with NYK in this case. It thought it was doing the right thing, but should have focused on the requirements of the break clause rather than concerns about finishing the dilapidations work. When it got no response from the landlord to its proposal, it should have returned the

keys and removed the security from the property. It could then have approached the landlord after the break date to seek consent to come onto the property to finish off the last few remaining dilapidations works.

Although a small number of items left at the property is unlikely to jeopardize the effective exercise of a break right, it does introduce a "litigation factor". It may give the landlord room to argue that the condition of vacant possession has not been satisfied. This may mean the tenant has to compromise its position in order to settle that litigation and avoid the cost and uncertainty of a legal dispute. In this respect, it is best to adopt the recommendations in the Code for Leasing Business Premises.

As a landlord, you could put a clause in the lease entitling you to remove any items left in the property if the tenant has not done so within a certain period following expiry of the lease, coupled with a right for the landlord to sell those items and use the sale proceeds to cover any costs incurred in removing and selling the items.

As a tenant, if there is a vacant possession condition in the break clause, ensure that all people have left the property on or prior to the break date, especially any subtenants or any other third parties with rights of occupation, such as group companies sharing the property. Ensure too that all items are removed from the property to avoid the litigation factor.

Practical Tips

- Vacant possession means:
 1. No people on the property. The landlord must be able to assume immediate and exclusive possession, occupation and control.
 2. There must not be any items left at the property although this is a question of degree. For example, a small amount of items is unlikely to mean vacant possession has not been given.
 3. Return the keys to the landlord.
- In practice, it is advisable for tenants not to agree vacant possession as a condition of the successful exercise of a break right. Reducing the obligation to one requiring the tenant to give up occupation reduces the risk of the tenant losing its right to break.



If you would like to discuss this with us, please contact:

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This briefing note is intended merely to provide a summary of the law in this area and is not a comprehensive guide. It is not intended to provide legal advice for specific cases. The law and practice in this note is stated as at August 2011.