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## It's nearly vacant possession – give us a break!

What constitutes 'vacant possession' for the purposes of satisfying break clause conditions? The recent Court of Appeal decision in *NYK Logistics (UK) Limited v Ibrend Estates* is a timely reminder to both tenants and landlords of the Court's interpretation of vacant possession.

### Background

In this case, NYK Logistics (UK) Limited (**NYK**) were the tenant of a property under a lease entered into with Ibrend Estates BV (**Ibrend**). NYK were entitled to terminate the lease after one year however, for the break clause to be effective, NYK were required to fulfill the following two conditions by the break date:

- pay all rent due and
- deliver up vacant possession.

The break clause also gave Ibrend discretion to waive the conditions.

NYK validly served a break notice on and Ibrend arranged for a terminal schedule of dilapidations to be prepared. NYK decided to undertake the dilapidations works to extinguish their liability prior to termination of the lease, but they ran out of time to complete the works before the break date.

NYK therefore proposed to fund the existing security at the premises for one week after the break date in order complete the small amount of outstanding works. That proposal was met with silence from Ibrend. NYK made further approaches to Ibrend to return the keys but these were also unsuccessful.

NYK's contractors continued to work at the premises for a few days after the break date. Subsequently, Ibrend informed NYK that vacant possession had not been achieved. Ibrend were then successful at court in obtaining a declaration that NYK's lease had not been validly broken, Ibrend pointing to the continued presence of security and workmen on the property as not constituting vacant possession. NYK appealed.

### The Appeal

There was some sympathy, although not a lot, with NYK's position. It was acknowledged that NYK had made steps to overcome the issue of vacant possession, but, when a response from Ibrend was not received, NYK failed to take steps to protect its position by moving out entirely and stopping the works.

The appeal was dismissed, the Appeal Court finding that NYK had failed to satisfy the vacant possession conditions in the break clause and the lease continued. Rimer LJ said:

*"The concept of 'vacant possession' in the present context is not, I consider, complicated. It means what it does in every domestic and commercial sale in which there is an obligation to give 'vacant possession' on completion. It means that at the moment that 'vacant possession' is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, although the obligation in this*

*respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property."*

NYK had also argued that Ibrend had waived the conditions of the break clause by agreeing to (although failing to arrange) the return of the keys. This argument was unsuccessful, the court finding that an unguarded comment over the phone by Ibrend's representative about accepting the keys would not be seen as a formal waiver of the vacant possession conditions.

## Points to Note

- There were only a small amount of dilapidations. Although it may have seemed economical for NYK to undertake the works to avoid a dilapidations claim, the value was minute compared to rental payments they subsequently faced when the lease failed to break.
- NYK should have removed their contractors and workmen on the break date then made alternative arrangements, such as a licence, to re-enter the premises to complete the works.
- NYK should have ensured that the keys were returned to Ibrend on the break date.
- NYK had retained security at the premises to avoid vandalism but the Court highlighted that the onus was on Ibrend to arrange security for the premises following the break date, if the lease had validly been broken.
- NYK should have obtained an explicit waiver from Ibrend if it sought to rely on that provision in the break clause.

## Conclusion

The two tests previously considered to be settled law on the question of vacant possession have not been altered by this decision and appear to remain as follows:

- What is the ongoing **activity** of the tenant? Is the tenant using the premises for his own purposes (other than de minimis)?
- What is the **physical condition** of the property? Does the condition (e.g. items left on the property by the tenant) pose a substantial impediment to the Landlord's use of the property, or a substantial part of it?

This decision does however act as a warning to tenants. Irrespective of informal discussions between landlords and tenants the message here is, if in doubt - get out!

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