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VACANT POSSESSION - THE POTENTIAL IMPACT OF FAILING TO COMPLY

When a lease comes to an end there is almost always an obligation on the tenant to deliver up the premises with vacant possession. In addition, where a break option is included in a lease to allow for a lease to be terminated early it is often the case that vacant possession must be delivered up as a condition of exercising the break.

What 'vacant possession' actually means in practice is something that is less clear cut than might be assumed. The ramifications of getting it wrong though can be enormous. For instance, a failure to fully comply with the conditions of a break can be sufficient to render an attempt to break ineffective and leave a tenant liable for the continuing rent and other sums up until the end of the lease or (where applicable) until the next break date. This makes the issue one of vital importance to both landlords and tenants.

A recent decision by the Court of Appeal in *NYK Logistics (UK) Ltd v Ibrend Estates BV* [2011] EWCA Civ 683 provides some guidance on what is meant by this (the first time that the meaning of the term 'vacant possession' has been considered by the Court of Appeal since 1946). It also serves

as a useful reminder that any conditions attached to the exercise of a break clause must be fully complied with and any variation or waiver agreed between the parties as to these terms should always be recorded in writing.

The facts

NYK Logistics were tenants of a large warehouse unit in Rotherham of which Ibrend Estates was the landlord. NYK attempted to exercise a break clause in its lease. In order to successfully operate the break clause, certain conditions had to be complied with, one of which was that on the break date the premises be delivered up with vacant possession. A schedule of dilapidations was prepared and served by Ibrend on NYK, but the schedule of works was not agreed with NYK until less than a week before the break date. In order to save themselves costs by overseeing the remedial works, NYK proposed that their workmen be allowed to remain in occupation of the unit for a short period after the break date to

finish off the repairs. They put this proposal to Ibrend through an agent, but did not receive a response. NYK decided to remain in occupation of the premises in any event, and due to concerns over potential vandalism, also retained their own security staff at the premises. The keys to the unit were not returned to the landlord.

The dispute

A few days after the break date Ibrend, contacted NYK to inform them that the conditions of the break in respect of vacant possession had not been satisfied and that accordingly the lease was continuing. Ibrend argued that vacant possession had not been given because after the break date NYK had:

- continued to employ a security presence at the premises;
- left a number of items of equipment in the property; and
- instructed its workmen to remain in the premises in order to complete the various works of repair outstanding.

NYK sought to reject the arguments raised by Ibrend, claiming that although it had remained in occupation after the break date, this occupation was as a trespasser only and that they had no intention to occupy the premises or deny Ibrend access to or occupation of the premises. The continuing security presence was necessary in order to prevent vandalism of the premises.

“The ramifications of getting it wrong can be enormous”

Vacant possession?

The leading authority which considered the meaning of the term ‘vacant possession’ is *Cumberland Consolidated Holdings Limited v Ireland* (1946). This established that two separate tests (which are independent of one another) should be considered in order to establish whether or not vacant possession has been given. These are as follows:

- Is the tenant continuing to use the premises for his own purposes in a non-trivial way?
- Is there a physical impediment to a substantial part of the premises which provides a “substantial obstacle” to the landlord’s use and enjoyment of the premises?

If either or both of these tests is satisfied, then vacant possession will not have been given.

In the matter at hand, NYK sought to argue that their continued use of the premises was trivial only and that although some equipment and their own security guards remained at the premises, this did not represent a substantial obstacle to the landlord’s use of the premises.

Decision of the Court

The Court of Appeal found in favour of the landlord and confirmed that NYK had failed to deliver up the property with vacant possession on the break date, and consequently, had failed to validly exercise the break in their lease.

The judge provided a useful summary of what is meant by delivering up vacant possession.

He stated: “...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...”

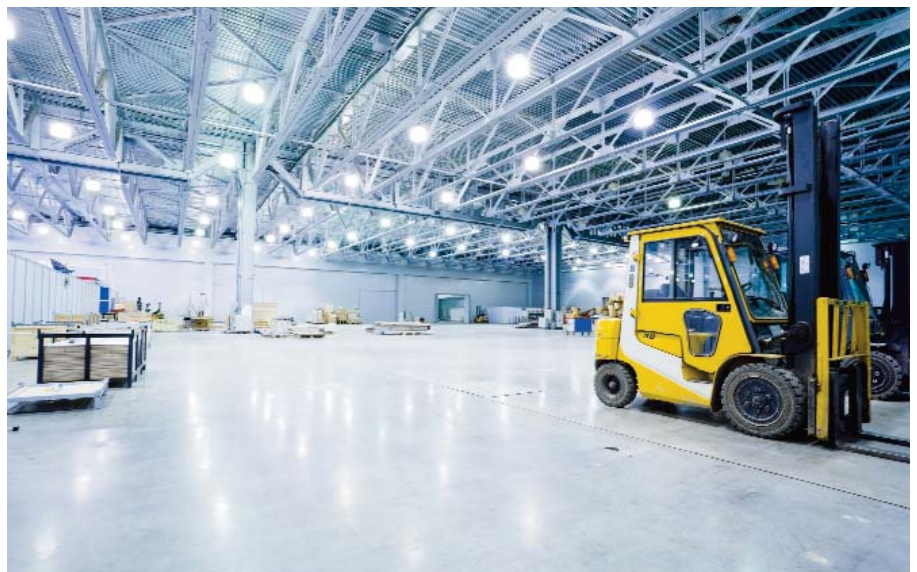
Applying this, although the Court commented that NYK’s proposal to prolong their occupation to finalise the works of repair was sensible, when no confirmation of the landlord’s agreement to the proposal was received, they should have taken the steps necessary to vacate and returned the keys to the landlord. Furthermore, their efforts in seeking the landlord’s agreement to their proposals in advance of the break date indicated that they were well aware that this is what they had to do.

The Court went on to comment that NYK had done nothing to indicate that they were giving up possession of the premises on the break date and continued to have exactly the same degree of control and ownership of the premises the day after the break date as the day before it.

In relation to NYK’s arguments in respect of the potential vandalism of the premises, this was considered to be irrelevant - any damage caused after the end of the lease was an issue for the landlord and was not something that NYK should have concerned themselves with.

Similarly in respect of the completion of the works of repair. It was not a condition of the break that all dilapidations works be completed, and NYK’s preference in remaining in occupation to complete the works was motivated by a desire to control the cost and quality of the works of repair and thereby avoid a subsequent dilapidations claim for damages over and above what it would actually cost them to complete the works themselves.

Fortunately for NYK, in this instance they were able to exercise a further break option and brought the lease to an end some 8 months later. Had this not been the case they would have been liable for all sums due under the lease for the full term, turning what was already a costly mistake into an extremely expensive one.



Lessons

- This case provides a useful reminder to tenants on the need to strictly comply with any conditions required to validly exercise an early lease break.
- It also highlights the need to consider with legal advisers at an early stage the conditions that need to be complied with in order to validly exercise a break.
- If a landlord is willing to agree to waive any conditions of a break then a tenant should ensure that any agreement to this effect be recorded in writing. If it is not, then the tenant should assume that no waiver is being given and should take the steps necessary to ensure strict compliance with all break conditions.

- When dealing with ill-defined concepts such as 'vacant possession', tenants should be especially careful to minimise the risk that landlords are able to successfully argue that vacant possession has not been delivered up. In practice, as a minimum, tenants should ensure that all staff and agents have left the premises by the break date and also that nothing is left on the premises. It is also good practice to return the keys to the landlord or their agents.
- In short, whilst it may appear sensible or practical for tenants to remain on the premises following a break date to deal with dilapidations and to secure the building, given the requirement for strict

compliance with break conditions, tenants should prioritise complying with those conditions and deal with any non-essential issues after the event.

For more information or advice, please contact:

Martin Edwards
Partner & Head of Real Estate Disputes
Martineau
T: 0800 763 1341
E: martin.edwards@martineau-uk.com

This article summarises complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal/professional advice on particular problems and we will be happy to assist.

Key Real Estate Contacts:

Real Estate

Clive Read - Partner & Head of Real Estate
 T: 0800 763 1439
 E: clive.read@martineau-uk.com

John Rice - Partner & Head of Property
 T: 0800 763 1572
 E: john.rice@martineau-uk.com

James Spreckley - Partner
 T: 0800 763 1672
 E: james.spreckley@martineau-uk.com

Amanda Hanmore - Partner
 T: 0800 763 1582
 E: amanda.hanmore@martineau-uk.com

Simon Coghlan - Partner
 T: 0800 763 1431
 E: simon.coghlan@martineau-uk.com

Iain Johnston - Partner
 T: 0800 763 1232
 E: iain.johnston@martineau-uk.com

Bhavesh Amlani - Partner
 T: 0800 763 1448
 E: bhavesh.amlani@martineau-uk.com

Quentin Butler - Partner
 T: 0800 763 1484
 E: quentin.butler@martineau-uk.com

Richard Schmidt - Partner
 T: 0800 763 1201
 E: richard.schmidt@martineau-uk.com

Kathy Toon - Partner
 T: 0800 763 1459
 E: kathy.toon@martineau-uk.com

Real Estate - Disputes

Martin Edwards - Partner & Head of Real Estate Disputes
 T: 0800 763 1340
 E: martin.edwards@martineau-uk.com

Stephen Belshaw - Partner
 T: 0800 763 1611
 E: stephen.belshaw@martineau-uk.com

Real Estate - Construction & Engineering

Michael Craik - Partner & Head of Construction and Engineering
 T: 0800 763 1341
 E: michael.craik@martineau-uk.com

Paul Mountain - Partner
 T: 0800 763 1344
 E: paul.mountain@martineau-uk.com



iPRT Group

Intelligent Transport Planning Solutions

Tel 0845 47 48 851

Fax 0871 900 7432

Email info@iprtgroup.com

Web www.iprtgroup.com

Offices Newcastle upon Tyne, Leeds, Manchester,
Birmingham, London, Edinburgh