



**CUSHMAN &  
WAKEFIELD**

# VACANT POSSESSION

2017



## EXPERT ADVICE FOR OCCUPIERS

The requirement for an occupier to give up the premises with ‘vacant possession’ is often found within the yield up or break clause of the lease and has potentially serious implications.

In the Court of Appeal case *NYK Logistics (UK) Limited vs. Ibrend Estates BV* [2011] EWCA Civ 683, an occupier was deemed to have failed to comply with the break clause provisions, and subsequently their lease continued. Lord Justice Rimer gave guidance as to what is meant by the requirement to give up a premises with ‘vacant possession’:

*“...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.”*

This can be broken down into two tests. These are independent of each other, and a landlord would only need to demonstrate one test in order to frustrate an occupier’s break.



***‘Vacant possession’ is often misunderstood – with costly repercussions***

# 1

## TEST 1

### HAS THE OCCUPIER MOVED OUT?

The property must be empty of people including employees, security and facilities management personnel. The landlord or purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of the premises.

In the case of *NYK Logistics (UK) Limited vs. Ibrend Estates BV* [2011], the occupier failed to hand over the keys on the break date, continued to employ security on site, and returned during the week after the break date to complete some dilapidations works.

The dilapidations works themselves did not form part of any break clause requirements and to undertake them was deemed by the judge only to be for the benefit of the occupier in trying to save costs against the landlord's claim.

The occupier, in these circumstances, should have obtained the landlord's agreement in writing to return back to the premises after the break date to complete dilapidations works under licence. In the absence of any such agreement the occupier should have moved everyone out of the property, including the security guards, and deliver the keys to the landlord or the landlord's agent by one minute before midnight on the break date. The occupier would then be free to try and agree

access under a formal license after the break date.

Another leading case on vacant possession is: *Legal & General Assurance Society Limited vs. Expeditors International (UK) Limited* (2006) EWHC 1008 (CH): [2007] 1P & CR5. In this case the occupier was found to have left fixtures and chattels behind and an employee sweeping and clearing up the premises after the break date. Furthermore, the occupier had failed to hand back the keys to the landlord. The court reconfirmed the conditions necessary for a successful a break. These must be strictly complied with and there is no room for fairness.

In this particular case the landlord had already reached an agreement with the occupier and therefore the Court's decision was in favour of the occupier. However, this case is important as it demonstrates the precarious nature of strict compliance. It is imperative that by midnight on the break date the occupier has fully performed all the break requirements.

# 2

## TEST 2

### HAS THE OCCUPIER SUBSTANTIALLY REMOVED ALL CHATTELS?

The property must be empty of chattels where these substantially prevent or interfere with the enjoyment of the right of possession over a substantial part of the property.

A lead authority on test 2 is *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264, CA (Eng) where the judge stated:

*"Is there 'physical impediment' to a substantial part of the premises which presents a 'substantial obstacle' to the landlord/buyer's use and enjoyment of those premises."*

In a recent case *Riverside Park Limited versus NHS Property Services Limited* (2016) EWHC 1313 (Ch) the court ruled that occupier installed internal non-structural partitions were deemed to be chattels. The reason given was that they could be removed without damaging the premises and had been installed by the occupier for its own benefit rather than adding value or improving the premises. The judge then went on to rule that not only were they a chattel but they also represented a physical impediment as the landlord should be entitled to market the property in open plan rather than in a cellularised layout.

Another recent case is *Secretary of State for Communities and Local Government versus South*

*Essex College of Further and Higher Education* 2016. The occupier not only left non-structural partitions but also chattels which included a photocopier, reception desk, computer screens and key fobs. The Court held that the occupier had not demonstrated 'to the outside world' that it had vacated the premises. The items left behind constituted abandonment rather than yielding up the premises with vacant possession, as they were deemed to be stored and therefore in practice the occupier was continuing to use the premises. However, the Court did consider that, had the partitioning been removed but the chattels left behind, they were minor in nature, and vacant possession could have been accepted.

Far from providing clarity these recent cases leave more questions than they answer. Non-structural partitioning cannot easily be removed on its own, so how far should reinstatement go?

Our recommendation is clear. Occupiers should err on the side of caution and prepare for the worst and negotiate with the landlord early. **If that fails, carry out the works.**



# WHAT IS A FIXTURE OR A CHATTEL?

Whilst Lord Justice Rimer provided some clarification of the term vacant possession, there is still ambiguity in respect to the interpretation of chattels and the extent to which an occupier is obligated to remove them from the property under the requirement of giving up the premises with vacant possession. Early advice from solicitors should always be sought where vacant possession is not clear and in particular where there is a requirement to remove chattels. Whilst there is no clear definition, the following two tests can be applied.

## WHAT IS THE EXTENT OR DEGREE OF ANNEXATION?

Is it physically attached to the property or freestanding? Can it be removed without causing damage to the property?

## WHAT IS THE PURPOSE AND INTENTION OF ANNEXATION?

Is it intended to be permanent or has it become a lasting improvement? If the item is designed to be part of the property it may be interpreted as a fixture. If the item is fixed in such a manner as to allow removal without damage to the property, then it may be deemed to be a chattel. In all cases, annexation will be a matter of fact and degree. The following list demonstrates the difficulty in interpreting items definitively:

- Carpet may be considered a chattel if resting under its own weight. Carpet tiles adhered with tackifier are a grey area as they lack the quality of permanency to become a fixture, yet may be damaged if removed and unlikely to lie flat if relocated;
- Fitted kitchen units are fixtures although freestanding units are deemed to be chattels;
- Data cabling is another grey area, as these are usually laid with the specific intention to be used in that location only. However, the cabling is not fixed to the premises in a permanent manner.
- In most cases the partitioning will be deemed to be a chattel, as it will be non-structural, installed for the benefit of the occupier and can be removed without causing damage to the property. Furthermore, recent case law has clarified that it will be seen as an impediment to a landlord's use and enjoyment of the property. Therefore it must be removed as part of a requirement in a break clause to give up the property with vacant possession.
- There is another issue, as yet untested in court. Removing partitioning on its own will leave an unsightly, potentially difficult to let demise, which may still trigger the second test as to whether there is a substantial obstacle to the landlord's/buyer's use and enjoyment of those premises. Further works such as repairs following removal and capping off services may also need to be considered.



## OUR ADVICE TO OCCUPIERS

In view of the considerable and onerous implications of having to give a premises up with 'vacant possession', especially in relation to break clause requirements, we would recommend the following:

1. Ensure no people are in occupation. This applies to occupier's employees, security, facilities management or trespassers
2. Ensure the landlord or purchaser is able to assume immediate and exclusive occupation, possession and control of the property
3. Remove all chattels from the property. Whilst the test refers to chattels which cause substantial impediment to a substantial part of the premises, err on the side of caution. The following list of chattels is by no means exhaustive:
  - Furniture, freestanding equipment, items resting on the premises under their own weight, and items that can be removed without damaging the property
  - Non-structural partitioning and temporary alterations
  - Pictures and signage
  - Debris – clean down the premises and remove all rubbish
  - Keys – it is essential that the occupier is deemed to have handed these back to the landlord or landlord's agent. Locks must be operable and in some circumstances this may include provision of security key codes. In circumstances where all control for security is through a

central computer owned and operated by the occupier, early advice from the landlord should be sought as to how they would like the property secured. If advice is not forthcoming full reinstatement should be undertaken

- It may also be necessary to supply the landlord with operating and maintenance manuals and as - built plans.

In summary, whilst recent case history has clarified some issues, there is still ambiguity and uncertainty as to the case law in relation to what is required to give a premises up with 'vacant possession'. Break clauses specifically requiring vacant possession are onerous and early contemplation of the works required to comply with its requirements must be given. If an opportunity arises to vary the terms of a lease, use it to remove the requirement for vacant possession, and when negotiating new leases with break clauses, we recommend avoiding the term vacant possession as a pre-condition to exercising the break.

One thing is clear however, in relation to break clause requirements, strict compliance with the conditions is essential, and if necessary occupants should err on the side of caution. Failure to do so may well mean the break will be deemed invalid.

**In all cases we recommend early advice is sought from legal and dilapidations practitioners.**



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