

Vacant possession – do the right thing (Case update)

On 16 June 2011, the Court of Appeal gave judgment in *NYK Logistics (UK) Limited v Ibrend Estates BV*.

While the decision in the case can be described as fact sensitive, there are some themes of general interest, particularly for those seeking to break a lease or to deny a break has taken place.

In very brief summary, NYK had two opportunities to break its lease. The case concerned the first. As it happened, the lease did come to an end early, but because, on a without prejudice basis, NYK served a break notice for the second break date and met the requirements of the lease to bring it to an end at that point, nearly nine months after the first break date. The case was, in effect, about whether NYK had a rental liability for that period of nearly nine months.

The break clause was not too onerous for the tenant: for the break to be effective, written notice had to be given in advance, the rent had to be paid up to date, and vacant possession was to be given.

NYK served a valid break notice, and it started to do some works of repair to try to minimise or extinguish any dilapidations claim and generally went about coming out of the property in a sensible way. Knowing that the date to vacate was approaching but that the works it wanted to do would take more time, NYK contacted the landlord about the basis on which it would have workmen stay at the property and deliver over the keys. All responsible stuff. However, it made one, significant, mistake. It did not make sure that the landlord had agreed (in a binding manner) to the extra period of occupation and simply allowed its workmen to stay on site for a few days after the break date. In the eyes of the court, it did not give vacant possession.

The tragedy for NYK is that, while it might have wanted to have control over the repairs it considered needed to be done, it did not have to make sure they were done for the break to operate. What it could, and should, have done was simply pull its workmen off site and ensure the keys were handed over, by midnight on the break date. As that did not happen, vacant possession was not given. If NYK felt it important enough to get dilapidations work done under its auspices, it could have planned its strategy to ensure works were complete before the break date.

There have been other cases considering whether or not vacant possession had been given. Leaving some things on site or even having a security guard there for a period of time might not allow the landlord to claim that vacant possession had not been given, particularly if it

can make beneficial use of the property. The problem in this case was the workmen carrying out repairs for NYK for a few days.

The right thing to do in this case would have been to adhere to the conditions of the lease, and not try to do more. Trying to do the responsible thing and to leave the property in an appropriate state of repair, NYK ended up with a liability of nearly nine months rent it was trying to avoid.

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