

The Effect of the Latest Break Clause Cases

Notices and Removals

Andrew Walker KC

Townsend Carriers v Pfizer (1977)

p.366

“I do not think that a requirement to “give” notice is one that excludes the indirect giving of notice. The question is whether the notice has been given, not whether it has been given directly. If the notice emanates from the giver and reaches the ultimate recipient, I do not think that it matters if it has passed through more hands than one in transit.”

UKI (Kingsway) v Westminster City Council [2018]

Service of a notice can be effected indirectly, but only if the person serving it caused this to happen

Townsend Carriers Ltd v Pfizer Ltd (1977)

“If the notice was addressed to the wrong person but was nevertheless delivered to the right person, the question would be whether the mis-addressing prevented the notice from being "given" to the right person. The purpose of a notice is ... to convey information; and if the notice, despite its being mis-addressed, suffices to convey the requisite information to the right person, I would have thought that it would satisfy the terms of the lease.”

Turner v OG Thomas Amaethyddiaeth [2022]

1) Where the requirement is a formal requirement, no question of interpretation arises.

e.g. the example about the colour of the paper in Mannai.

2) Where the requirement involves conveying information, the meaning of the notice will be interpreted according to ordinary techniques of interpretation.

Turner v OG Thomas Amaethyddiaeth [2022]

At [57]:

“whether a notice addressed to and received by A is a notice “given” to B is not a question of interpretation at all. It is a question of satisfying formal conditions.

... a notice addressed to A and received by A cannot be regarded as being a notice given to B, even if A knows that B would have been the correct recipient.”

Turner v OG Thomas Amaethyddiaeth [2022]

If a notice does not identify the right recipient then it will not be valid.

- A recourse to Mannai will not save a notice which identifies the wrong recipient, unless there is a clear and identifiable mistake in the language of the notice rather than as to the identity of the recipient.
- “If a notice is addressed to A (by his correct name) and sent to A’s proper address, it cannot be treated as a notice given to B” [45].

Prudential Assurance v Exel UK [2009]

A break notice served by joint tenants is not valid if it says only that it is served on behalf of one of them.

Reinforced by Turner?

Removals – vacant possession

The property is free of three things:

1. People

2. Chattels

> Other than any demised chattels which need to be returned

> Only if a substantial impediment to the landlord's use of the property or a substantial part of it (“exceptional” – Cumberland Consolidated)

3. Legal interests

Removals – vacant possession

Two strands:

1. Physical enjoyment

- > The property must be physically empty: no people and no chattels.

2. Control

- > The landlord must be able to assume and enjoy immediate and exclusive possession and control. There must be no-one at the property who is asserting a right to use it (explicitly or implicitly).

Vacant possession – fixtures v chattels

- **Fixtures become part of the land, so are part of the property that has to be given up at the end of the term (including on a break date).**
 - > This includes tenant's fixtures, which the tenant has the right – but not an obligation – to remove at the end of the term, subject to making good.
- **Chattels are not part of the land, so must generally be removed in order to give vacant possession.**

Vacant possession – alterations

- **Lawful (i.e. permitted) alterations are part of the property.**
 - > Whether they are fixtures or part of the land itself.
- **The same probably applies to unlawful alterations (i.e. those made in breach of covenant).**

Removals – fixtures and alterations

- **These do not need to be removed to give vacant possession at common law.**
 - > Unless the lease says something different, the tenant is entitled to hand back the property as it stands on the break date
- **Does the lease say something expressly about this?**
- **What if the lease requires the tenant to give vacant possession of “the Premises”?**

Removals - Riverside Park v NHS Property Services [2016]

Obiter:

1. “The Premises” included “all additions and improvements to the Premises and all fixtures and fittings of every kind which are at any time in or on the Premises ... except tenant’s or trade fixtures ... ”.

- The exclusion of tenant’s fixtures meant that these had never become part of “the Premises”, so had to be removed in order to give vacant possession of “the Premises”.

Removals - Riverside Park v NHS Property Services [2016]

Obiter:

2. The tenant was under a pre-existing obligation to reinstate the premises under a licence to alter.

- Because they had to be removed, they were a hindrance to vacant possession.

Removals - Riverside Park v NHS Property Services [2016]

- **Are those suggestions right?**

- > Does a definition of “the Premises” which excludes elements that are part of the property at common law mean that delivery of ‘vacant possession of the Premises’ requires removal of the excluded items?

In ordinary cases, I suggest not.

- > Does a pre-existing contractual obligation to remove fixtures or alterations have the same effect and/or turn fixtures into chattels?

In ordinary cases, I suggest not.

Capital Park Leeds v Global Radio Services [2021]

- **Break condition: the Tenant “gives vacant possession of the Premises to the Landlord on the relevant Tenant’s Break Date”**
- **Premises were stripped out before the break date**
- **Could the tenant hand back an empty shell?**
- Trial judge: No.
 - > Tenant gave back less than “the Premises” as defined, and did not give vacant possession (substantial impediment to use of the property).
- Court of Appeal: Yes.

Capital Park Leeds v Global Radio Services [2021]

Court of Appeal:

- It did not matter that tenant had given back less than “the Premises”.
- Focus of condition was on vacant possession – not on the physical condition of the property.
- No explicit condition to observe and perform covenants (unlike in yielding up covenant).
- Condition referred only to the premises as they were from time to time.

Removals – Capital Park = the right approach?

In most cases:

- Yes, where parts of “the Premises” have been removed.
- Probably, when elements excluded from “the Premises” have not been removed.

... so long as the tenant gives vacant possession of what it hands over, based on (1) what the property consists of at common law and (2) the common law test for vacant possession.

But every lease and situation must be considered on its own terms.

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