

The effect of the latest break clause cases

Notices and Removals

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Introduction

The exercise of break clauses continues to generate difficulties and disputes. Few of those disputes have led in the last year to reported judgments, but there are two fairly recent decisions worthy of your attention for the simple reason that they deal with perennial issues with the exercise of break clauses.

The first concerns giving notice to the wrong person. The second concerns what needs to be taken away (or left behind) in order to exercise the break.

Both issues arise from the need, as you will know, to comply strictly with break clause conditions.

Notices

My first case raises an issue which is far from new, but it provides fresh insight into how the courts are approaching this at the moment.

It also deals with an oft-cited *obiter* passage in the decision of Megarry V-C in Townsend Carriers (1977). Parties in difficulty with the service of notices have often relied on that case. Their success has been mixed, but it remains required reading for the desperate, so long as you also read the qualifications on it in later cases.

In Townsend Carriers at p.366, Megarry V-C said this:

“[There was] some discussion before me on the distinction between addressing a notice and giving a notice. I do not propose to explore this at any length. Clause 4 (c) of the lease says nothing about addressing a notice. The requirement is merely that the party concerned "shall give to the other party 12 months previous notice in writing of such its desire ..." If one party were to deliver to the other a notice which was not addressed to any named person, but simply stated "I hereby

give you notice ...," and so on, I do not see why that should not suffice to comply with the lease. [2] 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, of course, 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. However, on the footing that Wilkinson Transport Ltd. was Townsends' general agent for the demised premises, as I hold to be the case, the point does not arise ... I should, however, add that Mr. Speed emphasised that clause 4 (c) of the lease requires the tenant to "give" notice to the landlord, and he said that although the landlord had ultimately received the notice, no notice had ever been given to the landlord as such. However, [1] 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."

(numbering and emphasis added)

You may recall that in UKI (Kingsway) Ltd v Westminster City Council [2018] UKSC 67, [2019] 1 WLR 104 ([19], [29], [36]-[39]), the Supreme Court decided that service of a notice could indeed be effected indirectly, as suggested by Megarry V-C in the passage which I have numbered [1], but only if the person serving it caused this to happen in the sense that Lord Carnwath JSC described. That placed a firm qualification on proposition [1], but Megarry V-C was right to that extent.

A further and more significant blow has now been struck to the passage I have numbered [2]. This was done by the Court of Appeal in the case of Turner (2022), who decided that this passage is wrong in law.

Turner involved a notice to quit agricultural land, but the Court of Appeal's analysis will also be applicable to most notices to exercise break clauses. Indeed, they made important references to several break clause cases.

The relevant facts were these. Shortly before the landlord gave notice to quit, the tenant, Mr Thomas, incorporated a company, and assigned his tenancy to the company. He did not tell the landlord. The landlord sent a notice to quit. It was addressed to Mr Thomas by name, and was sent by recorded delivery to Mr Thomas at his home address. That address also happened to be the registered office of the company.

It was accepted on all sides that the notice to quit needed to be given to the company, and not Mr Thomas personally.

One unusual (but not unique) aspect of the case is that because Mr Thomas was the secretary of the company, the notice was validly served. This was because service on the secretary of a company is valid service under s.93(2) of the Agricultural Holdings Act 1986 ([25]-[28]). The issue was not with the mode of service, but only as to whether the notice was “given to the tenant” under s.26(1)(a). That raised the question whether the notice could be valid despite identifying the wrong addressee.

At common law, a notice to quit must be given to the tenant, and the court adopted that approach in Thomas. Similarly but in reverse, under most tenants’ break clauses, any notice to exercise the break must be given to the landlord.

If Megarry V-C’s proposition [2] was right, the notice in Turner could have been valid. It was served on the company’s secretary, and it communicated the landlord’s intention to terminate the tenancy. Unfortunately for the landlord, this analysis was not accepted by the Court of Appeal.

They first identified a distinction which they saw the majority draw in Mannai between formal requirements and requirements to impart information ([15]-[18]). All requirements must be complied with strictly, but they identified a distinction between the nature of those two types of requirement:

- 1) Where the requirement is a formal requirement, no question of interpretation arises. Cases in this category would include the notorious requirement about the colour of the paper, referred to by Lord Hoffmann in Mannai.

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

After reviewing the case law, they held that they were bound by R (Morris) v London Rent Assessment Committee to decide that a notice addressed to someone other than the tenant is not a notice “given to the tenant”. In saying this, they drew a distinction between cases in which the right addressee had been identified despite a minor error in the name, and those in which the wrong addressee had been identified, or where the error was such that the notice could not be read as having been addressed to the right person.

They were reinforced in this by Scottish case law, and that led them to decide that the formal validity of a notice must be resolved first: only if it is formally valid does the court go on to consider how it might have been understood by the reasonable recipient ([59]; Ben Cleuch; Balgray). In other words, all issues in the first category need to be considered first, before any issues in the second category.

That led them to conclude in summary that “*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*” ([57]).

In other words, this was a case in the first category, and the notice failed to satisfy the formal condition of being given to B.

I do not doubt the outcome in this case. A notice addressed to one person as landlord and sent to that person’s address cannot be regarded (without a lot more) as having been given to someone else as landlord, even if that other person has the same address. Some care needs to be taken with the reasoning, though.

Taken at face value, the reasoning in the Scottish cases to which Lewison LJ referred, and in his own judgment, might suggest that no question arises as to the interpretation of a notice as regards the identity of the intended recipient ([57], [59]).

How does this fit with the cases Lewison LJ mentioned in which a notice was properly addressed despite an error on the address's name? How, indeed, does this fit with the fact that a notice has to be read in order to identify the person to whom it has been given? Reading necessarily involves identifying the meaning of the words used to identify the intended recipient, whether you call that a process of interpretation or not.

The explanation may lie in part in the case by which the Court of Appeal said that they were bound, and indeed from the very passage to which they referred: R (Morris) v London Rent Assessment Committee [2002] EWCA Civ 273, [2003] L&TR 5 at [11]:

*"The notice was not addressed to the tenant, Mr Fry, either expressly by name or implicitly by status as tenant. It was expressly and unambiguously addressed by name to an altogether different person, Mr H.G. Barnby. That was not a minor error or slip. Mr Barnby was not Mr Fry, and he was not, and had long ceased to be, tenant of the flat. **The reaction of the reasonable tenant** receiving the notice addressed to Mr H.G. Barnby (or receiving an envelope so addressed) would be to think that the notice or the envelope and its contents were meant for Mr Barnby. The notice **cannot be construed** as a notice given to Mr Fry."*

(emphasis supplied)

Note, too, this description of the issue in the first of the Scottish cases – Ben Cleuch at [60]:

*"Nothing **turns** in this case on **the construction of the notice**. It was invalid because it was not given to the landlord, but to a third party. **The stage of considering how the notice would be understood by the recipient is not reached**. ... None of the cases cited which turned on construction of the notice was concerned with the situation in the present case, where the notice was given to the wrong party. They concerned **the different question of how a notice, given to the correct party but containing erroneous information on other matters, would be understood by the correct recipient**."*

(emphasis supplied)

Consistently with principle, I suggest that what Lewison LJ (and Lord Macfadyen) meant about there being no issue of interpretation in these cases is a combination two things:

1. The cases that they were dealing did not raise the question whether the notice conveyed a particular required meaning or particular information to the proper recipient, but whether the notice itself complied with the requirement in the break clause that it must be directed to the right recipient.
2. There was far too little on which to base an argument in those cases that the notice was directed to the right recipient: the wording in each was unambiguous in referring to someone else as the intended recipient¹.

There can still be cases in which the notice contains a minor error in the name of the recipient, but as a matter of interpretation it nevertheless identifies the right addressee. Those cases can still raise a question of interpretation at the first stage. Turner may narrow the scope for a successful interpretation argument, but it does not rule it out.

You may also need to bear a second point in mind. When what is in issue is the correct recipient, it may not be just a question of reading the notice. If the notice is in an envelope, addressed to the wrong recipient, will the correct recipient even receive and open that envelope? Unless that happens, the notice will never be read by the right person at all, unless it is opened by someone else and passed on, which might not satisfy the requirements of UKI as to good indirect service. This was not the situation in Turner, because Mr Turner was also the company secretary, but in other cases this could be a factor.

What lessons can be taken from Turner?

¹ See Lewison LJ's treatment of Lazarus Estates at [53] and his approach at [56] asking, "*can a notice addressed to Mr Thomas by name, and repeatedly asserting that he is the tenant, be understood to mean that the notice was addressed to a company of which the landlord knew nothing? In my judgment the answer to that question is "no". Since **the reasonable recipient** in the shoes of Mr Thomas [?] knew that the landlord was unaware of the assignment, he would not have understood the notice as referring to the company. There was no verbal error: there was a factual one.*" (emphasis supplied)

- 1) If a notice does not identify the right recipient then it will not be valid. *“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]: a phrase very similar to that of Lord Macfadyen in Ben Cleuch at [60]).

As one judge – now in the Court of Appeal – once said to me: “So your submission, Mr Walker, is that the words mean what they say.” Blunt, and something of a short cut perhaps, but absolutely right.

To put it another way, a recourse to Mannai cannot 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 (Turner at [30]-[35], [36]). It may be that this will now be possible only in the case of a “minor” mistake in the recipient’s name, or some equivalent minor error.

- 2) You can no longer pray in aid the dictum of Megarry V-C in Townsend Carriers at p.366 that misaddressing a notice does not matter if it is actually given to the right person. It does matter.

In some cases, if the break clause allows this, it may be safer not to name the recipient. For example, if there is some uncertainty over the recipient’s exact name, or perhaps over which is the relevant company in a group (all of which have the same registered office or business address), you might want to use a description instead, such as “the landlord”. You must also, of course, ensure that the notice is actually served on the right recipient.

Finally, remember that the analysis in any particular court decision is not expressed or applied in a vacuum. You can see that in Turner itself. An appreciation of the widely varying factual situations needs to be factored in to any review of the case law, and into any advice you give to a client on your own particular cases.

I close this topic with one further thought. Turner may have implications for the reverse situation as well: i.e. where there is some failure accurately to identify the party giving a notice. This takes me back to a hard-fought case of mine back in 2009 – Prudential Assurance v Exel UK. In that case, the break notice named

only one of the two joint tenants as the company giving it. I argued on behalf of the landlord that it could not be valid, even if it had actually been served on behalf of and with the authority of both joint tenants (which we also challenged, unsuccessfully), because it did not say that it had been given by them both. The judge agreed, although only after some hesitation and after considering a fair number of authorities on the approach to this type of error in a notice. There are other cases in which different errors about the party giving a notice have been decided the other way, taking a Mannai interpretation approach to identifying of the serving party.

This reverse situation raises some different and additional issues, but Turner may now reinforce the landlord's position as a matter of principle if a tenant's break notice names the wrong person as the tenant.

Removals – vacant possession and fixtures/reinstatement

Many break clauses require the tenant to give vacant possession as a condition of exercising the break clause.

On the other hand, just because there is a covenant to do something at the end of the term does not mean that this is necessarily a pre-condition to the effective exercise of the break clause, or that these obligations have any effect on what is meant in the break clause by vacant possession.

That distinction is critical.

What is “vacant possession”?

I begin with a reminder of what vacant possession involves. It can be a useful rule of thumb to think of this in terms of the property being free of three things: people, chattels and legal interests (see Goldman Sachs at [39]; Capitol Park Leeds plc v Global Radio Services Ltd [2021] EWCA Civ 995 at [13]).

A more nuanced analysis is to appreciate that there are two strands to this: one is concerned with physical enjoyment; the other is concerned with control. These strands were identified by Neuberger J in Expeditors International at first instance at [36]-[37] and [41]-[42], by reference to the leading case of Cumberland Consolidated. He framed them in terms of whether the landlord will get physical

enjoyment, and whether the tenant was retaining control, but it seems to me that this analysis is useful more generally, such as where there may be an issue with third party rights.

On this approach:

- Physical enjoyment involves the property being physically empty: empty of people and empty of chattels (other than any landlord's chattels that may have been demised and need to be returned).
- Control requires that the landlord must be able to assume and enjoy immediate and exclusive possession and control. This includes the requirement that there must be no-one at the property who is asserting a right to use it (explicitly or implicitly).

Whatever analysis is applied, a failure to comply will mean that vacant possession has not been given, unless:

- a) the failure is truly de minimis; or
- b) in the case of the presence of chattels, the physical impediment does not substantially prevent or interfere with the landlord's enjoyment of the right of possession of a substantial part of the property: Cumberland Consolidated at 271; Expeditors International (first instance) at [41]-[42]; NYK Logistics (CA) at [42]. These cases show that there will be a sufficiently substantial interference from chattels "only in exceptional circumstances", but that does not mean it cannot happen: the tenant failed on this basis in the Riverside Park case.

Removal of chattels and fixtures and the reinstatement of alterations

What does this mean for the removal of chattels and fixtures, and the reinstatement of alterations, where vacant possession is a break clause condition? I need to start with some common law principles.

There is a clear distinction between fixtures and chattels, even if it can be difficult to draw that distinction in practice. For present purposes, the key distinction is this:

- Fixtures become part of the land. If they are present on the break date, they will be part of the property that is being handed back.
- Chattels are not part of the land, so must generally be removed in order to give vacant possession.

You will also all be familiar with the position with tenant's fixtures. In general, tenant's fixtures become part of the land. The tenant has the right – but not an obligation – to remove them at the end of the term, subject to making good. As a result, at common law, the presence of tenant's fixtures will not inhibit vacant possession (Expeditors International (first instance) at [32]-[34]).

The position is similar so far as alterations are concerned. In short, unless the lease says something different, the tenant is entitled to hand back the altered property on the break date.

- Lawful (i.e. permitted) alterations to the property itself will be part of the property, whether they are fixtures or part of the land itself². Their continued presence does not undermine vacant possession.
- The same probably applies to unlawful alterations (i.e. those made in breach of covenant).

This means that, if a break clause takes effect based on the common law, it can be operated effectively:

- Without fixtures being removed beforehand, and
- Without alternations being reinstated before the break date.

But if the lease says that something different must be done as a condition of exercising the break, then that will have to be done.

In many cases, leases do not say this clearly, but the landlord may try to argue that this is how the lease should be interpreted. This can give rise to difficult questions. I want to deal with just one aspect of this: definitions.

² The distinction apparently reflects everyday life and language as regards what people regard as 'fixtures' rather than as an integral part of the land: see Elitestone at 690.

Definitions

Most modern leases will include some form of definition of the property that has been demised. That defined term may then be used in the break clause. For example, there might be a definition of “the Premises” – perhaps quite a detailed definition – and the break clause might include a condition that the tenant gives vacant possession of “the Premises” on the break date.

The use of a defined term of that sort has opened up arguments for landlords, most successfully in the Riverside Park case in 2016. This case concerned a break clause which was effective only “if the Tenant gives vacant possession of the Premises to the landlord” by the break date.

Various items had been brought onto the premises by the tenant pursuant to a licence for alterations which was contemporaneous with the lease. These included a large number of partitions. HHJ Saffman held that these were chattels, and that they were so extensive that vacant possession had not been given in the physical sense. As a result, he held that the tenant had failed to exercise the break, through having failed to comply with the requirement to give up vacant possession.

However, he went on to consider what the position would have been if he had decided that the partitions were tenant’s fixtures. He concluded that this would not have made a difference to his decision: the tenant would still not have given vacant possession.

How did he reach that conclusion? In two ways:

- First, the definition of ‘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 (whether originally fixed or fastened to them or not) except tenant’s or trade fixtures and fittings ... so far as they exist at any time during the Term”.

He concluded that the exclusion of tenant’s fixtures from the definition of ‘the Premises’ meant that the tenant’s fixtures had never become part of ‘the

Premises’ as defined, and so had to be removed in order to give vacant possession of ‘the Premises’ ([36], [62], [69]-[77]):.

- Even if he had been wrong about that, he would still have reached the same conclusion on a further ground: that the tenant was under a pre-existing obligation to reinstate the premises under a licence to alter, which required the tenant to remove the partitions ([78]-[92]). On the facts, this obligation had not arisen because the landlord had requested reinstatement, but because the tenant had become liable to reinstate them as soon as it had installed them: having failed to comply with a particular condition in the licence, the licence had ceased to have effect, triggering an automatic obligation to reinstate under the licence. That situation would have led him to the same conclusion as on the first point: the partitions had to be removed and so were a hindrance to vacant possession.

In effect, HHJ Saffman concluded that, for the purposes of the obligation to give vacant possession in the break clause, the parties had agreed that tenant’s fixtures were to be treated as chattels; and that they had agreed this:

- 1) by using the defined term ‘the Premises’ in the break clause, or
- 2) by placing a contractual obligation on the tenant to remove them.

Those are bold conclusions; and on each occasion when I have spoken about this case, I have questioned the judge’s analysis.³ My thinking has developed as a

³ In part, HHJ Saffman might have read too much into the discussion in Expeditors International about “what exactly must the tenant give vacant possession of?”. He went on to say that, in his case, “It is of course the Premises as defined” (Riverside Park at [36]). This appears to derive from Expeditors International at [31]: “the first question ... is vacant possession of what? In this case vacant possession of the premises.”). This had two aspects to it in Expeditors International:

- First, “the premises will ... exclude anything that is not demised” (see [31]). Some of the items argued to interfere with vacant possession were on neighbouring land. These might have constituted trespasses, but the failure to remove them was irrelevant to the exercise of the break clause, because they were not on the property demised.
- Second, the premises included anything which had become part of the premises by annexation, including tenant’s fixtures. Fixtures are “part of [the] thing of which vacant possession has to be given. [Their] presence does not amount to an impediment to vacant possession itself” (see [32]).

There does not appear to have been a detailed definition of ‘the premises’ of the sort found in the lease in Riverside Park (see Expeditors International at [2], [4]), but Neuberger J’s focus was solely on what items could be regarded as impediments to vacant possession: not on the

result of having to dive deeply into the law on this in a case in which it might have been argued both that too little and too much had been left behind, but that has not led me to look more favourably on that analysis.

As a matter of proper interpretation, it is conceivable that a lease could treat fixtures or alterations as akin to chattels for the purposes of a requirement to give vacant possession; or (more likely) that a lease may say that fixtures or alterations must be removed as a condition of exercise of a break clause. But I question whether this will usually be the right interpretation of a break clause condition which simply requires a tenant to give vacant possession, just because the clause uses a defined term for the demised premises; and I question whether this will usually be the right interpretation of a such a condition just because there is a separate obligation to remove fixtures or alterations.

Thankfully, the Court of Appeal has since taken a different approach to the use of a defined term in a break clause, albeit in a contrasting factual situation. This is my second case for today.

In Capital Park, the break condition required the tenant to give “vacant possession of the Premises to the Landlord on the relevant Tenant’s Break Date”.

‘The Premises’ were defined in the lease as including “all fixtures and fittings at the Premises whenever fixed except those which are generally regarded as tenant’s or trade fixtures and fittings”.

The tenant stripped out the premises before the break date. In the process, it stripped out not just tenant’s fixtures but also items that were either landlord’s fixtures or part of the fabric of the property.

The trial judge decided that the break had not been exercised effectively. He observed that by using the definition of ‘the Premises’ in the break clause, “the [Landlord] was ensuring that a Tenant exercising its Break Option could not do so by handing back an empty shell of a building which was dysfunctional and unoccupiable”. Echoing the first point in Riverside Park, he held that, by giving back substantially less than ‘the Premises’, and by doing so to that extent, the

scope of what “premises” had to be handed back. It is difficult to find any support in Neuberger J’s judgment for the significance given to the definition of ‘the Premises’ in Riverside Park.

tenant had not given vacant possession, because the physical condition of the property was such that there was a substantial impediment to the landlord's use of the property.

The second part of the trial judge's conclusion seems to me to misunderstand what vacant possession requires and, on appeal, the landlord did not support that argument (see [10]). Instead, the landlord focused on the first element, and argued that the tenant had removed elements which were part of "the Premises" as defined, with the result that on the break date, the tenant had given back less than "the Premises", so had not operated the break.

On the tenant's side, it was argued that the break condition was not concerned with the physical state of the property, but simply with whether the landlord was recovering it free from things, people and interests: i.e. with vacant possession.

The Court of Appeal agreed with the tenant, on balance, on several grounds. Of particular note for other cases are these points:

- They read the clause as being focused on vacant possession, and not on the physical condition of the property ([13]-[14], [21]).
- They pointed out that the break clause did not include any explicit condition that the tenant had to observe and perform the covenants in the lease ([14]).

They drew a contrast in that regard between the break clause and the general yielding up covenants. The latter included an obligation to yield up the Premises with vacant possession and in a state of repair, condition and decoration which was consistent with the proper performance of the tenant's covenants in the lease ([14]). The general yielding up covenants required more, on their wording, than the break clause.

- They had regard to the implications of a broader interpretation of the break clause, which they considered would be contrary to business common sense ([15]) and would lead to internal inconsistency ([16]). Similar implications are likely to exist in many cases, and the point about inconsistency is also likely to apply in other cases.

- Overall, they interpreted the term “the Premises” in the break clause as referring to simply to the premises as they were from time to time ([18]-[19], [21]).

This was a decision on the interpretation of that particular lease. Every lease will still need to be read with care and interpreted in its own context, but similar arguments may well assist a tenant in other cases.

Perhaps most importantly, Capital Park places the emphasis where in my view it should be: on the giving of vacant possession, and not on the extent of the property that is returned. This does not rule out the arguments which attracted HHJ Saffman in Riverside Park, at least in a case where the issue is whether too much has been left behind rather than too little, but the Capital Park focus on vacant possession should strengthen the position of tenants.

In summary, I suggest that Capital Park identifies what is likely to be the right approach in many cases, both where parts of “the Premises” have been removed and (probably) when elements excluded from “the Premises” as defined have been left behind. If the tenant gives vacant possession of the property handed over based on the common law, that should normally be the right approach, and sufficient to exercise the break clause effectively.

But the terms of any lease, and the particular circumstances, will still need to be analysed carefully. These may still give room for creative arguments, and the significance of a failure to exercise a break clause effectively will continue to provide a strong incentive to run such arguments.

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Cases Mentioned

Notices

- Turner v OG Thomas Amaethyddiaeth Cyf [2022] EWCA Civ 1446
- Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd [1997] AC 749
- Townsend Carriers Ltd v Pfizer Ltd (1977) 33 P&CR 361
- R (Morris) v London Rent Assessment Committee [2002] EWCA Civ 273; [2003] L&TR 5
- Ben Cleuch Estates Ltd Scottish Enterprise [2008] CSIH 1; [2008] SC 252
- Balgray Ltd v Hodgson [2016] CSIH 55, 2016 SLT 839
- Prudential Assurance Co Ltd v Exel UK Ltd [2009] EWHC 1350, [2010] 1 P&CR 7

Removals

- Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264
- Elitestone Ltd v Morris [1997] 1 WLR 687
- Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd [2007] 1 P&CR 5 (at 1st instance, Lewison J)
- NYK Logistics (UK) Ltd v Ibrend Estates BV [2011] 2 P&CR 9
- Riverside Park Ltd v NHS Property Services Ltd [2016] EWHC 1313 (Ch)
- Capitol Park Leeds plc v Global Radio Services Ltd [2021] EWCA Civ 995