How far can you push the court over break clauses?

Vacant possession, reinstatement, removal of tenant's chattels and fixtures

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Introduction

My focus in this talk is on one type of break clause condition: those which deal with what the tenant has to give back to the landlord in order to exercise the break clause.

You will be familiar with the basic problem in these cases. Break conditions must be strictly complied with, unless the lease says otherwise, so knowing exactly what you have to do is critical to the effective operation of a break clause.

In recent years, the law has become clearer, but there are still difficulties with the interpretation of break clauses themselves, with the application of the law to the circumstances, and with the practicalities of occupying and managing commercial property.

I cannot solve all of those difficulties for you in a short talk, but if you take nothing else from what I have to say, take away a determination to distinguish between two things:

1. What I will call general yielding up obligations, by which I mean those tenant's covenants that have to be complied with at the end of the lease (including when the tenant exercises a break clause); and

2. Conditions which have to be complied with in order for the break clause to be validly exercised.

These often overlap, but it is critical to distinguish between them, primarily for two reasons:

A. Although the landlord may have a claim for damages for a failure to comply with the tenant's general yielding up obligations, that will not in itself affect the operation of the break clause. An attempt to operate a break clause will only fail if there is a failure to comply with a condition that has to be satisfied to operate the break.

B. If there is just a breach of the general yielding up obligations, then a minor failure will only affect the tenant's liability for damages; but where a break condition is in issue, even a minor failure to comply may prevent the tenant from operating the break clause effectively.

Structure

There is a close relationship between vacant possession and the removal of chattels, so I shall tackle vacant possession and yielding up first, followed by what to do about fixtures and the reinstatement of alterations.

Vacant possession and yielding up

In most cases, it will be a condition that the tenant gives the premises back to the landlord with vacant possession.

This will usually require two things:

- Obtaining vacant possession of the premises.
- Giving them back to the landlord, with that vacant possession.

There is a considerable overlap between those two things, but the former focuses on the position at the premises, and the latter on what the tenant has to do to show it is giving them back.

"Vacant possession"

It can be a useful reminder to think of 'vacant possession' 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]).

Another way of looking at it, though, is to see that there are two strands to what this requires: one concerned with the physical position and the other concerned with control:

- The physical element is that the property must be empty: empty of people and empty of chattels (other than any landlord's chattels that may have been demised and need to be returned).
- The control element is that the landlord must be able to assume and enjoy immediate and exclusive possession, occupation and control. Rights asserted by a third party or by the tenant itself may mean that this is not the case.

A failure to comply in either respect will mean that vacant possession has not been given, unless:

a) the failure is truly *de minimis*; or

b) in the case 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 270; Expeditors International at 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.

You should be aware that some types of problem may mean that there is a failure to obtain vacant possession in more than one respect. For example, if both chattels and people are still on site after the break date, that might have two results:

1) The presence of the chattels may mean that vacant possession has not been given in the physical sense: Cumberland Consolidated at 270; Expeditors International at first instance at [41]-[42]; NYK Logistics (CA) at [42].

2) The presence of both chattels and people may mean that the tenant is still using or occupying the premises. If so, then vacant possession will not have been given in the sense of giving the landlord full control.

The latter is was what happened in Expeditors International. There, the tenant had not quite finished everything it needed to do by the break date, and that led to four consequences:

- It held on to the keys;
- It had at least one employee still on site;
- It continued to use the warehouse for storing chattels that were of use to it; and
- It was still awaiting further vehicles to collect the remaining chattels.

As a result, the landlord was not in a position to be able to occupy the property without difficulty on the day after the break date, and the judge concluded that the situation was one of continuing use and occupation of the property by the tenant.

Can there sometimes be stricter requirements than under the general law? This is possible in theory, but has not yet been seen in any of the cases. For example, a lease will sometimes add words which qualify the term "vacant possession", such as "full vacant possession" or "vacant possession of the whole of the premises", but trial judges have yet to be persuaded to interpret such phrases as imposing stricter requirements. Arguments to this effect failed in Goldman Sachs at [19] and South Essex College at [31] respectively.

Yielding up / giving back

If the tenant has managed to ensure that it has vacant possession by the break date, it may not be enough simply to walk away: there may need to be something showing that the tenant is 'yielding up' or giving back the premises to the landlord[1].

This requires no particular procedure, but it probably does require the tenant to show (objectively) a clear intention to hand over control of the property to the landlord, sufficient to avoid a court finding that it was continuing to assert a right to use, occupy or control the property.

So what does this mean in practice? It means paying careful attention to the practicalities of occupying and managing the property, with a particular focus on keys and security measures.

[1] On the terminology here, note the comments in Amber Pass at [42(1)] and [45(1)]. "Give back" is the form of words used in the Model Commercial Lease.

There are a number of cases you need to know about.

First – two more helpful cases for tenants.

The first in time is Amber Pass. On the break date, the premises were still surrounded by free-standing security fencing and removable concrete vehicle barriers. The tenant continued to instruct a security firm to keep the premises secure, and it held onto the keys. Despite all three factors, the judge held that the property had been 'yielded up' (see [45]-[47]). The reasons given included that it was clear that the landlord was challenging the exercise of the break, and that there was a serious risk of vandalism and unlawful occupation.

The decision in Amber Pass has been criticised, at least as regards the significance of the retention of keys and the absence of any other act of handing over; but the judge's approach was approved by the Court of Appeal in Jones v Merton at [33].

Similarly, in the later case of Riverside Park, a failure to deliver up all key fobs and to turn off an alarm system did not have the result that the tenant failed to give vacant possession (see [41]): they were said not to be enough on the facts to involve any claim by the tenant to a continuing right to use the property[2]. The focus in that case was, though, on vacant possession rather than yielding up.

By way of contrast, in several other cases, holding on to keys and maintaining security has been unhelpful to the tenant, and has led to a failure to exercise a break. I can give you three examples of this:

- The continued retention of all of the keys by the tenant in Expeditors International was a significant factor in Lewison J reaching the conclusion *obiter* at first instance that vacant possession had not been delivered up ([44], [47]), although as in Riverside Park, the argument focused on vacant possession not yielding up. That outcome was particularly ironic. The tenant had managed to reached a compromise with the landlord over much more difficult break pre-conditions, particularly a requirement to have "substantially performed and observed [its] material covenants up to the date of expiry of the notice", but it then fell down on this much more basic point.
- In South Essex College the tenant continued to operate an alarm system after the break date, and held on to the keys, and the judge held that the property had not been handed back ([52], [55]).
- The Court of Appeal reached a similar conclusion in NYK Logistics ([49]), where the tenant ran out of time to complete repairs: repairs which were not required by the break clause. The tenant kept the keys, kept up its security, did nothing else to deliver up possession, and

[2] The landlord's own evidence may well have encouraged the judge to reject its argument about the key fobs and the alarm system: see [19.4]-[19.5].

continued to finish off repair works on site on the Monday after the break date on the preceding Friday.[3] As a result, it failed validly to exercise the break clause.

What is the best advice about this to a tenant?

Given that after the break date the risk of damage to the premises lies with the landlord (as the Court of Appeal pointed out in NYK Logistics at [47]), the best advice will often be to make sure that the tenant does not hold on to any keys or maintain any form of security after the break date.

Fixtures and reinstatement of alterations

Here, I need to start with some common law principles.

You will all know that there is a distinction between fixtures and chattels, even if it can be difficult to draw that distinction in practice. For present purposes, the key point is that fixtures become part of the land, and so part of the property that has to be given up at the end of the term (including on a break date); chattels do not.

You will also all be familiar with the position with tenant's fixtures. In general, tenant's fixtures become part of the land, but 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 the giving of vacant possession (see, e.g. Expeditors International at first instance at [32]-[34]).

The position is similar so far as alterations are concerned. Lawful (i.e. permitted) alterations to the property itself will be part of the property which has to be given back, whether they are fixtures or part of the land itself[4]. It is the property as it stands at the end of the term (including on a break date) which has to be handed back. The same probably applies to unlawful alterations (i.e. those made in breach of covenant), although there may be a liability to pay damages.

In short, unless the lease says otherwise:

- No fixtures or alterations need to be removed by the break date,
- No changes need to be made to them before the break date, and
- What must be left behind is simply the property as it stands on the break date.

But what if the lease does say otherwise, or arguably does so?

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

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[3] An attempt in such circumstances to hand over only some of the keys is not likely to improve the tenant's position: compare Mourant at [32].

[4] The distinction is intended to reflect everyday life and language as regards what people regard as 'fixtures' rather than as an integral part of the land: see Elitestone at 690.

In many cases, though, the lease will not say this clearly. Two areas of drafting, in particular, can cause problems.

1. Definitions

The first area of difficulty is with definitions. Most modern leases will include some form of definition of the property that has been demised. That definition might then be used in the break clause.

So, 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 Premises" are delivered up on the break date. This use of the definition could cause real difficulties in a range of ways, depending on the terms of the definition and of the break clause. For example:

- What if "the Premises" are defined so as to include tenant's fixtures expressly? Does that mean that all tenant's fixtures must be left behind?
- What if "the Premises" are defined so as to include alterations unless the landlord requires them to be removed, and the landlord then gives notice requiring their removal? Could a failure to do that mean that the break clause cannot be exercised?

There can be no general rule as to the meaning of different leases – you need to consider each lease as a whole and in its particular context – but in many cases I suggest that the right approach is likely to be to read definitions used in a break clause in a general way rather than a specific way, unless the wording drives you to the opposite conclusion.

In other words, I expect that in most cases, the use of a definition of "the Premises" in the break clause will be interpreted only as identifying the property in a general sense (i.e. the property as it is on the break date), not as imposing pre-conditions on the exercise of the break clause which have not been spelled out explicitly.

The dangers in the use of definitions can be seen from the Riverside Park case. This case was about whether the tenant had "given vacant possession" of 'the Premises', as the break clause required. The argument centred on various items that had been brought onto the premises by the tenant. The judge held that a large number of partitions were chattels, and that they were so extensive that vacant possession had not been given in the direct physical sense. As a result, the judge 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 these 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, tenant's fixtures were expressly excluded from the definition of 'the Premises'. It seems that, for him, this would have been enough to mean that all tenant's fixtures had to be removed in order to give vacant possession (see [36], [69]-[77]). (It is not clear whether it was also argued that handing back the Premises with additions would, in itself, have involved a failure to give back 'the Premises' as defined.)
- 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]).

When I last spoke to this conference about the Riverside Park case, I questioned the judge's analysis, and I continued to do so.

I can also now point to a decision of the Court of Appeal on a similar issue, where they took the same approach as I do. This decision gives greater certainty – and greater reassurance – to tenants in relation to tenant's fixtures.

The case in question is Capitol Park Leeds plc v Global Radio Services Ltd [2021] EWCA Civ 995.

There, the relevant break condition was that the tenant had to give vacant possession of "the Premises" to the landlord.

"The Premises" were defined 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 decided to strip out items that were either landlord's fixtures or part of the premises.

The trial judge decided that the tenant had handed back what he described as "an empty shell of a building which was dysfunctional and unoccupiable". He held that this meant that the 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. As a result, the break had not been exercised effectively.

On appeal, the landlord did not support that approach. Instead, it 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 this 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.

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 (see [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 (see [14]).
- They drew a contrast in that regard between the break clause and the general yielding up covenants in the lease. 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 (see [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 (see [15]) and lead to internal inconsistency (see [16]). Similar implications are likely to exist in many cases, and the point about inconsistency is also likely to apply in other cases.
- They interpreted the term "the Premises" in the break clause as referring to simply to the premises as they were from time to time (see [18]-[19], [21]).

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

2. Cross-references

Some leases use wording such as "yield up … in accordance with clause X" or "yield up … with vacant possession as provided in clause Y".

Does wording such as this import into a break clause the more detailed provisions in clause X or Y covering yielding up (imposing obligations in addition to the delivery of vacant possession), and turn them into conditions as to the valid exercise of the break?

This will depend on the interpretation of the documents in question, but arguments that they did were rejected in Goldman Sachs.

The break clause in that case stated that "*On the expiration of [a break] notice, the Term shall cease and determine (and the Tenant shall yield up the Premises in accordance with clause 11 and with full vacant possession)* …". Clause 11 imposed obligations as regards reinstatement and the condition of the premises.

On those words, the judge held that the cross-reference did not bring into the break clause the additional obligations in clause 11, but in other cases, the lease wording or the circumstances may lead to a different conclusion.

Even if the meaning of the break clause is clear

Even a clear meaning of the break clause regarding fixtures and reinstatement may not avoid difficulties, particularly if you do need to do something about the physical state of the property. Four examples of other problems that I have come across will serve to illustrate the sort of things you may need to think about:

- There will often be uncertainty over the status of particular items: e.g. are they chattels, tenant's fixtures or landlord's fixtures? This can be a real conundrum. A typical example is partitions. In Riverside Park, most of the partitions (standard demountable metal stud partitions, covered with painted plasterboard on each side, with fixed aluminium skirtings and with some a/c units and electrical wiring and sockets attached) were merely screwed to the raised floor and to the suspended ceiling grid, and arranged in a "unique" configuration designed for the tenant's purposes, and these were held to be chattels. By way of contrast, a folding partition, suspended from a steel track fixed to the structure, was held to be a fixture.

  To deal with this, you are likely to need to make a detailed inspection of the property and to give careful consideration to the circumstances in which items were attached or introduced.

  If the only relevant break condition is vacant possession, then removal of what might be found to be chattels may be the safer course, even if this risks a damages claim; but if the break clause requires compliance with covenants or the delivery up of landlord's fixtures or tenant's fixtures, for example, then it could be difficult to decide what to remove and what to leave.

- Where the break clause requires the property to meet a required standard of condition which is debatable, or is dependent upon the landlord's supervision or 'reasonable satisfaction' or notice (perhaps given very late in the day), then the tenant may face serious difficulties in ensuring that it meets the standard required in order to operate the break.

- There may be uncertainties as to the physical extent of the demise, leading to uncertainty over whether particular elements of the property need to be (or can be) handed back or removed.

- Where alterations need to be identified, there may be other factual uncertainties: e.g. where alterations may have been made by a previous tenant, but the records are missing.

These will all be case-specific, but they serve emphasise the importance of expert legal advice.

Ten Top Tips for making sure you give the landlord what the break clause requires

1. Give careful thought to how the various provisions of the lease may fit together.

2. Plan as far ahead as you can.

3. Prepare a checklist in advance of the acts to be done, when and by whom in order to ensure that the property is both empty and handed back.

4. Make sure any works being done are finished in good time before the break date, ideally with a buffer period.

5. If any works are not finished by the break date, just leave them as they are. Exercising the break should be the priority. A liability for damages is likely to be commercially less significant, and can be argued about later.

6. If there are difficult issues, considering trying to draw the landlord into committing to a position on those issues, with a view to establishing an estoppel.

7. Make sure any removals are completed in good time[5].

8. Unless the balance of risk is unacceptable, make clear to the landlord that it may take over security arrangements if it wishes, but that the tenant will not continue them after the break date. If the balance of risk is unacceptable, then what alternatives may be available will depend on the circumstances.

9. Make sure that, by the break deadline (or before – it will usually be midnight!) you do your utmost to give all of the keys (including those used for electronic entry) to the landlord in some way, or at least to tender them to the landlord.

10. Consider what else you should do to show objectively that you are handing back the property to the landlord, particularly if the landlord is trying to make it difficult to hand over the keys, or there are problems with doing so.

[5] But do not lose heart as the deadline approaches. Apparently, there are companies that can remove even very large and heavy items at short notice, at least if they are accessible – see Cantt Pak, esp. at [68]-[71] and [99]-[101] – although this was not put to the test in that case.

Cases Mentioned

- Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264
- Elitestone Ltd v Morris [1997] 1 WLR 687
- John Laing Construction Ltd v Amber Pass Ltd [2004] 2 EGLR 128
- Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd [2007] 1 P&CR 5 (at 1st instance)
- Jones v Merton LBC [2008] EWCA Civ 660
- Mourant Property Trust Ltd v Fusion Electric (UK) Ltd [2009] EWHC 3659 (Ch)
- 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)
- Secretary of State for Communities and Local Government v South Essex College of Further and Higher Education (CLCC, 28.7.2016; HHJ Dight)
- Goldman Sachs International v Procession House Trustee Ltd [2018] EWHC 1523 (Ch)
- Cantt Pak Ltd v Pak Southern China Property Investment Ltd [2018] EWHC 2564 (Ch)
- Capitol Park Leeds plc v Global Radio Services Ltd [2021] EWCA Civ 995