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Grey Areas and Unresolved Arguments Over Break Clauses

Vacant Possession

Reinstatement

Removal of Tenant's Chattels and Fixtures



Photo: Wikipedia

“It is easier to get into something than to get out of it.”

Donald Rumsfeld

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“The only pre-conditions to tenants exercising any break clauses should be that they are up to date with the main rent, give up occupation and leave behind no continuing subleases. Disputes about the state of the premises, or what has been left behind or removed, should be settled later (like with normal lease expiry).”

Code for Leasing Business Premises in E & W 2007

The Tenant may end the Term on the Break Date by giving the Landlord formal notice of not less than [] months following which the Term will end on that Break Date if:

- .1 on the Break Date the Main Rent due on or before that Break Date and any VAT payable upon it has been paid in full; and
- .2 on the Break Date the whole of the Premises are given back to the Landlord free of the Tenant's occupation and the occupation of any other lawful occupier and without any continuing underleases; ...

Model Commercial Lease (2014)

“3.3 Unless the landlord has special reasons for imposing stricter conditions, a tenant’s break should be conditional only on there being no rent arrears, the tenant paying the basic rent up to the end date, giving up occupation and leaving no subtenants or other occupiers. Disputes about the state of the premises, or what has been left behind or removed, should be settled later, as at normal lease expiry.”

**Draft wording – RICS Professional Statement
Code for Leasing Business Premises (2019)**

What will your practice be?



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Four core questions

- What has to be removed by the break date ...
- What changes need to be made before the break date ...
- What has to be left behind on the break date ...
- What has to be done on the break date ...

... as pre-conditions to the effective exercise of the break?



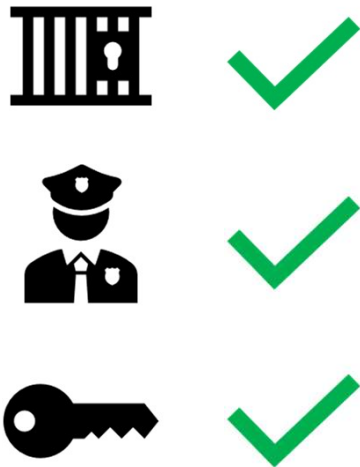
“I'm not into this detail stuff. I'm more concepty.”

Model Commercial Lease

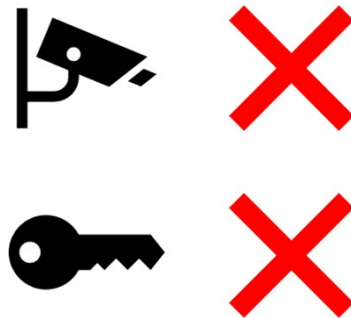
“on the Break Date the whole of the Premises are given back to the Landlord free of the Tenant’s occupation and the occupation of any other lawful occupier and without any continuing underleases”

Yielding up (and perhaps 'giving back')

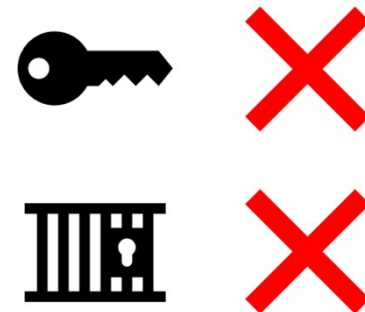
Amber Pass



South Essex College



NYK Logistics



Vacant possession

- The property is empty of people and chattels (other than any landlord's chattels that may have been demised).
- The landlord is able to assume and enjoy immediate and exclusive possession, occupation and control.

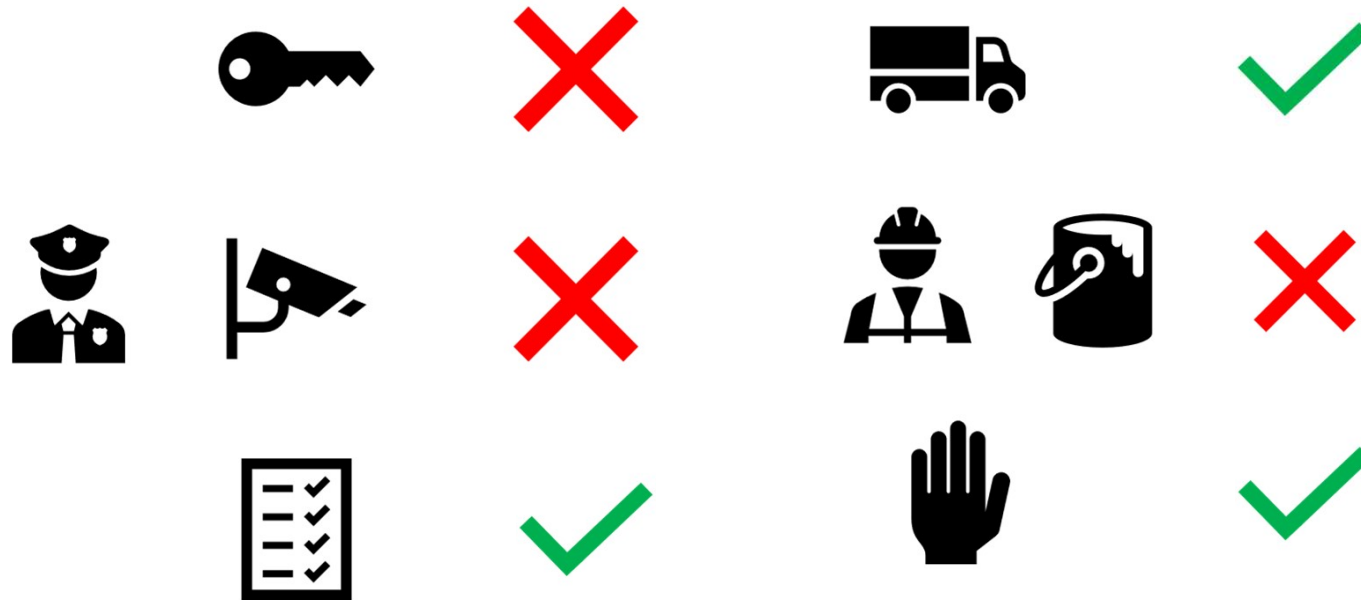
Vacant possession



Chattels and people :

- Too many chattels may mean no vacant possession in a direct, physical sense; and/or
- Tenant is still using or occupying, so has not given the landlord full control.

Giving back with vacant possession



Fixtures v Chattels

(subject to the terms of the lease)

- Fixtures are part of the land to be handed back.
- Chattels must be removed.
- The tenant may remove tenant's fixtures, but is not obliged to do so.

Alterations

(subject to the terms of the lease)

- Lawful (permitted) alterations = part of the land (whether fixtures or an integral part of the land), except where the 'installation' or alteration of chattels is involved.
- Unlawful (not permitted) alterations = the same.

Problems and Uncertainties

- Terms often change the position on tenant's fixtures and alterations.
- Added difficulty from requirements as to condition, or to comply with more extensive 'end of term' obligations.
- All depends on the terms of the lease.
- Difficulties compounded by uncertainties and 'hidden' or unexpected conditions.
- Common issues to look for: definitions; cross-references; potentially conflicting requirements.

*“on the Break Date **the whole of the Premises** are given back to the Landlord ...”*

“Premises” = the premises known as ... including:

- (a) all buildings from time to time on the Premises ...
- (c) all Conducting Media and landlord’s plant, equipment and fixtures exclusively serving the Premises;
- (d) all tenant’s fixtures; and
- (e) any Permitted Works carried out to or at the Premises.



“Conducting Media” = any media for the transmission of [water, gas, air, foul and surface water drainage, electricity, oil, telephone, heating, telecommunications, internet, data communications and similar supplies or utilities];

“Permitted Works” = any works or installations to which the Landlord has consented or for which ... the Landlord’s consent is not required

Questions:

Must all tenant's fixtures be left behind?

Must all data cabling (for example) be left behind?

Must any works which are not Permitted Works be removed?

Answer:

Perhaps, on the basis of the break clause itself; but now compare the 'end of term' obligations.

Definitions

Riverside Park – definition expressly excluded tenant's fixtures; also a pre-existing obligation to reinstate; led to tenant failing to exercise break, as the presence of fixtures meant no vacant possession

Goldman Sachs – arguments left open

Cross-references

Goldman Sachs – cross-reference did not bring in reinstatement and condition obligations as break conditions

Inconsistent obligations

Additional uncertainties – examples:

- Factual uncertainties, e.g. historic works
- Uncertainties over the status of particular items, e.g. partitions
- Standard of condition is debatable, or dependent upon the landlord's supervision or 'reasonable satisfaction' or notice (perhaps very late in the day)
- Physical extent of the demise

What advice can you give to tenants on fixtures/alterations?

- Read the lease and all related documents carefully.
- Take the best advice you can afford.
- Plan as far ahead as you can.
- Allow enough leeway to address last minute difficulties.
- Consider trying to force the landlord to commit to a position on difficult issues, or to risk stacking the merits in the tenant's favour.
- Make sure exercising the break is the priority in all respects, leaving any other consequences to a damages claim.

If still in doubt:

“Success ... goes to the person who recognizes that life is pretty much a percentage business.”

