

Ashworth Kemp LLP: Real Estate know-how

Case notes: break clauses, notices, vacant possession, tenancy and licence. Prepared for matter NOR/0412.
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These are our own summaries of the decisions, with only short quotations. They are not a substitute for the law reports.

1. Construction of notices

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 (HL). Break notices given by a tenant named 12 January as the termination date when the correct date was 13 January. By a majority the House of Lords held the notices effective. A notice is construed objectively, by asking how a reasonable recipient with knowledge of the lease and the background would have understood it. If such a recipient would have been in no doubt that the tenant wished to terminate on the date permitted by the lease, a minor slip does not invalidate the notice. Lord Hoffmann distinguished cases where the lease itself requires something specific: if a clause required a notice to be on blue paper, a notice on pink paper would not do, however clear its meaning. Mannai is a rescue principle for obvious errors; it does not cure a failure to comply with a mandatory requirement of the clause, and it gives no help where the recipient could reasonably be left uncertain.

Note on conditional or qualified notices. A notice exercising a break must be clear and unequivocal. A notice expressed to be "subject to contract", "without prejudice", or conditional on some future agreement risks being treated as not an exercise of the option at all, because the recipient cannot tell whether the lease has been terminated.

2. Strict compliance with break conditions

Avocet Industrial Estates LLP v Merol Ltd [2011] EWHC 3422 (Ch). A break was conditional on the tenant having paid sums due under the lease. The tenant had paid its rent but not a modest sum of interest that had accrued on earlier late payments. The court held that the condition had not been satisfied and the break failed. The case illustrates that conditions precedent to a break are applied strictly according to their terms, with no de minimis exception, and that what counts depends on the precise wording of the condition in the particular lease.

Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72. The break condition required the tenant to have paid all rent due by the break date. The break date fell part-way through a quarter, so the tenant had to pay the whole quarter's rent in advance (and a break premium) to satisfy the condition. The tenant then claimed back the rent for the period after the break date. The Supreme Court refused to imply a term requiring the landlord to refund it. The lease was a detailed professionally drafted document and the term was not necessary to give it business efficacy. The Apportionment Act 1870 did not assist, because rent payable in advance is not apportioned. If a tenant wants a refund of rent paid for a period after the break date, the lease must say so expressly.

3. Vacant possession

NYK Logistics (UK) Ltd v Ibrend Estates BV [2011] EWCA Civ 683. The break was conditional on vacant possession. On the break date the tenant's contractors were still completing repairs, a security guard remained on site and the tenant retained the keys. The Court of Appeal held that vacant possession had not been given. The question is whether the landlord can assume and enjoy immediate and exclusive possession, occupation and control of the premises. Leaving workmen in occupation, even with good intentions, meant the tenant had not given up possession by the break date.

Riverside Park Ltd v NHS Property Services Ltd [2016] EWHC 1313 (Ch). The tenant left behind demountable partitioning, kitchen units, floor coverings and other items when it purported to break. The court held that the partitioning was a chattel rather than a fixture, having regard to the degree and purpose of its annexation, and that leaving it was a substantial impediment to the landlord's use of a significant part of the premises. Vacant possession had not been given and the break failed. Whether an item is a fixture (which becomes part of the property, so leaving it does not prevent vacant possession) or a chattel (which must be

removed) depends on how it is attached and why.

Capitol Park Leeds plc v Global Radio Services Ltd [2021] EWCA Civ 995. Before the break date the tenant stripped out parts of the premises, including ceilings, radiators and parts of the services, intending to refurbish, and then abandoned the works. The landlord argued that the tenant had failed to give vacant possession of the "Premises" because the property returned was not the property demised. The Court of Appeal disagreed. The vacant possession condition required the tenant to give back the property free of people, chattels and legal interests. It was not concerned with the physical state or condition of the property, which is the subject of the repairing and yield-up covenants and is remedied by a claim for damages. Reading the condition as requiring the return of every demised element would have made the break almost impossible to operate with certainty.

Note on sub-occupiers. An occupier claiming through the tenant who remains in occupation, or who has a subsisting legal interest such as a tenancy, at the break date will generally prevent the tenant from giving vacant possession. The tenant should ensure any such occupation has ended, and the occupier and its property have left, before the break date.

4. Tenancy or licence

Street v Mountford [1985] AC 809 (HL). An occupier granted exclusive possession of residential accommodation for a term at a rent was a tenant, although the agreement was called a licence and stated that no tenancy was intended. The House of Lords held that, save in exceptional circumstances, a grant of exclusive possession for a term at a rent creates a tenancy. The parties' label is not decisive; the court looks at the substance of the rights granted. The same approach applies to business premises, although in an office-sharing arrangement the court will consider carefully whether the occupier really has exclusive possession, for example whether the grantor retains unrestricted access or can move the occupier around.

5. Time periods

Dodds v Walker [1981] 1 WLR 1027 (HL). Where a period of calendar months runs from a specified event, the day of the event is excluded and the period ends on the corresponding date in the appropriate later month. Where a notice must be of not less than a stated number of months and expire on a specified date, the corresponding date rule identifies the last day by which the notice must be given (or treated as given under the lease's service provisions).