

## BREAK RIGHTS

### THE NEED FOR TENANTS TO GIVE VACANT POSSESSION

For more information

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In the present difficult economic climate landlords may be keen to take a technical point to challenge the validity of a tenant's break notice and thereby hang on to their tenants. Tenants must ensure that they comply fully with any pre-conditions to the valid exercise of their right to break, such as ensuring they deliver up vacant possession on the due date. This issue was addressed recently by the Court of Appeal in **Ibrand Estates BV v NYK Logistics UK**.

#### Facts of the case:

- The tenant wanted to exercise the break clause in its lease. Delivery up of vacant possession on the break date was a pre-condition to the validity of the break;
- The tenant wanted to comply fully with its repairing obligations prior to lease expiry in order to avoid a subsequent dilapidations claim;
- The tenant sought to agree with the landlord that it could remain in occupation for a few days after the break date in order to complete the works, but this was never formally agreed by the landlord. Nevertheless the tenant's contractors remained on site for a couple of days after the break date to complete the works;

Despite the tenant paying the rent in full and attempting to return the keys, the landlord subsequently challenged the validity of the break on the basis that the presence of the contractors after the break date, together with a small amount of the tenant's equipment and vehicles, meant that vacant possession had not been given by the break date.

#### The decision

The Court of Appeal agreed with the landlord that, in the absence of a formal agreement to let the tenant remain in occupation to complete the works, the presence of the contractors and equipment beyond the break date meant that vacant possession had not been given at the break date and that therefore the lease continued to subsist.

The Court clarified the definition of vacant possession to mean:

- (i) The landlord must be able to enjoy immediate possession, as of the break date; and
- (ii) The property must be empty of any chattels which could interfere with the landlord's enjoyment of the right of possession.



#### Practical implications

- Tenants must strictly observe any pre-conditions to the valid exercise of their right to break and not rely on informal arrangements with their landlords;
- The obligation to give vacant possession can be construed strictly against a tenant and will ideally involve removal of all the tenant's chattels and rubbish.