

How "Vacant" is "Vacant Possession"?

The obligation to procure vacant possession is generally understood to refer to the legal commitment to ensure that at the relevant date (e.g. on completion of contracts or termination of a lease) a given property is in a state fit to be occupied (both physically and legally) and enjoyed.

According to *Topfell Ltd v Galley Properties Ltd* [1979], the meaning of the words "vacant possession" (hereafter "VP") can vary according to the context in which they are used. This provides little certainty to those who are eager to ensure that VP is procured at the relevant time (but, in some cases, may provide hope to those who would rather argue that it has not been!).

This essay asks the simple question - - what *really* constitutes VP? It analyses the little case law which currently exists in this area and focuses on the two major issues that regularly impact on the obligation to give VP, namely (1) how the obligation to procure VP can be breached due to persons being in occupation of the property at completion and (2) specifically in the leasehold context, how the obligation to procure VP can be breached due to items being left at the property at the date of the exercise of a break option conditional upon VP being given.

Questioning the nature, scope and extent of the obligation to procure VP, scrutinizing the current tests that case law have established to determine when VP has been given and exposing where further clarification is required, the essay expounds constructive suggestions which may help the definition of VP to no longer, by its inherent nature, remain "vacant" in respect of the legal emptiness currently associated with the term's meaning.

Persons in occupation of the property

There is conflicting obiter dicta with regard to whether people in unlawful occupation (i.e. trespassers) breach the obligation to provide VP. Dictum from *Cumberland Holdings Ltd v Ireland* [1946] suggests that the obligation would be breached in this situation, presumably on the basis that it is the duty of the seller (as the person responsible for providing VP) to ensure that trespassers are evicted. *Sheikh v O'Connor* [1987], however, suggests that a seller would not be in breach by virtue of there being a person in unlawful occupation of the property at completion. Here receiving a property free of unlawful occupants on completion seems to be treated as a right which (in the absence of any competing legal claim) passes to the buyer on completion (and which

the buyer can take county court action of their own accord to enforce if necessary), rather than an obligation of the seller.

The cases of *Beard v Porter* [1948] and *Sharneyford Supplies Ltd v Edge* [1987] are authorities which provide that where people are in lawful possession of the property under a lease or licence on completion, the seller's obligation to procure VP will have been breached. In *Royal Bristol Permanent Building Society v Bomash* [1886-90], notwithstanding that the buyer itself could have had the person in lawful occupation evicted by the sheriff, the seller was found to be in breach of his obligation to give VP on completion (i.e. it was and remained the seller's obligation to provide VP).

Based on these cases, can a distinction therefore be made between lawful and unlawful occupation with respect to a seller's obligation to procure vs. a buyer's right to receive VP on completion? Does, and should, such a distinction exist?

If a distinction can be made, one must also question what actually constitutes unlawful occupation. Indeed, can a further distinction be made between, for example, squatters (who never had a right to occupy) and former licensees (who at one time had consent to occupy) or would these both be categorised as persons in occupation with no lawful claim?

Further, if VP is not an absolute obligation of the seller in all cases (e.g. in circumstances where there are persons in unlawful occupation of the property at completion), does that make the duty of the seller to procure VP potentially capable of discharge? Where persons unlawfully occupied a property and the seller did all he reasonably could be expected to have done in the circumstances to provide VP for the buyer, the dictum in *Sheikh* seems to imply so.

The above discussion is set in the context of fully fledged rights to occupation, but what about persons with less extensive rights of possession such as a profit à prendre or even the exercise of certain easements / rights of way over a property? Does a seller's obligation to procure VP refer to all conceivable possession rights and, if not, what lesser interests do and do not qualify?

All this goes to the heart of the question of "to what the obligation to procure VP specifically refers?" Assuming there is an obligation to procure VP, it would seem that case law needs to confirm (1) the scope of the obligation (i.e. does it encompass unlawful occupation and how is this defined?); (2) the nature of the obligation (i.e. is it absolute or capable of discharge?); (3) the obligation's extent (i.e. to what rights

(and especially to what lesser rights) does the obligation refer?); and (4) whether (and if yes, how) the VP obligation of the seller is separate from a buyer's right to VP (or are the obligation and the right inextricably interrelated as one in the same thing)?

Items left at the property upon exercise of a break option

The term "Break Option" is commonly used to describe an option granted to one or both parties to a fixed term lease to terminate the lease before its contractual expiry date.

As a general rule, it is suggested that where possible the tenant should try to avoid the exercise of the break right being conditional upon anything other than payment of all rent accrued due at the break date and VP. But this could still leave the tenant in a difficult position whereby the landlord could argue that the VP obligation has not been complied with because chattels have been left behind by the tenant at the property.

In *Cumberland Consolidated Holdings Ltd* the test for VP was held to be whether what is left behind substantially prevents or interferes with enjoyment of a substantial part of the property. It was held that (subject to the *de minimis* rule) VP could not be said to have been given when chattels had been left at a property since this act is consistent with claiming a right to the property for one's own purposes (namely as a place to store one's own goods). In *Scotland v Solomon* [2002] the obligation to provide VP was found to have been breached where a quantity of chattels was left at the property and in *Legal and General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] it was noted (obiter) that the presence of employees at the property and the use of the property for further storage purposes would have constituted a breach of the obligation to procure VP if the break conditions (including a VP obligation) had not been waived by the landlord as part of a settlement agreement between the parties. The location of items left with respect to the property also appears to be a relevant factor; in *Hynes v Vaughan* [1985] rubbish left outside the property did not satisfy the *Cumberland Consolidated Holdings Ltd* test and therefore did not constitute a breach of the VP obligation.

In *John Laing Construction Limited v Amber Pass Limited* [2004] the break right was conditional on the tenant "yielding up the entirety of the demised premises". The landlord argued that the tenant had not satisfied this condition by the ongoing presence of security personnel and the tenant leaving fencing in place and security barriers at the property. The Court held that it should look objectively at what had occurred and determine whether a clear intention had been manifested

to effect such termination and whether the landlord could, if it wanted to, occupy the property without difficulty or objection.

Practically speaking, it is advantageous that a tenant avoids the procurement of VP as a precondition for exercise of the break option (and that any agreement to provide VP is entirely separate from the exercise of the break option). This way, the tenant will not be prevented from exercising the break if VP cannot be given and the landlord, rather than seeking to contend that the lease is still continuing, will instead be forced to rely on other remedies to deal with the VP issue. It goes without saying that tenants also need to be aware of the potential scope of their obligation to yield up the property which may include the procurement of VP more generally.

Notwithstanding the above, a number of questions still arise.

Are there any circumstances in which the law may/will imply VP into the exercise of a break option despite the lack of an express obligation? In *Royal Bank of Scotland v Secretary of State for Defence* [2004], the landlord tried to argue that, even though there was no express obligation to procure VP, as various chattels had been left behind at the property an implied obligation to give VP had been breached. If VP is/can be implied into a break option then this raises the question of whether VP must always be provided when a break option is exercised, subject to an express agreement between the parties which operates to waive the tenant's requirement to provide VP (*Legal and General Assurance Society Ltd*).

At what level does the *de minimis* threshold operate and again is that a purely objective test in this context? Further, does the *de minimis* threshold refer to the quantity of items left, their size, moveability, degree and purpose of annexation and/or (following *Hynes*) their location in, around or outside the property concerned?

What extent of difficulty is required (general inconvenience or significant distress)? *Cumberland Consolidated Holdings Ltd* suggests that a tenant has to remove all chattels and also rubbish which "substantially prevents or interferes with enjoyment of a substantial part of the property". But what constitutes "substantial" and is this test purely objective or is there a subjective element to it? Is the test judged against any landlord or any landlord with particular qualities to the landlord in question? Does the Court consider more generally whether rubbish left at the property on the break of a lease prevents the average landlord (objectively speaking) from occupying without difficulty or objection or (objectively speaking) the landlord in question given its specific subjective circumstances? Further, does there have to be an actual

interference, or will the likelihood or potential for the left over chattels to cause a substantial interference be sufficient?

What counts as a valid objection and again, can subjective factors relating to the landlord in question be taken into account when determining whether the landlord can (objectively speaking) occupy without such an objection? Could a materially similar objection be deemed valid in one context, but not in another, given the specific subjective circumstances of the landlord in question?

Disputes can arise as to whether items left behind at a property are fixtures (and therefore part of the land) or chattels (personal property of the tenant obliged to procure VP) (*Elitestone Ltd v Morris* [1997]). In these circumstances the VP obligation (as a matter of fact and law) is likely to be breached, but what if the parties cannot agree at the relevant time whether items at the property are fixtures or chattels and what if steps are taken by the tenant to remove such items within a reasonable period of time after the break date - is that sufficient to remedy any breach (or is any breach irremediable)? As highlighted in the preceding section, the nature of the obligation to provide VP (i.e. whether it is an absolute obligation or capable of discharge) and whether an actual breach is absolute or technically remediable in given circumstances requires further clarification.

Conclusion

If the author could effect one House of Lords ruling it would be a decision which provides judicial guidance on the meaning of VP and, in particular, the nature, scope and extent of the obligation to procure VP.

Whilst this essay has focused on how persons in occupation of a property at completion and items left at a property at a break date affect the obligation to procure VP, wider questions about what it means to give VP could also have been asked. For example, what happens if a property is agreed to be let for a certain purpose but is then destroyed (e.g. by fire)? Would a shell building constitute VP of a set of intended office premises? Would it be legally possible for the obligation to give VP to be satisfied in such a circumstance? Here the same question as posed by this essay needs to be answered, namely: what *really* constitutes VP?

If we are to have any hope in the future of a property being the only thing "empty" and "unoccupied" on completion or at a break date, and not the currently "vacant" legal definition of VP, further judicial interpretation and explanation of the meaning of VP is required.

Case References

Beard v Porter [1948] 1 KB 321

Cumberland Holdings Ltd v Ireland [1946] KB 264

Elitestone Ltd v Morris [1997] 2 All ER 513

Hynes v Vaughan [1985] 50 & CR 444

John Laing Construction Limited v Amber Pass Limited [2004] All ER (D) 115 (Apr)

Legal and General Assurance Society Ltd v Expeditors International (UK) Ltd [2006] All ER (D) 279 (Apr)

Royal Bank of Scotland v Secretary of State for Defence [2004] 1 P & CR 28

Royal Bristol Permanent Building Society v Bomash [1886-90] All ER Rep 283

Scotland v Solomon [2002] EWHC 1886 (Ch)

Sharneyford Supplies Ltd v Edge [1987] Ch 305

Sheikh v O'Connor [1987] 2 EGLR 269

Topfell Ltd v Galley Properties Ltd [1979] 1 WLR 446