

# Pretty vacant

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**Although 'vacant possession' of a property is a term discussed in a range of case law it still proves problematic, as Nick Dowding and Vivien King find**

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The phrase 'vacant possession' arises in several different contexts: it's a requirement in a sale and purchase agreement, in a lease covenant to yield up, or even in a court order.

Yielding up with vacant possession is often a pre-condition in a tenant's break clause as well. Even if not mentioned, an obligation to return the premises with vacant possession will usually be implied when a tenant vacates.

Thanks to Lord Justice Rimer's judgment in [NYK Logistics \(UK\) Ltd v Ibrend Estates BV \[2011\] EWCA Civ 683](#), we also know that the phrase 'means that at the moment that "vacant possession" is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it'.

It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession or a substantial part of the property.

Despite this, questions persist. What constitute chattels is an obvious one, and whether their presence would substantially prevent or interfere with the landlord's right of possession is another.

Note that chattels include not only unfixed items but may, depending on the facts, include some fixed ones such as demountable partitions, as held in [Riverside Park Ltd v NHS Property Services Limited \[2016\] EWHC 1313](#) in relation to partitions that were fixed to the raised floor and suspended ceiling grid with screws.

## Fixtures and alterations

Do fixtures installed or alterations made by a tenant during the term also need to be removed to give vacant possession?

One consideration is whether such items are part of the property of which vacant possession must be given. Often, the tenant must give vacant possession of 'the demised premises' or similar, so it is necessary to look carefully at that expression's definition in the lease.

It may explicitly include fixtures and alterations, but even where it doesn't these will usually be included by virtue of the principle that the demise includes everything that is in law part of the land ? that is, fixed to it ? at the time.

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In such cases, fixtures, alterations and similar need not be removed to give vacant possession, because they are part of the premises.

But there may be cases where the definition of what must be yielded up does not include them. For example, the demised premises may be defined as including 'all subsequent alterations and additions but excluding tenant's fixtures'.

It might be argued in such a case that the tenant's fixtures must be removed to comply with the vacant possession condition. While this argument was assumed correct in *Riverside*, the judgment is not clear as to why, and given that the judge's conclusion was not essential to his decision it is not binding on other courts.

## **Contractual obligation**

Another point to be considered is whether the tenant is under a contractual obligation to remove fixtures or alterations and reinstate. If so it might be argued ? as it was in [Goldman Sachs International v Procession House Trustee Ltd & Anor \[2018\] EWHC 1523 \(Ch.\)](#) ? that the obligation to give vacant possession requires the relevant items to be removed.

That argument again appears to have been assumed correct in *Riverside*; likewise, the judgment contains no substantial discussion of it and it was not essential to the judge's decision. The point was not decided in *Goldman Sachs*, although Mr Justice Nugee did say 'the ordinary meaning' of vacant possession is to return the premises free of people, chattels and legal interests.

The better view would seem to be that failure to remove the items will not prevent the premises from being yielded up with vacant possession, but that removal will simply form part of the claim for dilapidations. However, it is important to be aware ? particularly when advising a tenant ? that there is a possible argument the other way.

In the end, as always, the most important feature will be the words used. In *Goldman Sachs*, Mr Justice Nugee determined, on the particular wording of the break clause in that case, that the break was conditional on vacant possession being given, but not on compliance with the yielding-up clause; this required the tenant to remove alterations and additions, reinstate the premises to their original condition and yield them up in the condition set out in a works specification.

At the time of writing, leave has been given to the landlord to appeal. So watch this space.

**Nick Dowding is a QC and Vivien King is a consultant at [Malcolm Hollis](#)**

## **Further information**

- Related competencies include: [Legal/regulatory compliance](#)
- This feature was taken from the [RICS Building surveying journal](#) (October/November 2018)
- Related categories include: [Landlord and tenant](#)