

Sorry, no vacancy

Development Vacant possession may seem like a straightforward term, but obtaining it can involve a number of headaches for developers, explains Rachel Wevill

Years of mothballing construction projects followed the 2008 downturn, but development is back. Crossrail, HS2, the London Olympics legacy, London tideway improvements and the Queensferry Crossing over Scotland's River Forth are among the UK's major projects, but, at all levels, building is booming. With development often comes a need to obtain vacant possession.

Vacant possession is one of those terms of real estate art that crops up everywhere. It is implied into the sale of land by virtue of the open contract rules, it is often a precondition to the exercise of a tenant's break option, it is required at the end of a lease and it is crucial to the build-out of development sites.

But obtaining vacant possession can pose significant problems in the context of site assembly and development. Taking Crossrail as an extreme example, the effort in identifying and securing plots, applying for planning permission and obtaining vacant possession prior to commencing work must be a logistical conundrum.

The lead-in times for the development and delivery of such projects – or even more modest ones – can be lengthy. In order to buoy up cash flow while disparate plots are secured and planning permission is sought, landowners may seek a rental stream from short/medium-term tenancies. How does that sit with the requirement for vacant possession, and what steps should landowning developers take to ensure the development can proceed when the time is right? Issues of security of tenure are interwoven into the business of construction in such situations.

Vacancy can be even more difficult to obtain if the owner does not want to give up its premises. Despite being owned by Tottenham Hotspur supporters, local business Archway Sheet Metal Works objected to a compulsory purchase order (“CPO”) being used to make it vacate premises in the footprint of the proposed redevelopment of the football club's White Hart Lane ground. In February, the High Court rejected Archway's challenge, clearing the way for a 56,000-seat stadium, but tensions over the CPO have been extreme.

What does vacant possession mean?

In the context of a sale of property, the obligation to give vacant possession is an

obligation on the seller:

(i) to make the property available on completion in a state in which the buyer can physically and legally occupy it; and (ii) to give the buyer undisturbed enjoyment of the property.

In *When 'pretty vacant' won't do* (EG, 23 May 2015, p80), Richard Housley went into greater detail on the law behind vacant possession, citing a number of examples from case law. As is so often the way, all will depend on the context, from case to case. Lord Greene MR's judgment in *Cumberland Consolidated Holdings Ltd v Ireland* [1946] EGD 70, where hardened cement was left behind in a cellar, formulated the test for vacant possession in this way:

“Subject to the rule *de minimis*, a vendor who leaves property of his own on the premises on completion cannot, in our opinion, be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment.”

Broadly, this remains the applicable test today.

In the context of a break clause

It is no longer usual to see a raft of preconditions to a break clause, the only requirements for a tenant break usually being that the tenant should be up to date with the main rent and give vacant possession.

As the operation – or otherwise – of a break clause is crucial to landlords and tenants, the meaning of vacant possession comes under some scrutiny in this context. In *Ibrend Estates BV v NYK Logistics (UK) Ltd* [2011] EWCA Civ 683; [2011] 3 EGLR 1, it was held that a tenant had failed to give vacant possession (for the purposes of operating its break) because two workmen contracted to the tenant had remained at the property after the break date in order to complete the works they had been tasked to carry out.

In the context of yield-up or sale

In the Model Commercial Lease (“the MCL”), the tenant's “end date obligations” (or “yield up” provisions) include giving back the premises with vacant possession,



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except to the extent that any permitted undertenant has the right to the statutory continuation of its underlease under the Landlord and Tenant Act 1954 (“the 1954 Act”).

As the cases have shown, leaving a premises un-vacant can take a variety of guises – from sacks of cement to diligent contractors. The latter are not saleable, but what can the landlord do with the sacks of cement or other, more marketable, items that are left behind?

The MCL says:

(i) the landlord may sell that property as the agent of the tenant;
(ii) the tenant must indemnify the landlord against any liability of the landlord to any third party whose property has been sold in the genuine but mistaken belief that it belonged to the tenant; and
(iii) the landlord must pay to the tenant the sale proceeds after deducting the costs of transportation, storage and sale incurred by the landlord.

In the absence of express provisions in a



Archway Sheet Metal Works unsuccessfully challenged a CPO necessary for the redevelopment of Tottenham Hotspur FC's stadium

lease, or contract, the landlord/buyer cannot simply dispose of the chattels but must do what is reasonable in accordance with ordinary principles of negligence, the circumstances of the case and the opportunity afforded the seller to remove the chattels (*Da Rocha-Afodu and another v Mortgage Express Ltd and another* [2014] EWCA Civ 454).

In the context of a development

Imagine the scenario if an investor/developer has funds to build the next biggest shopping centre in Europe and needs to assemble its site, secure planning permission, build it and get some tenants. Working with planning and development consultants, the developer scopes out its pre-scheme valuation budget, planning and implementation strategies.

It approaches and starts acquiring parcels of land in the desired location. Some of the existing properties are let, some are vacant. Some local property owners are resistant to selling up – such as Archway Sheet Metal Works – and the

developer seeks advice on the prospects of a successful CPO. All this takes a long time, and in the meantime there's not much money coming in.

To mitigate this, and preserve the empty business rates exemption, the developer decides to let a couple of the habitable parcels of land to start-up enterprises, happy to take short-term tenancies while their businesses find their feet.

Watchful of the ultimate goal – gaining vacant possession of the whole site and redeveloping – the landlord must ensure that the new leases are correctly contracted out of the protection of the 1954 Act so there can be no question of the tenants holding over at the end of their respective terms with security of tenure. But in relation to the existing leases, some do have security of tenure and, as the end of the term approaches for one, the tenant serves notice of its intention to renew.

It is just this scenario that section 30(1)(f) of the 1954 Act was designed to address. A landlord can oppose a lease renewal if "...on the termination of the

current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and... he could not reasonably do so without obtaining possession of the holding".

Assuming the landlord can show the ability to develop and the pre-requisite statutory intentions, and subject to the speed with which a court can hear its claim, the landlord should be able to gain possession of the site. Despite this, its ability to commence development could be delayed if the tenant has left material or equipment on the site.

Vacant possession means the site must not be used by any other party, for whatever reason. There are a weight of practical considerations behind this technical little term – sacks of cement are not required.

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