

Legal update — February 2017

Residential private client Knock Knock...who's there? How "vacant" must a property be for vacant possession to have been given?

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Most buyers and sellers will be buying and selling with 'vacant possession' (VP). Indeed, the Standard Conditions of Sale (Fifth Edition) normally adopted on residential sales usually impose a contractual obligation on a seller to sell its property with VP.

If buying or selling a property subject to VP, this means that the property must be free from 1) physical occupation; and 2) legal occupation.

Extensive case law has highlighted the implications in failing to achieve VP on a sale and purchase of a property. So, what does VP actually mean?

Physical occupation usually concerns persons in occupation (in *NYL Logistics (UK) Ltd v Ibrend Estates BV* [2011] it was held that VP had not been offered when workers carried out repairs to property after it had otherwise been vacated) or chattels. If chattels are left in the property, the issue is whether the chattels are likely to prevent or interfere with the enjoyment of the right of possession of the property. When delivering a property with VP it is essential to check that the property is free from the following:

- *Large quantities of rubbish (Cumberland Consolidated Holding Ltd v Ireland [1946]);*
- *Personal goods/furniture (Scotland v Solomon [2002]); and*
- *De-mountable partitioning (Riverside Park v NHS Property Services [2016]).*

The property must also be capable of being legally occupied. If the property is subject to a tenancy agreement, licence, under-lease or "AirBnB" style temporary lettings, then VP has not been given.

There are some rights, which are not registered on the title registers but nevertheless are binding on purchasers of the property. These rights, known as "overriding interests" include: leases for a term of seven years or less; the rights of persons in actual occupation (e.g. squatters) and legal easements (eg. rights of way).

Whilst the contractual obligation may be on a seller to deliver the property with VP, it is important for buyers' solicitors to carry out all necessary searches and raise pre-contract enquiries and for the buyer to carry out pre-exchange and completion inspections. If an overriding interest is discovered after the buyer is bound by the transaction, it is not enough that the buyer did not discover them, only that they were discoverable. The buyer might have a claim against the seller for failure to deliver VP (and possibly misrepresentation); but the property remains bound. Where the overriding interest is someone in actual occupation then, provided the sale is for valuable consideration to a buyer acting in good faith, payment of the purchase price to co-owners (trustees) should mean the occupant's interest is 'overreached' and attaches to the sale proceeds leaving the occupant with a remedy against the seller.



Source: Fotolia

Vacant property can be an attractive asset for criminals to exploit; evident by the increased number of reported cases relating to property fraud. If you are purchasing property subject to VP, you need to be particularly vigilant when making full and proper checks regarding the other party's identity and pass on any suspicions to your solicitors. If you are selling property with VP, HM Land Registry offers a free 'Property Alert' letting you know when applications are received in respect of up to 10 properties. In addition you can register restrictions on your titles to prevent sales or mortgages particularly where you do not live at the property

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