

Break Clauses: tips and pitfalls

This article provides an insight in to the use of break clauses in commercial leases.

A landlord and tenant can agree in the Heads of Term to a provision allowing the lease to be brought to an end part way through the term – a 'Break Clause'. However there are several issues which have the potential to become contentious and which both parties ought to consider the practical implications of before entering in to the lease.

Apportionments of Rent

Unless there is an express apportionment clause, it is difficult for a tenant to argue that it is entitled to an apportioned refund for monies already paid for but which relate to a period after the break date. The courts have found that there is no right to have a term implied into the lease entitling a tenant to a repayment.

In the event that a tenant finds itself in a lease wanting to break, and there is no express apportionment clause, then the tenant will have little choice but to pay, say a full quarter's rent, even though the break date may fall midway through that quarter. This is because if the right to break the lease is conditional on all sums being paid up to the date the break notice is served, then the condition will not have been satisfied. This means the break notice will be invalidated and the break right will be lost. It may be cheaper to break the lease and pay the rent in advance, even if the break date falls part way through a rental payment period, rather than being tied in to the lease for several more years. However, it is potentially very expensive if the rent is high.

In the event that the lease is still being negotiated,, a tenant's solicitor should always include an express right to an apportionment of sums paid in advance where the lease is broken midway through a rent period. Alternatively, it is a good idea to ensure that, where possible, the break date falls on the last day of a quarter, or whatever rent period has been agreed (i.e. monthly).

Vacant Possession

Many break rights are conditional on the tenant giving the landlord vacant possession of the property at the break date.

Case law has determined that any break conditions must be strictly construed and performed and therefore in some scenarios, simply 'vacating' the property according to its usual meaning may not be sufficient to comply with the condition. In the event that compliance with the condition is disputed or the condition is found not to have been complied with, any break notice served may be invalidated and the tenant will remain responsible for its liabilities under the lease, for example the obligation to pay rent, for the remainder of the term or until the next break date. This is therefore a very serious concern.

The particular circumstances of any case must be considered on their own merits, and whether vacant possession has been given is an objective test. Generally however, if repairs, works or re-decoration have not been concluded by the break date, then this would be sufficient to prevent vacant possession being given. Likewise, leaving particular items in the property after the break date may be considered to substantially interfere with the physical enjoyment of the property even if such items are removable (i.e. chattels and/or rubbish).

The Lease Code is a voluntary Code of Practice for Commercial Leases in England and Wales which was initially published as a voluntary agreement between professional and industry bodies. It contains recommendations for all stages of the Lease transactions, including the terms of a Lease. A condition requiring the tenant to give vacant possession does not comply with the Lease Code 2007 and my advice to tenants is always to renegotiate the obligation to give vacant possession and agree instead to 'give up occupation' or similar, which has a less specific meaning.

From a landlord's perspective, if the landlord agrees a 'lesser' condition of the tenant, i.e. giving up occupation rather than vacant possession, it is still able to claim damages from the tenant in respect of any antecedent breach of covenant, for example the covenant to keep the property clear of rubbish and in a clean and tidy condition.

Form and service of a break notice

As mentioned above, any specific requirements in connection with the valid exercise of an option to break will be construed strictly. If a lease stipulates that a break notice must be in a certain form, or contain certain elements, then that notice must be in that form or contain those elements, even if they do not make sense.

Likewise, the party serving a break notice must ensure that it is served on the other party correctly. For the avoidance of doubt, I would always recommend if there is any question about how it should be served (i.e. fax, recorded or first class post) or on what address (i.e. the address for that party stated in the lease, their solicitor's address or their current registered office address) that it is served by multiple methods and at every possible address, to ensure that it is validly served and received.

As above, in the event that notice was not in the form prescribed by the lease or served in accordance with its provisions, it may be held to be invalid and therefore the break would not have been exercised and the lease would continue.

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