

Break clauses in leases: continuing nightmares

There is, unfortunately, no statutory 'consumer protection' for tenants in relation to break clauses, and the Courts have always taken a landlord-friendly attitude to interpretation in this area. Whereas the Courts generally interpret the wording of contracts in the light of what people would generally assume to be the intention of the parties, they have tended to abandon this principle in relation to leases, instead focusing on a strict interpretation of the precise wording used.

For this reason, tenants should be particularly wary when negotiating break conditions. Landlords will often seek to include various provisions which are on the face of it intended to ensure that the tenant does not leave the property without performing its obligations, but in many cases these will render the break right almost worthless and vastly increase the cost of ensuring that the lease ends.

Break conditions

Common conditions that landlords will seek to impose upon the validity of a tenant break right include:

- (a) a precondition to give prior notice;
- (b) an obligation to comply (often materially or substantially) with the lease covenants;
- (c) an obligation to pay sums due under the lease; and
- (d) an obligation to give vacant possession.

Any of these conditions can be problematic for a tenant, given that a small lapse in observance of lease requirements may result in their continuing to be liable under the lease for the remainder of the term. The situation is often compounded by the fact that, unless expressly required by the lease, there is no obligation on the landlord to confirm in advance whether or not it is satisfied that the conditions have been complied with. The position is even more extreme where there is a 'one-off' break right exercisable only on a particular date (as opposed to a 'rolling' break), since the tenant only has one chance to comply.

Notice

For commercial reasons, it is not unreasonable for a landlord to require prior written notice of the tenant's intention to exercise its break right; this is often six months, but might be three or twelve, or in the case of serviced lets, as little as one month. This does not mean that complying with such a precondition is always straightforward; break notices have been held to be invalid where the name or address of one of the parties is incorrect, or the form of notice prescribed by the lease has not been used. Since the failure to serve a valid notice can be fatal to the tenant's ability to exercise its break right, it would be wise to ask a solicitor to prepare or review the draft.

Compliance with lease covenants

The big trap here is that the leasehold covenants include covenants to repair. If the covenant is unqualified, the tenant must fully comply with this obligation on exercising their break. (This is more onerous than the legal position at the end of a lease, where a landlord's right to compensation for disrepair is limited to the actual loss in value of the property to the

landlord.) Total compliance with repairing obligations is difficult, not least because such covenants are notoriously variably construed by the Courts, the age and original condition of the property sometimes being taken into account, and sometimes not. Even if the tenant is only required to 'substantially' or 'materially' comply with the lease covenants, the Courts have taken a restrictive view of these qualifications, generally siding with the landlord. The uncertainty and extra cost involved in complying with these covenants, and the risk that notwithstanding honest attempts to comply, the landlord may dispute whether the condition has been satisfied, means that tenants should resist any such condition to a break clause.

Payment of sums due under the lease

It might seem reasonable for a landlord to insist that all sums due under the terms of the lease are paid before the tenant is permitted to leave the property. However, such a provision has been shown to be extremely prejudicial in view of the lack of any obligation on the part of the landlord to tell the tenant whether there are any sums outstanding at all. In the [*Avocet Industrial Estates LLP Case \(2011\)*](#) the break clause was invalid because some rent had been paid late, although it had never actually been demanded by the landlord at any stage. Further complications can arise with respect to whether other payments such as service charge have been properly paid when due. Tenants should ensure that any such condition to a break right relates only to the annual rent, or to sums which have been formally demanded by the landlord, say 14 days before the break date. Complex drafting is often required in order to ensure the position is satisfactory.

Vacant possession

Vacant possession effectively means that there must be nothing remaining that relates to the tenant with respect to either legal issues such as underletting or permitted occupiers, people associated with the tenant such as its employees, or substantial material objects at the property. In the case of [*Riverside Park Limited v NHS Property Services Limited \(2016\)*](#) it was held that vacant possession had not been given where demountable partitioning had been left by the tenant at the property. The break was invalid and the lease did not terminate, despite the fact that the tenant had made arrangements to remove the partitioning after the break date.

Rent payments

A separate issue, relevant whether or not there are break pre-conditions, is the tenant's ability to recover any rent paid in advance which relates to a period after the break date. Again, the Courts have come to manifestly unreasonable conclusions in this area. The Supreme Court confirmed in the case of [*Marks & Spencer PLC v BNP Paribas \(2015\)*](#) that where a break right takes effect in the middle of a rent period then in the absence of specific provisions to the contrary any rent paid in advance that covers a period after the break date will not be refundable. This can be significant where the break date falls shortly after the commencement of a new rent period: assuming the break right is conditional upon payment of rent and/or compliance with lease covenants, the tenant will have had to pay a whole quarter's rent in advance in order to ensure that their break right is valid. In such cases it is crucial to insert draft wording to ensure that any rent relating to a period after the break date should be repaid to the tenant.

What to do

It is unfortunate that the Court's attitude to interpretation of these clauses has tended simply to confirm various traps lying within the law. In order to manage these risks, charities should:

- (a) not accept break conditions in leases unless agreed at the initial 'heads of terms' stage;
- (b) resist broad conditions requiring compliance with leasehold covenants;
- (c) insist that any condition as to payment of sums due under the lease includes an obligation on the landlord to respond to queries as to whether any sums are outstanding;
- (d) limit clauses requiring vacant possession to stipulate only that there should be no people at the property and that any sub-tenancies should be terminated; and
- (e) ensure the inclusion of a specific clause requiring a refund of rent paid for a period where the tenant is no longer in occupation.

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