

A warning for tenants exercising break clauses

A lease may include a break clause allowing the tenant to bring the lease to an end early. It is nearly always preferable for charitable tenants to have a break right as it gives flexibility, which is particularly important where funding may come to an end or not be renewed.

If the tenant wishes to exercise this right, time limits and any conditions imposed by the break clause must be strictly observed. A recent case reminds tenants of the importance of fully complying with conditions when exercising a break clause and how the conditions can trip tenants up even where they are not unduly onerous.

In this recent case the break clause required vacant possession of the premises to be given at the purported termination date.

In determining what constitutes vacant possession it is necessary to look at whether the person who is required to give vacant possession (the tenant in this scenario) is actually using the property for his own purposes or whether the physical condition of the property is such that there is a substantial impediment to use by the landlord. The property must be available for immediate occupation and use by the landlord.

The vacant possession condition was not complied with where the tenant had remained on the premises carrying out dilapidation repairs after the specified break date. The break was therefore not effective and the lease continued, with the tenant liable to pay rent and comply with other obligations until termination was effective.

It did not matter that the tenant did not intend to exclude the landlord from the premises during the time in which they remained on the premises, or that the tenant was only remaining in occupation to comply with the repair covenant in the lease, or that there had been discussions regarding an extension of time as these discussions had been inconclusive.

The case highlights the fact in order to effectively exercise a break right it is always necessary to strictly comply with the conditions in the break clause. Particularly in the current economic climate tenants cannot expect assistance from their landlords with this compliance. If it will not be possible to fully vacate the premises, formal arrangements need to be made with the landlord prior to the end of the term. Failing to do so could be a very costly omission. Of course, it would be preferable to negotiate the removal of any conditions on a break clause when initially negotiating the lease.

NYK LOGISTICS (UK) LTD v IBREND ESTATES BV [2011] EWCA Civ 683

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