"The Award-Winning, Specialist Independent Insurance Broker for Title Insurance"

EXCERCISING BREAK CLAUSES & OTHER METHODS OF TERMINATING COMMERCIAL LEASES

9TH NOVEMBER 2022

Richard Snape

www.LawSureInsurance.co.uk

ABOUT RICHARD SNAPE

Richard has been the Head of Professional Support at Davitt Jones Bould since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors firm and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

ABOUT LAWSURE INSURANCE

LawSure Insurance Brokers are an award winning, leading independent UK based insurance broker specialising in providing title insurance covers. LawSure works with leading solicitors' firms and developers to facilitate all types of property developments and transactions, including finding solutions to complex bespoke issues as well as the more straightforward ones.

Our service is free for all conveyancing practitioners and developers and there is no obligation to take out any of our quotes.

We work with all the major title insurance providers so we can offer the most comprehensive title broking service to our clients. Working with us, you can be confident that we will aim to provide you with the most competitive quote available in the market. Our independent, comprehensive approach means that we satisfy the SRA requirements for insurance mediation as well as the Insurance Distribution Directive (IDD).

We only get paid (by the insurer) if and when a quote is taken up - so our service has to be (and is) first class. We often get asked whether it is more expensive using a broker. It isn't! It is at least the same price, and often cheaper – with the certainty that you are doing the best for your client by LawSure reviewing the market on your behalf, saving you time and money. And all for free.

CONTACT US

If you would like to speak to us to see how we can help or to request a quote, please call our broking team on **01293 880 700** or email us at enquiries@lawsureinsurance.co.uk

OUTCOME FOCUSED TRAINING INFORMATION

Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

CONTENTS

BREAK CLAUSES

Conditions to Exercising the Clause

Conditions precedent

Fitzroy House, Epworth Street v The Financial Times [2006] EWCA Civ 329

If a lease contains an absolute condition of compliance with terms of the lease before the break can be exercised then no solicitor may allow this to be accepted as any landlord will be able to find a minor breach, usually in relation to dilapidations which allows the tenant to be held to the lease. More commonly, therefore, a lease will require material, or substantial, or reasonable compliance with the terms of the lease. This was the case in the present scenario. The question for the court was what does material compliance actually mean?

This case involved a very valuable site on the outskirts of the City of London. The cost of failure for the tenant if he was held to the lease and had to pay the remaining rental was in the region of £3.5 million.

A break clause was dependent on material compliance with the terms of the lease. The court stated that not every defect had to be remedied. Regard should be had to the age, type, location, and use of the premises in determining what was expected.

The landlord could only refuse consent if it was fair and reasonable to do so and the purpose of limiting the right to break was to enable a landlord to preserve its legitimate interest in being able to re-let speedily thus maintaining the value of the reversion.

The Court of Appeal partly reversed this decision. There is a difference between reasonable compliance, where a reasonably competent surveyor's report may be relied upon and material or substantial compliance where this is not so. Here the test as to whether the landlord loses rental is the appropriate one.

A better solution, it is suggested, and one which is becoming increasingly acceptable to landlords, is to allow the tenant to break the lease without conditions. If needs be, the tenant may still be sued for antecedent breaches. Some landlords put forward a defence to this line of reasoning that the tenant may not be worth suing. This rather begs the question: if the tenant were not worth suing, why would the landlord wish to keep him?

In ***Sirhowy Investments v Henderson [2014] EWHC 3562*** planning permission for a second hand car business was granted subject to conditions that a scheme would be agreed with the local authority in relation to turning facilities to enable car transporters to unload cars without causing obstruction to the highway. Three years after the lease had been granted the council served notice for a breach of a planning condition. On this happening, the tenant was entitled to serve a break notice if they could show that they had acted reasonably in procuring the scheme. However, the tenants had breached a condition as to exercising the break in that they had to keep the premises in good and substantial repair and as part of a fence had fallen down exercise the break.

William Page v BNP Paribas (2008) 4 September (unreported) - As a condition precedent to exercising the break, the tenant had to comply with repairing obligations. The tenant was a dormant company and the obligations were carried out by an associated company. The break was still valid.

Note: It is also suggested that a tenant intending to break the lease should make sure that they have fire asbestos risk assessments under the Regulatory Reform (Fire Safety) Order 2005, and Control of Asbestos Regulations 2012 in order to comply with the lease terms.

In ***Avocet Industrial Estates LLP v Merol Ltd and another company [2011] EWHC 3422*** a condition precedent to exercise the break clause was that the rent had to be up to date. Over the previous six years the tenant had on a few occasions been late in payment of the rent and interest had accumulated, although the landlord had not demanded this. As the interest had not been paid at the break date the tenant had not effectively brought the lease to an end. Here the tenant's interest amounted to £130, the cost of the tenant in extra rent was £300,000. On occasion the landlord had demanded rent but not always. The landlord held £20,000 of rent deposit but this was irrelevant as was the fact that the tenant had asked the landlord to confirm that no other money was owed. The landlord's agents did this but there was no estoppel as they themselves did not realise that the £130 was owed.

Note: Leave to appeal to the Court of Appeal was given but case was settled.

In ***Quirkco Investments Ltd v Aspray Transport Ltd [2011] EWHC 3060 (Ch)*** it was stated that dependent on the terms of the lease any insurance premium which was reserved as rent may have to be paid for the whole year if the payment date fell before the break day. In ***PCE Investors Ltd v Cancer Research UK, [2012] EWHC 884 (Ch)*** the Court of Appeal held that a break could not be exercised when the break day fell between rent days and the whole quarter in advance had not been paid. It is essential in these circumstances that the tenant is only responsible for basic rent, or as a lesser alternative, the lease deals with apportionments after the break date.

In ***Canonical UK Ltd v TST Millbank [2012] EWHC 3710 (Ch)*** the tenant had to pay the rent quarterly in advance and also had to pay a one month penalty in order to exercise the break. They paid two months' rent and claimed that the third month could be offset against the penalty. It was held that on an interpretation of the clause this was not so and the break was not successfully exercised.

Marks & Spencer v BNP Paribas [2015] UKSC 72 - The Supreme Court has now heard this case. The tenant, Marks & Spencer, had to pay rent quarterly in advance and also insurance charge and a car parking licence in advance. They also had to pay monetary payments owed to the landlord as a condition precedent for exercising their break clause. There was also a premium payable in relation to exercise of the break. The break did not correspond with a quarter day. The tenant paid the rent and other monetary payments in advance and then claimed that it must be implied that they could recover back money relating to the period beyond the break date.

The High Court agreed with this but on appeal the Court of Appeal disagreed. The Supreme Court has now agreed with the Court of Appeal. There is no scope for implication of such a term, especially as the parties had agreed in great detail the terms of the lease and not expressly included anything. Lord Neuberger also confirmed that the case of ***Ellis v Rowbottom [1900] 2QB 740*** was correct in that the Apportionment Act 1870 applied to rent payments in arrears but not in advance.

The RICS Code for Leasing Business Premises from September 2020 states that good practice is to return rent due after a break date to the tenant.

Ventgrove Ltd v Kuehne + Nagel [2022]

Although a Scottish case this is equally applicable in England and Wales. A break clause was exercisable subject to paying a premium of £112,500.00 plus any VAT properly due. The Court decided that VAT should be added to the premium to exercise the break.

Gemini Press v Cheryl Lindsay Parsons [2012] EWHC 1608

Where a break clause could be exercised by a named tenant, a successor was not entitled to exercise the break.

Vacant Possession

In ***Cumberland Consolidated Holdings Ltd v Ireland [1946] KV 264*** Lord Greene MR stated that failure to give up vacant possession would require something that *"substantially prevents or interferes with the right of possession of a substantial part of the property."*

Mourant Property Trust Ltd v Fusion Electronics Ltd [2009] EWHC 3659

A break clause contained conditions precedent requiring that the tenant would give up vacant possession, pay the rent due and not be in other material breach. On the termination date the tenant had retained keys in order for contractors to access and finish repair works. The break was void.

NYK Logistics (UK) Ltd v Ibrend Estates [2011] EWCA 683

The break clause required vacant possession. The tenants gave notice and cleared the premises. Arrangements were made to surrender keys and the tenant agreed to carry out some repairs. The landlord did not collect the keys on the date and the contractors did not complete the repairs until six days afterwards. They also employed security staff on the premises over a weekend. The tenant had not given up occupation and could not break the lease.

See the Code for Leasing Business Premises. The Code suggests that conditions precedent should not be used with the exception of the basic rent being up to date, the tenant giving up occupation, and any subleases ending. In the current Code from September 2020 the Royal Institution of Chartered Surveyors has included mandatory terms for surveyors. This, amongst other requirements, means that written heads of terms must be produced. These must give the tenant, subject to contract, details of break rights and the duration of the lease. Nothing in the Code will allow the court to reinterpret an unambiguous term in the lease.

Riverside Park Ltd v NHS Property Services [2016] EWHC 1313 The tenant was required to give up vacant possession as a condition of exercising the break clause. The premises contained a large number of partitions, floor coverings and kitchen fittings which were not removed. The court decided that as they were not substantially attached and could readily have been removed they were fittings belonging to the tenant who had therefore failed to vacate and could not exercise the break. The court went on to say that even if they had been fixtures there was no provision in the lease whereby they had been part of the demise. They were therefore tenant's fixtures which should have been removed.

In ***Capitol Park Leeds plc v Global Radio Services [2021] EWCA 95*** the High Court held that a condition precedent as to vacant possession had not been complied with when the tenant vacated but removed ceiling tiles, window frames and grids which belonged to the landlord. The Court of Appeal have now reversed this decision. All that is needed is that the tenant removes fittings and

tenant's fixtures, people, and there is no legal interest remaining. If the tenant has removed landlord's fixtures or is in breach in any other way they can be sued in damages.

Manner of Exercise

A break clause or option to renew is usually exercisable by notice in writing. There is rarely any need to specify a form of notice, although it is sensible to provide for service of the notice. This is usually done by incorporating the provisions of the **Law of Property Act 1925, S.196** or those of the **Landlord and Tenant Act 1927, S.23**. Which of the two is incorporated is largely a matter of preference. It is suggested that one or other method of service be expressly incorporated. Although the **Law of Property Act 1925, S.196(5)** (which incorporates the method of service therein prescribed) applies to all leases unless a contrary intention appears it applies only in respect of notices 'required' to be served by the lease in question. It does not apply to notices 'permitted' to be served by the lease. It is arguable that notices exercising options do not fall within **S.196(5)**.

Note: **S.23** may be preferable in terms of certainty. It is also the notice provision which is used under the **Landlord and Tenant Act 1954** and the **Landlord and Tenant (Covenants) Act 1995** - see ***Commercial Union v Moustafa [1999] 24 EG 155***

If the original tenant or guarantor is to be sued for rental liability or a service charge, then, by **S.17 LT (c)A 1995,** they must be notified within 6 months of the amount becoming due.

Here, the S.17 notice was served at the last known address by recorded delivery but returned by the Post Office. It was still validly served however. Contrast ***Galinski v McHugh [1989] 57 P&CR 354*.** It appears, from ***Chiswell v Griffon Land and Estates [1975] 1WCR 1181*** service occurs at the time the letter would have been received of sent by ordinary post.

See also ***Webber v Network Rail [2003]*** where services was deemed to occur at the moment of posting a letter by recorded delivery whether or not the letter was received.

Contrast **S.196 LPA 1925**, where if recorded delivery is used and the notice returned, it is deemed not to be served.

Time for Exercising the Clause

Trane (UK) Ltd v Provident Mutual Life Assurance Association [1994] EGCS 121

A lease was expressed to commence on 28 August 1981. It was executed on 6 January 1982. There was a break clause exercisable after 10 years on giving six months' notice.

The tenant was assured by the managing agent of the landlord that the notice must expire in January 1992. The tenant served notice but the landlord refused to accept it. The judge agreed that the notice should have been given to expire in August 1991, i.e. the tenth anniversary of the date of commencement. However, the landlord was estopped from denying his managing agent's representation even though given 'without prejudice'.

The tenant would thus have won but for the fact that there was minor disrepair at the date of exercise of the break clause.

Micrografix v Woking 8 Ltd [1995] 37 EG 179

The break clause to determine lease was exercisable on 23 June 1995. The tenants erroneously stated in the notice that the lease would determine on 23 March 1994 and referred to the relevant clause in the lease.

Held: The mistake was obvious to someone with the landlord's knowledge. The landlord would not be misled by the wrong date. The notice was valid.

Mannai Investment Co v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945, HL

The tenant entered into a ten year lease of office premises subject to a right to exercise a break clause terminating on the third anniversary of the commencement date.

The commencement date was 13 January. The notice to break was expressed to terminate on 12 January. The House of Lords reversed the decision of the Court of Appeal by a 3:2 majority. Break clauses should be treated no differently from notices to quit periodic tenancies.

As long as a reasonable receipt of the notice made clear what was intended, the notice was valid. It was sufficiently clear that the tenant intended to exercise the option to break.

Reference to the clause allowing the break would presumably be sufficient, at least in the case where the lease contains only one break. Mistakes are still made, however, e.g., where breaks are served in the name of the wrong tenant, in particular where there is an associated company in occupation.

MW Trustees Ltd and others v Telular Corporation [2011] EWHC 104

A lease provided for a tenant to terminate it by giving six months' written notice by hand or special delivery to the landlord. The tenant served an invalid break notice as it was addressed and sent to

the former landlord.

The tenant subsequently emailed the new landlord attaching a copy of the original notice. The landlord forwarded the email to its managing agents, who confirmed to the tenant that they accepted the notice and were happy for the tenant to terminate the lease. However, they asked the tenant to re-address the notice to the landlord.

The tenant prepared a replacement notice but it was not received by the landlord. The landlord argued that no effective break notice had been served. The High Court held that:

- Applying the principles in ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] UKHL 19***, a reasonable recipient would not have been misled as to the tenant's intention to terminate the lease even though the notice was addressed to the wrong person. On the court's construction of the lease, although notice had to be given to the landlord, it did not need to be addressed to the landlord.

- Although the lease did not permit service by email, the landlord was estopped from challenging the validity of the notice.

Hotgroup plc v Royal Bank of Scotland [2010] EWHC 1241

In the absence of an estoppel it is essential to give the break notice to the correct person. Here the terms of the break required notice to be served on the landlord's management company. The notice was served on the landlord and was invalid.

Siemens Hearing Instruments v Friends Life [2014] EWCA Civ 382 Here, a break notice had to be served in accordance with **S.24** of the **Landlord and Tenant Act 1954**. The notice did not refer to the section and was held to be void.

Baker Tilly Management Ltd v Computer Associates UK Ltd (2009) 11 December

In this case, the claimant was tenant under an underlease. The lease had originally been granted to Baker Tilly Services Ltd. The lease included a break clause allowing the tenant to determine it by service of a notice on its landlord. The tenant served a notice which complied, in all material respects with the requirements of the underlease. However, in between the grant of the lease and the exercise of the break right, the tenant had changed its name to Baker Tilly Management Ltd. The break notice was served in the original name of Baker Tilly Services Ltd. Was the notice valid? Applying the 'reasonable recipient' test, the court held that it was.

Dun & Bradstreet Ltd v Provident Mutual Life Assurance [1998] E EGLR 175

The tenant had become a wholly owned subsidiary of another company. The break was served by the head company. The notice was void as there was no clear agency. Moreover, as a rent penalty had not been paid, there had also been a failure to comply with a condition precedent.

Orchard (Developments) Holdings plc v Reuters Ltd [2009] EWCA Civ 6

The lease set out provisions as to the service of a break notice whereby if recorded delivery was used the notice would be served on receipt by the landlord. However, if any other form of notice was used then the receipt had to be acknowledged. The break was received but receipt never acknowledged and the service was therefore invalid.

INADVERTENTLY ALLOWING A BREAK

Forfeiture

B&Q v G S Fashions Estates [1993]. The tenant openly parted with possession and the landlord served a Section 146 notice and commenced forfeiture proceedings. The tenant did not claim relief and the court held the lease to be forfeited once the notice had been served.

This constitutes a highly effective means of breaking a lease if the landlord is off his guard.

SECTION 27 LANDLORD AND TENANT ACT 1954

A tenant who does not wish to be bound by a new lease may give at least three months' notice to leave terminating no earlier than the end of the fixed term of the tenancy. Alternatively, he may merely vacate by the end of the fixed term and not be bound by any notice: ***Esselte v Pearl Assurance [1997] 1WLR 891***, in this circumstance he should be careful not to lose any compensation for disturbance which requires occupation until the end of any S.25 notice.

FORFEITURE AND PEACEABLE RE-ENTRY

The landlord may peaceably re-enter the premises. See ***Billson v Residential Apartments [1992] 1 AC 494***. However, if the tenant is using the premises as a dwelling, a Court Order must be obtained under S.2 of the **Protection from Eviction Act 1977**. There may also be a criminal offence of violent entry committed under S.6 of the **Criminal Law Act 1977**.

Forfeiture may not be an effective remedy in a downward market, in particular in view of the payment of full business rates for empty properties. See ***B&Q v GS Fashions (1994)***, a tenant does not have to seek relief from forfeiture in which case the lease will be terminated on service of a notice. A better alternative may be illustrated by the case of ***Hemingway v Dunraven Securities [1995] 09 EG 233*** where an injunction was available preventing an unlawful subletting.

Leasehold Property (Repairs) Act 1938

This applies to all proceedings for damages or forfeiture where the lease was granted for seven years or more and three years or more are unexpired. The Act applies to a "*covenant or agreement to keep or put in repair during the currency of the tenancy*" (see ***Starrokate Ltd v Burry (1982)***). Where the **Leasehold Property (Repairs) Act 1938** applies the landlord cannot proceed without first serving a notice under S.146 of the LPA 1925 which must inform the tenant of his right to serve a counter-notice. If the tenant serves a counter-notice no further proceedings can be taken without leave of the court.

A notice under S.146 of the LPA 1925 must contain the following information:

a. Specify the breach of covenant complained of; and

b. If the breach is capable of remedy, require the tenant to remedy the breach; and

c. In any case, require the tenant to make monetary compensation for the breach.

The court may not give leave under the 1938 Act unless the landlord shows that the immediate remedying of the breach is required:

a. To prevent substantial diminution in the value of the reversion;

b. By any Act or bye law;

c. In the interests of any sub-tenant;

d. Because it can be remedied at an expense that is relatively small in comparison with the much greater expense if the work was postponed;

e. Because it would be just and equitable to grant leave.

In ***Jervis v Harris [1996] Ch196*****,** it was settled that if the landlord reserves the right to enter, carry out work and charge, the claim is in debt and is thus not covered by the Act. In ***Associated British Ports v C H Bailey [1989] 2AC 706****,* the House of Lords held that to proceed with action the landlord had to show the case that he would succeed on a balance of probability in a full case. He failed as the lease still had a 94 year term left, equipment in disrepair would be obsolete anyway.

Note: By reserving the right to enter and carry out works, the landlord will render himself potentially liable under S.4 **Defective Premises Act 1972**. Whereby any person reasonably likely to be affected by repairing breaches may sue. The duty arises whenever a landlord has or should have knowledge of a breach also regular inspections must be made.

REMOVING ENTRIES ON THE REGISTER

Substantively registered leases will be noted against the landlord's title, and leases for more than three or seven or less years, may also be noted in order to protect easements. These should be removed by the tenant.

If the tenant leaves without serving a break, then an attorney clause may be used in order to clear title. Alternatively, if nobody is in occupation, the Land Registry may accept peaceable re-entry for non-payment of rent. It may be difficult to re-let for a further 6 months however, as a tenant may seek relief from forfeiture.

Published January 2022

DISCLAIMER

This oral presentation including answers given in any question and answer session ("the presentation") and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in this presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or the accompanying paper. Richard Snape and Davitt Jones Bould will not accept responsibility for any loss suffered in consequence of reliance on information contained in the presentation or paper.

OUR CREDENTIALS

LEGAL 500

- London Real Estate: Corporate Occupiers, Investors, Property Litigation, Local Government, Planning
- North West: Commercial Property
- South West: Commercial Property, Planning, Property Litigation, Local Government

CHAMBERS UK

- South West: Real Estate, Real Estate Litigation

INDUSTRY AWARDS

- 2021 Property Week Property Awards – Finalist – Legal Team Award
- 2021 Estates Gazette Awards – Finalist for Legal Team Award 2021
- 2021 Legal Business Awards – Finalist – Real Estate Team of the Year
- 2021 Legal Business Awards – Highly Commended – Boutique Law Firm of the Year
- Times Best Law Firm List 2022 – Commended for Commercial Property and Landlord and Tenant Law
- 2020 Legal Business Awards – Shortlisted – Real Estate Team of the Year
- 2019 Lawyer Awards – Finalists – National Firm of the Year
- 2018 British Legal Awards – Winner – Boutique Firm of the Year
- 2018 Estates Gazette Awards – Finalists – Legal Team of the Year 2018
- 2017 Estates Gazette Awards – Finalists – Real Estate Law Firm of the Year
- 2016 American Lawyer Legal Awards – Global Finance Deal of the Year – Honouree
- 2013 Lawyer Awards – Winner – Boutique Firm, National
- 2013 Lawyer Awards – 2nd – Real Estate Team

www.djblaw.co.uk
0344 880 8000

CONTACTS

Sue McCormick, Account Director
Local Authorities
T: +44 1823 328 084
M: +44 7535 655 060
E: sue.mccormick@djblaw.co.uk

Madeleine F Davitt, Senior Partner
Central Government and Property Companies
T: +44 203 026 8295
M:+44 7904 677 739
E: madeleine.davitt@djblaw.co.uk

Peter Allinson, Chief Executive
Real Estate Support for Other Law Firms
T: +44 203 026 8290
M: +44 7904 677 773
E: peter.allinson@djblaw.co.uk

Yvonne Hills, Client Director
Property Companies
T: +44 20 3026 3467
M: +44 7921 925 761
E: yvonne.hills@djblaw.co.uk

OFFICES

LONDON - CITY
Level 24 The Shard,
32 London Bridge Street,
London SE1 9SG

LONDON - WEST END
48 Dover St,
Mayfair,
London W1S 4NX

BIRMINGHAM
2 Snow Hill,
Birmingham BG4 6GA

MANCHESTER
Floor 2, 3 Hardman Square,
Manchester M3 3EB

TAUNTON
12-14 The Crescent, Taunton,
Somerset TA1 4EB

DAVITT JONES BOULD

REAL ESTATE LAW SPECIALISTS