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# EXERCISING BREAK CLAUSES & OTHER METHODS OF TERMINATING COMMERCIAL LEASES

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**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

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## **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.



## **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.

***O.G. Thomas Amaethyddiath v Turner [2022] EWCA 1446***

This was an agricultural tenancy case on notices to quit but is equally applicable to break notices. The tenant had an oral yearly tenancy. He assigned the Lease to a company of which he was sole director and shareholder. The landlord did not know this and three days later served notice to quit on the original tenant. The court of appeal decided that a failure to satisfy a formal condition such as a name of a party can not be saved under ***The Mannai v Eagle Star [1997] Principle***. This will only validate an incorrect notice in relation to such matters typographical errors or on dates.

## 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.

## IMPLIED SURRENDER

If there is an implied surrender and re-grant where the new lease needs to be excluded on the Act then notices must be served prior to surrender.

### ***Beegas Nominees v BHP Petroleum [1999] 77 P & CR 14***

Where the assignee agreed a stepped rent which was outside the scope of the original lease, this did not bind the original tenant: following ***Friends Provident v BRB [1996] 1 All ER 336***. This is now enshrined in S.18 Landlord and Tenant (Covenants) Act 1995. However, the original lease was not impliedly surrendered by the variation. For there to be such a surrender there must be a change in the demised premises or the term of the lease. In these situations, landlords' advisers should ensure that, e.g. a separate lease is granted if the demise is increased, or a reversionary lease is used to increase the term, otherwise the landlord may find that they have lost their sureties.

## **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 *Starrokat 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.

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