

BREAK CLAUSES: AN OVERVIEW

A break clause in a lease entitles either the landlord or the tenant to terminate the lease early. Here we look at some of the issues affecting a **tenant's right** to break the lease. It is the practice of the Courts to interpret break clauses strictly and specific legal advice should always be sought on your own position. This note is not intended to be a substitute for such advice.

Conditions attaching to break clause

Although best practice¹ suggests that the:

only pre-conditions to [a tenant] exercising [a] break clause should be that [the tenant is] up to date with the main rent, [gives] up occupation and [leaves] behind no continuing subleases

many break clauses have traditionally imposed additional and more onerous conditions before the right to break can be exercised.

Some break clauses may require that there is no existing material breaches of any of the tenant's obligations under the lease. Other break clauses may not even contain a "materiality" qualification. Unfortunately there have been a number of cases where tenants have lost their right to break the lease because of innocuous or trivial breaches of the lease.

A tenant considering exercising a break clause must take legal advice on its rights to break and must do so as early as possible.

Once and for all right

Although it is possible to have a rolling right to break a lease, this is rare and generally a tenant only has one opportunity to exercise the right and during a limited time frame. A failure to follow the correct procedure or exercise the right in the correct way will almost certainly lead to the loss of the right to break. Possibly with costly consequences.

¹ The Code for Leasing Business Premises in England and Wales 2007

Some practical issues for tenants

As a tenant must comply strictly with all relevant requirements in the break clause it should protect its position by keeping evidence of its compliance. In addition to serving the break notice in good time, and strictly in accordance with the terms of the lease, the tenant should:

- Keep evidence of the method of posting or delivery of the notice. If there are no deemed service provisions in the lease, the tenant could ask the landlord to acknowledge receipt.
- Consider carrying out a compliance audit with its surveyor's advice before serving the break notice. The tenant can then take steps to remedy any breaches to ensure compliance with its covenants.
- Pay any outstanding sums due, **even if these are in dispute**. Payment can be made on a without prejudice basis and the matter argued about later.
- Check for evidence of previous late payments and whether default interest may be due on them. If so, include a sum to cover such interest.
- Make sure that payment is made **in cleared funds by the required date** unless the landlord has expressly agreed to accept a cheque or there is a clear course of dealings under which the landlord has habitually accepted rent by cheque.
- Consider asking the landlord for confirmation of the steps the tenant needs to take in order to comply with any conditions. You could request the landlord prepare a schedule of dilapidations in relation to any repair works. However, do not rely upon any failure to respond by the landlord.

This list is not exhaustive and the relevant factors a tenant must consider will vary from case to case.

The cost of moving

If a tenant is really intending to exercise the right with the intent of moving, other practical considerations in relation to the move will need to be considered. A tenant should seek to negotiate a rent free period with its new landlord as there is likely be some overlap of occupation between old premises and new. The cost of moving in terms of down-time and management time always needs

to be considered. You may also need to examine the contracts of employment of your staff. Can you compel them to move with you? Does the move make them redundant? Finally, the termination of the lease is likely to crystallise the costs of putting premises back into the state of repair that the tenant is obliged to keep them under the lease. These costs are sometimes not insignificant and these should be factored into any decision to move.

Breaking as a negotiation tactic

The tenant should also consider carefully whether it really intends to break the lease. In a tenant friendly market, the tenant may threaten to exercise a break right or actually exercise it, with the intention of persuading the landlord to give the tenant more favourable terms. Once a break notice has been served, however, it cannot be withdrawn unilaterally. Any mutual waiver of the notice will be deemed to constitute the grant of a new lease with effect from the date of expiration of the break notice. This may have stamp duty land tax consequences for the tenant dependent upon the rent and length of the term of the new lease.

Further information and advice

For further information or advice on the issues raised by this briefing note or indeed any commercial property matter please contact me by:

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