

Break options — opportunities for landlords and harsh lessons for tenants

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Three recent cases have highlighted that, the courts will interpret the wording of a break clause strictly and tenants who fail to understand the exact operation of the clause will not gain any help from the court. In each case, the unfortunate tenants would have benefitted enormously from taking proper professional advice in good time.

1. Pay ALL rents demanded prior to break –PCE Investors v Cancer Research UK (2012)

The lease in this case included an option for the tenant to terminate halfway through the September -December quarter, amongst other conditions, paying all rents 'due and demanded up to and including the break date'. The landlord issued a rent demand for the entire quarter in the usual way. The tenant made a payment for the period 29 September up to the break date and sought confirmation from the landlord that this was agreed. The tenant chased the landlord for this confirmation but received no response before the break date. The landlord argued that the break had not been validly exercised.

The High Court agreed, stating that:

- It was clear from the terms of the lease that the tenant was to pay the full quarter's rent prior to the break date in order to satisfy the break conditions.
- There is no general duty for a landlord to point out a tenant's error. The landlord had not misled the tenant by not replying to its request for confirmation that it need only pay a proportion of the demanded rent.

2. Pay default interest (even if not demanded). *Avocet Industrial Estates LLP v Merol Limited and another (2011)*

The break option in this lease was conditional, among other things, upon payment of all sums due under the lease as at the break date. The lease did not specify whether such sums had to be demanded prior to the break. The lease also provided that default interest would be charged on any arrears from the date the sums were due until the date of payment.

The tenant served a break notice on the landlord and stated in its covering letter that it was not aware of any breach of the tenant covenants under the lease. It did not receive any response from the landlord.

Between service of the break notice and the break date, the tenant paid the rent late on three occasions. No demand for default interest was served by the landlord. The tenant vacated the property on the break date. Subsequently, the landlord wrote to the tenant stating that it did not consider the break to have been validly exercised as default interest was owed in respect of the late payments of rent.

The High Court reluctantly held for the landlord:

- It was clear from lease that default interest was due on arrears of rent.
- The break condition regarding payment of rent or other sums, i.e. including default interest, did not specify that such sums must be demanded by the landlord.
- The tenant should have been aware that default interest was due even in the absence of any demand from the landlord, and could have calculated what amount was owed (approximately £130). As this had not been paid, the break had not been validly exercised.

3. Vacate when vacant possession required –*NYK Logistics (UK) Ltd v Ibrend Estates BV (2011)*

In this case the break option was conditional, among other things on the tenant delivering vacant possession on the break date. The tenant served the landlord with a valid break notice to terminate the lease on the break date. Two days before the break date, it met with the landlord's surveyor and agreed to carry out repairs to the property to avoid any dilapidations claims. As they could not be completed in the short time-frame, the tenant had contacted the landlord to agree an extension of a week to complete the works. However, no response was received. As the works were still incomplete on the break date, the tenant's workmen and security staff remained in occupation.

A week later, after obtaining legal advice, the landlord wrote to the tenant stating that it had not validly exercised the break option as it had not delivered vacant possession.

The Court of Appeal agreed with the landlord:

- In order to satisfy the break condition, the tenant had to give vacant possession by midnight on the break date. As this had not been done, the tenant had not validly exercised the break option.
- Providing vacant possession means:
 1. ensuring the property is empty of people;
 2. enabling the landlord to assume and enjoy immediate and exclusive occupation and control of the property; and
 3. removing from the property all the tenant's items, both chattels and tenant's fixtures.
- The tenant should not have relied on the landlord's failure to respond to the request for an extension to complete the repair works. As no agreement had been reached on this point prior to the break date, the tenant should have vacated the property on the break date and contacted the landlord's agent the next working day to arrange for access, as a licensee, to complete the outstanding work.

Are you hoping to exercise a break option?

We advise you to speak to us well in advance of exercising any break option. We will advise on the form and service of the notice and on the implications of any conditions attaching to the break option. A few key points for tenants:

1. Break options are typically conditional on the tenant paying all rents due at the break date. If it is not clear what is required, it is sensible to err on the side of caution and pay the full rent and other sums due to ensure break is validly exercised: unless the break conditions require sums to have been demanded in writing, don't rely on the landlord's inaction.
2. Where there is doubt about the specific requirements of the break conditions, tenants should seek legal advice rather than rely on the landlord to clarify.
3. Keep as accurate a record as possible of the due dates of any payments under the lease, and the date that such sums are paid, to keep track of any possible claims for default interest.
4. Give serious consideration as to whether compliance with a vacant possession requirement will be a problem.

If you would like to discuss anything raised in this article or have questions about the break clause in your lease please speak to Paul Brecknell on +44 (0)20 7597 6037 or paul.brecknell@withersworldwide.com.

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