

A guide to exercising break rights in commercial leases

Commercial leases contain binding legal obligations, to be complied with throughout the term, irrespective of whether the tenant can derive any benefit from the premises. As the past few years have shown, circumstances can change and businesses can find themselves in the situation where their premises are surplus to their needs but still bound to pay the rent and other outgoings due.

Whilst most leases contain rights to assign or underlet where premises are surplus to the existing tenants requirements, [see Alienation – A guide to assigning or underletting your lease](#), this may be of little help if demand for new business premises is weak.

Some, but not all, leases contain a break right affording the Tenant (and sometimes the Landlord) the right to end the lease early. In this latest factsheet from our commercial property team, we look at the operation of tenant break rights and the key points to consider.

What is a Break Right?

All leases must be granted for a fixed term. Some commercial leases may however include a right for the Tenant (and sometimes the Landlord) to end the lease early, on one or more specified dates, upon service of a notice. Such right is usually subject to conditions which have to be satisfied in order for the break to be effective.

Service of the Break Notice

If a Tenant is intending to exercise a break right, there are 3 initial points to consider:

- when the break notice must be served in order for the lease to be terminated on the break date;
- how the notice is to be served; and
- by whom and on whom the notice should be served.

The time-scale for service of the notice will ordinarily be set-out in the definition of “Break Date” at the beginning of the lease or in the break clause itself. Failure to serve the notice within the correct time period could mean losing the right to break completely and the lease will continue.

The notice will usually need to be in writing but it is also important to check the lease to see if the break clause specifically states how the notice is to be served, or if it is covered by notice provisions elsewhere in the lease.

Finally, you should confirm who exactly must give the notice and on whom the notice is to be served. This can be more complicated than you might think for a number of reasons: the current Landlord and Tenant may no longer be the original parties detailed on the lease; the Landlord may be based abroad or the lease may state that the notice must be served on an agent at a different address to that of the Landlord.

Break Clause Conditions

It is also important to review the terms of the break clause itself to see if there are any conditions which the Tenant must comply with, if they are to successfully exercise their break, for example, all rent must be paid up to the break date; there to be no substantial breaches of the lease terms and the lease must be surrendered vacant of all third party occupants i.e. if the Tenant has sub-let the property then the occupants

must have left by the break date. This may seem straightforward but the conditions must be strictly adhered to. The Courts have held that even a small amount of interest outstanding on the rent on the break date will render the break invalid.

The requirement in some leases that the property is handed back with “vacant possession” is generally viewed as draconian and is certainly not compliant with The Code for Leasing Business Premises in England and Wales (2020) which provides guidance on how to most fairly prepare leases for all parties. Vacant Possession means that the Tenant must have left the property and that the property must be entirely empty so that the Landlord is able to reoccupy itself or let to a new tenant immediately. Even leaving a small piece of furniture or bags of rubbish could invalidate the break. Conversely, the vacant possession provision can also be breached by removing too much from the property, as it is also arguable that a requirement to provide vacant possession means that all alterations which have been carried out, must be reviewed.

In the High Court case of [In Capitol Park Leeds plc v Global Radio Services Limited](#) [2020] EWHC 2750 it was found that the vacant provision condition had not been satisfied because the tenant had removed items such as ceiling tiles, lighting and heating so as to render the premises incapable of immediate re-occupation and use.

Some break clauses also require the Tenant to have complied with all the lease covenants as a condition of the break. This is also extremely difficult to comply with and should be resisted where possible. The main problem with this is the ability of the Tenant to have fully complied with its repair liability. The Tenant must hand the property back in the state of repair required by the lease, having removed all alterations and having made good any disrepair. It is not always possible however to establish with the Landlord what items it considers in need of repair so that the Tenant can remedy these before the break date.

Conclusion

Whilst break rights are extremely beneficial, tenants should carefully review the break clause requirements and consider whether they can realistically fulfil the conditions before serving a break notice and exercising the right to break. The above is just a summary of some key points in relation to break options. It is always recommended that you seek the advice of a solicitor before exercising a break right. Our commercial property solicitors are experienced at dealing with early termination rights and can check the terms of your lease and advise you on the requirements to be satisfied. We can also draft and serve the Break Notice for you.

Moorcrofts' commercial property team provides legal advice to owners and occupiers of commercial property. We specialise in tenant representation and have extensive experience advising corporate occupiers on all aspects of leasehold acquisitions and disposals. If you would like legal assistance with your commercial property needs, please contact our Partner and Head of Commercial Property – Julia Ferguson.



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