



# A guide to exercising break rights and the benefits of these in the Covid-19 Environment

The current pandemic has highlighted the binding nature of commercial leasehold obligations, irrespective of whether the tenant can derive any benefit from the premises. Many tenants, particularly in the retail sector, have found themselves with little or no income, unable to operate their businesses from their commercial premises 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 has been of little help recently as the appetite for taking on new business premises has largely stagnated.

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 additional benefits these may offer in the current climate.

## 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 the 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 would 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 must 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.

In the recent High Court case of [In Capitol Park Leeds plc v Global Radio Services Limited \[2020\] EWHC 2750](#) last November 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.

It is also arguable that a requirement to provide vacant possession means that all alterations carried out need to be removed.

It is therefore worth considering whether, in the current climate, it will be possible to empty the Property due to lockdown. In this instance, it may be possible to negotiate with your Landlord in advance of the break date to waive this requirement.

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 carry these out before the break date.

### Break rights in the Covid-19 Environment

Where a lease contains an immediately available, or upcoming break option, this can offer a convenient route out of what may have become cumbersome leasehold obligations for commercial tenants right now. However, with lockdown easing, tenants should perhaps consider whether breaking is the right option for their business and if the break clause could be more effectively used as a negotiating tool. Tenants may wish to approach their Landlord and offer to forgo their break rights in exchange for a rent reduction, rent free period or delay in their rental payments. This would have to be properly documented by way of a Deed of Variation to alter the terms of the lease and a side letter may be needed to document the rental concession but the result would be beneficial to both parties. The Landlord retains its tenant and rental income and the tenant keeps occupation under the lease but on more favourable terms.

### 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. 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.

Our highly skilled team offers both professional and practical expertise allowing our clients to have confidence in the advice provided. If you would like to discuss the options available to you in relation to your lease, please contact our head of commercial property – Julia Ferguson.

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