



Break Options in Commercial Leases

A Practical Overview

Ian Morgan, Pinsent Masons LLP (ian.morgan@pinsentmasons.com)

Pierre Smith, Pinsent Masons LLP (pierre.smith@pinsentmasons.com)



Summary



What we will cover

- ▶ What is a Break Clause?
- ▶ Common pitfalls: a discussion
- ▶ Pre-conditions of service
- ▶ When can you serve?
- ▶ Contents of a break notice
- ▶ Conditions of a break – (1) Vacant Possession; (2) All Sums Due; (3) Compliance with Covenants
- ▶ Final thoughts
- ▶ Q&A

What is a Break Clause?



- ▶ An option (exercisable by the landlord or the tenant, or both) to terminate the lease before the contractual expiry, often in accordance with certain conditions
- ▶ Conditions require strict performance
- ▶ One of the biggest sources of professional negligence claims against surveyors (and solicitors) – careful attention and planning is needed!
- ▶ See example. Can you spot the potential issues?

Common Pitfalls



Some Issues to Consider When Negotiating Break Clauses

- ▶ Pre-conditions to service of the break notice?
- ▶ When can you serve a break notice? (i.e. timing issues)
- ▶ Parties – personal or binding on successors in title?
- ▶ Form and content of notice?
- ▶ Method (and location) of service?
- ▶ Conditions of the break?
- ▶ Landlord and Tenant Act 1954 / Electronic Communications Code (if Landlord's break)

Pre-Conditions of Service



- ▶ Break clauses don't always make it clear whether compliance with conditions is needed:-
 - ▶ Before or at the time of serving the break notice itself
 - ▶ On or before the break date
 - ▶ At some other time

Practical Tips:

- ▶ If acting for the party who might want to exercise the break, at HoTs stage, clearly record, in relation to conditions, when you expect these to be complied with. IE at the date of the notice or on the break date
- ▶ If you have break dates coming up check to see whether you / your clients need to have done anything before they can serve the notice (i.e. paid any sums due or, commonly with landlord's breaks, formed an intention – i.e. to redevelop)
- ▶ Get your ducks in a row early!

Timing of a Break Notice (when can you serve)?



- ▶ Is it a fixed break date or a rolling break?
- ▶ How much notice do you need to give?
- ▶ Are there any other timing issues such as:-
 - ▶ Internal / client decision-making processes – how long will it take to make a decision and get approvals?
 - ▶ 1954 Act notices to be served (and grounds of opposition)?
 - ▶ Statutory undertakers / telecoms operators / undertenants?
 - ▶ Planning permissions / redevelopment plans?
 - ▶ Methods of service – i.e. do we need to serve in Jersey, the BVI...?
 - ▶ Allow enough time for 'deemed' service

Contents of the Break Notice



Key Points

- ▶ You may have heard of the 'reasonable recipient' or 'Mannai test' – taken from a 1997 case of that name. *Mannai is over-used and over-relied upon*
- ▶ Courts will expect strict compliance

*"The clear moral is: if you want to avoid expensive litigation, and the possible loss of a valuable right to break, you **must** pay **close** attention to **all** the requirements of the clause, including the formal requirements, and follow them **precisely**" (Lewison LJ in *Siemens Hearing Instruments Limited v Friends Life Limited* [2014] EWCA Civ 382 (Court of Appeal))*

Conditions of the Break



(1) Vacant Possession

- ▶ Landlord must be able to '**assume and enjoy immediate and exclusive possession, occupation and control of the property**

▶ EMPTY OF PEOPLE

- ▶ Everyone including contractors (*brand*), security guards, squatters

▶ EMPTY OF CHATTELS

- ▶ Chattels – What are they? What about fixtures / other things?

- ▶ Breached only if 'substantial impediment'

- ▶ Examples: Bags of cement (*Cumberland Partitioning (Riverside)*) Other items?

▶ Practical Tips:

- ▶ Model Commercial Lease and Lease Code 2007 – do not advocate VP and consider the alternative
- ▶ Approach landlord in good time and arrange a handover (keys / alarm codes) – but no obligation to be helpful
- ▶ If in doubt, rip it out!
- ▶ Buy off the risk – settlement agreement and / or formal deed of surrender

Conditions of the Break



(2) Payment of Sums Due and Apportionment

- ▶ What payments are required? (Principal rent, service charge, insurance, VAT, **interest on arrears, fees and expenses**?) *Avocet Industrial Estates LLP v Merol and Another* [2011] EWHC 3422 (Ch)
- ▶ Do they need to be formally demanded or not?
- ▶ A middle ground: "if demanded not less than x days prior to the break date?"
- ▶ Make sure received as cleared funds
- ▶ Unless the clause provides for the repayment of sums paid in advance the tenant will not get them back (*Marks and Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72)

Market Position:

- ▶ Anything other than principal rent is a breach of the Lease Code
- ▶ Model Commercial Lease does include a repayment clause
- ▶ **Negotiating Points:**
 - ▶ Do you want all sums (including interest) due or just principal rent?

Conditions of the Break



(3) Compliance with Covenants

- ▶ Compliance with ALL covenants – a minor or trivial breach can invalidate the break
- ▶ 'Material' or 'Substantial' compliance – better?
 - ▶ (*Fitzroy House Epworth Street (No. 1) v Financial Times Limited* [2006] EWCA Civ 329) – Assessed by reference to the ability of the landlord to re-let or sell the property without delay or additional expenditure Few breaches which were all minor in nature
 - ▶ Outstanding breaches wouldn't affect ability of landlord to re-let
 - ▶ Outstanding breaches would not affect the rent or any rent free period
 - ▶ Damage to the landlord's reversionary interest was negligible (or nil)
- ▶ No obligation for landlord to co-operate – for the tenant to form its own opinion.
- ▶ The test is objective - the parties conduct, motivations and intentions will not be under review

Final Thoughts



- ▶ One of the biggest sources of professional negligence claims against surveyors (and solicitors)
- ▶ Clarity in Heads of Terms over what is or is not agreed is vital. Understand the effect of what is agreed – i.e. 4 months' notice means 4 months' notice not 4 months and 1 day; 'all sums' means all sums including 20p of interest from 3 years ago – is that what was intended?
- ▶ Once exercised the break notice cannot be withdrawn. Even if the landlord and tenant agree to its withdrawal before the break date, as a matter of law, a new lease is created with effect from the expiry of the break notice:
 - ▶ NOT contracted out of 1954 Act
 - ▶ Loss of any Authorised Guarantee Agreement (AGA)
 - ▶ Breach of alienation provision of any superior lease (no consent to the grant of the lease)
 - ▶ Prudent approach is to agree the grant of a new lease
- ▶ If you are wanting to exercise a break – plan early and take advice on the conditions sooner rather than later.

Any Questions?

