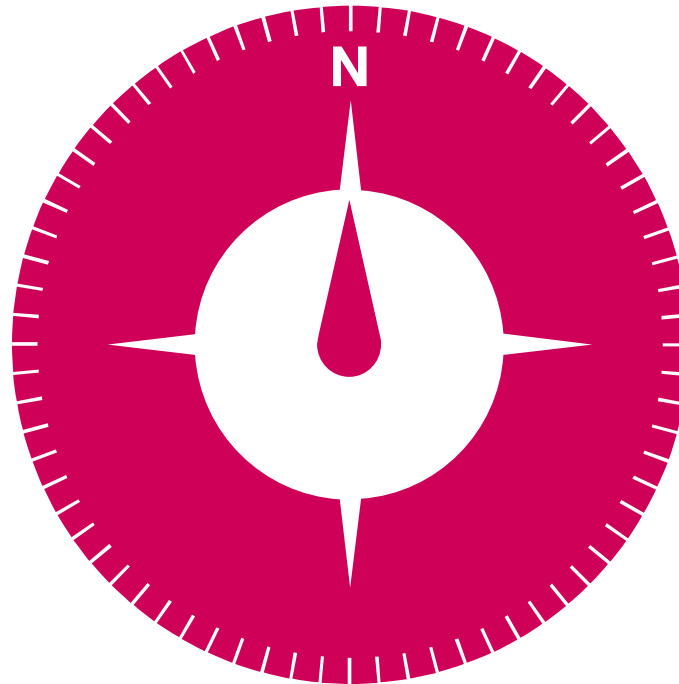


Give Me A Break ! Successfully manoeuvring your way around break clauses^o



Go further



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General Principles



“in general, conditions attached to a break clause ... must be strictly complied with , so that even a day’s delay in giving vacant possession or a shortfall in the payment of rent of a few pounds would be fatal.”

Legal & General Assurance Company Ltd v Expeditors International (UK) Ltd [2007] 2 P & CR 10, per Lloyd LJ.

“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 ... and follow them precisely.”

Siemens Hearing Instruments Ltd v Friends Life Ltd [2014] EWCA Civ 382, per Lewison LJ.

Requirements for a valid Break Notice



- “If [a break clause] had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease.”
- *Mannai Investment Co Limited v Eagle Star Assurance Co Limited* [1997] AC 749, per Lord Hoffmann. See also *Hotgroup plc v The Royal Bank of Scotland plc* [2010] EWHC 1241 (Ch)
- How should the break notice be served?
 - Look at the Notices clause
 - Mandatory or permissive methods of service ?
 - Is there a deeming provision ?
- Who should give the break notice ?
 - Mind the registration gap ! See *Sackville UK Property Select II (GP) No 1 Ltd and another v Robertson Taylor Insurance Brokers Ltd and another* [2018] EWHC 122



Conditions requiring compliance with covenants



- What are the conditions which must be satisfied?
 - *Goldman Sachs International v Procession House Trustee Limited and Procession House Trustee 2 Limited* (2018)
- When must the conditions be satisfied?
 - The date of service of the break notice; or
 - The break date; or
 - The tenant may be required to have performed the covenants “up to” the relevant date: see *Bass Holdings Ltd v. Morton Music Ltd* [1988] Ch 493.

Conditions requiring compliance with covenants



- The covenant to repair and other such similar covenants give rise to the most difficulties for a tenant. If the tenant fails strictly to comply with them, the break will not take effect and the lease will continue. For example:
 - *Finch v Underwood* [1876] 2 ChD 310
 - *West Country Cleaners Ltd v Saly* [1966] 1 WLR 1485
 - *Bairstow Eves (Securities) Limited v Ripley* [1993] 65 P & CR 220

Conditions requiring compliance with covenants



Conditions requiring compliance with covenants



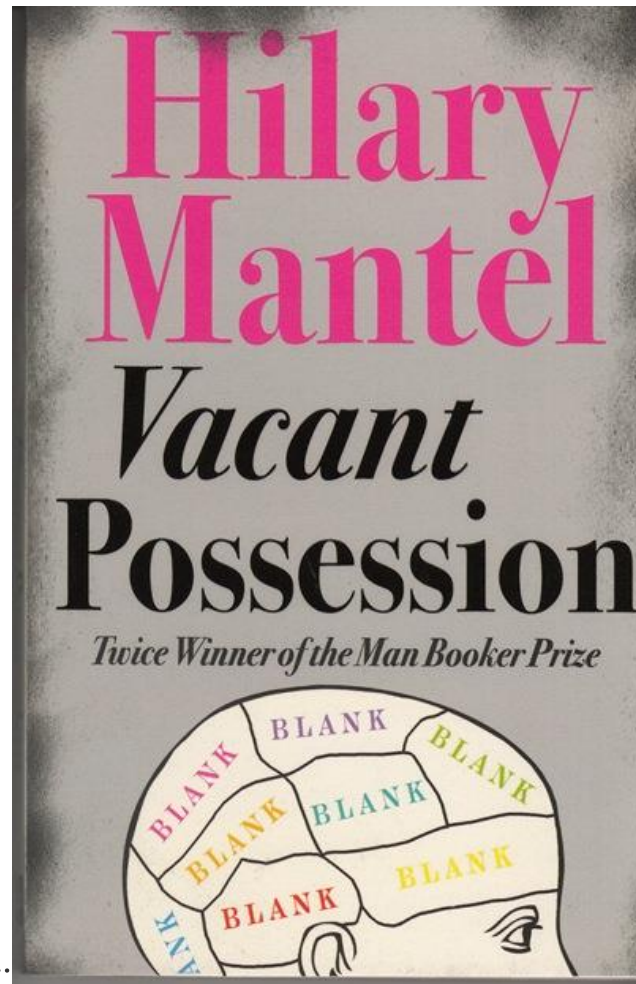
- Look carefully at the repairing covenant: even where the condition within the break clause is unqualified, the covenant to repair may not require the tenant to keep the premises in perfect physical order.
 - e.g. a repairing covenant within a lease which merely requires a tenant to keep the demised premises in “*good and substantial repair, order and condition*”.
- A tenant’s option to determine is sometimes made conditional on there not being any “material” or “substantial” breach of covenant: see, for example, *Fitzroy House Epworth Street (No 1) Limited v The Financial Times Limited* [2006] 2 All ER 776.
 - in such cases, the question whether or not the tenant has satisfied the condition will be determined by whether the landlord can re-let or sell the property without delay or additional expenditure.

Conditions requiring vacant possession



- See:
 - *NYK Logistics (UK) Ltd v Ibrend Estates BV* [2011] EWCA Civ 683
 - *Riverside Park Limited v NHS Property Services Limited* [2016] EWHC 1313 (Ch)
 - *Secretary of State for Communities and Local Government v South Essex College of Further and Higher Education* [2016] PLSCS 249
- Key question: can the landlord assume and enjoy immediate and exclusive possession, occupation and control of the property ?
- To satisfy the test, you should make sure that:
 - There are no people at the property.
 - There are no moveable items left at the property.
 - If the lease requires fixtures to be removed, they should be removed and not left.
 - There is no one with an ongoing right to possession.
 - The keys are handed over.

Conditions requiring vacant possession



Conditions relating to payments



- When a break date is between rent payment days, what does the tenant have to pay on the rent payment day immediately before the break date ? If the rent is payable quarterly in advance does he have to pay the full quarter's rent ?
- Yes !
 - *PCE Investors Limited v Cancer Research UK* [2012] EWHC 884 (Ch); and
 - *Canonical UK Ltd v TST Millbank LLC* [2012] EWHC 3710 (Ch)
- Remember that where rent is payable in advance, it is not apportionable under the Apportionment Act 1870: see *Canas Property Co v KL Television Services* [1970] 2 QB 433.

Conditions relating to payments



- In the *Canonical* case, the break clause provided that the break would only operate if:
 - the rents under the lease were paid up to and including the break date; and
 - the tenant paid to the landlord, on or before the break date, a sum equivalent to one month's rent.
- The rent clause in the lease provided that the tenant had to pay *"yearly and proportionately for any part of a year the Yearly Rent... by equal quarterly payments to be made in advance on the usual quarter days in every year the first such payment or a proportionate part thereof (being a proportionate payment in respect of the period commencing on the Rent Commencement Date ... and ending on the day before the next succeeding quarter day) to be paid on the Rent Commencement Date"*.
- Vos J concluded that the tenant was not entitled to apportion the rent which fell due on the June 2012 quarter day.

Conditions relating to payments



- Where the break date is between quarter days and where the tenant pays the full quarter's rent on the quarter day immediately preceding the break date, after the lease has come to an end on the break date, is the tenant entitled to recover the “overpayment” of rent from the landlord ?
- *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72

Conditions relating to payments



- Marks and Spencer was the tenant of four leases of offices in Paddington. It had the right to break the leases on 24 January 2012. The break was conditional on there being no arrears of the basic rent at the break date and payment of a penalty premium on or before that date. Rent under the lease was payable quarterly in advance.
- In July 2011, break notices were served. All payments were made under the leases, including both the full December 2011 quarter's rents and service charges and the penalty payments required to secure termination on the break date, 24 January 2012.
- After the leases had ended, Marks and Spencer requested a refund of sums paid in respect of the period beyond 24 January 2012. These included rent and service charge, which had been paid for the quarter up to 24 March 2012, and insurance rent paid for the year to 30 June 2012.

Conditions relating to payments



- The Point, Paddington Basin



Conditions relating to payments



- Marks and Spencer claimed it was entitled to repayment of the rent because a term to that effect should be implied into the leases.
- At first instance, Morgan J concluded that it was an implied term of the lease that rent paid in respect of the period after the break date would be repaid after the lease had successfully been brought to an end in accordance with the break clause.
- The Court of Appeal overturned Morgan J's decision. Marks and Spencer then appealed to the Supreme Court. The Supreme Court unanimously dismissed Marks and Spencer's appeal.

Conditions relating to payments



- In *Marks & Spencer*, the Supreme Court reminded us that terms should only be implied into a contract if it really is necessary to do so. Reasonableness does not enter into the equation. Moreover, the more detailed a contract was, the less plausible it was to imply a term.
- In making its decision, the Supreme Court re-emphasised the old orthodoxy. For a term to be implied, the test is a strict one:
 - The term must be reasonable and equitable.
 - The term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it.
 - The term must be so obvious that “it goes without saying”.
 - The term must be capable of clear expression.
 - The term must not contradict any express term of the contract.

Conditions relating to payments



- The Supreme Court decided that Marks and Spencer could not therefore recoup the “overpayment”.
- Tenants will not, as a general rule, be entitled to any refund of rent paid in advance if they exercise a break clause in a lease.
- If parties want to be able to recover “overpayments”, they should ensure that leases include express apportionment clauses.

Can estoppel save the day ?



Can estoppel save the day ?



- *Avocet Industrial Estates LLP v. Merol Limited and Tudor Rose International Limited* [2011] EWHC 3422 (Ch)
- The Lease contained an option for the tenant, Merol, to break the Lease by giving to its landlord, Avocet, not less than three months notice. The break clause itself was conditional on Merol satisfying a number of detailed requirements.
- The Lease provided that a break notice served by Merol would be of no effect if any payment due under the Lease had not been made.
- Merol's solicitors served a break notice on Avocet. The break notice was accompanied by a detailed letter which stated that all of the requirements of the break clause had been satisfied.
- Avocet did not formally respond.

Can estoppel save the day ?



- Merol accepted that it had paid the rent due under the Lease late. However, Merol argued that it was not liable to pay default interest to Avocet unless and until it received a formal demand from Avocet.
- Morgan J concluded that Avocet was not obliged to serve a formal demand on Merol. Merol did therefore owe default interest to Avocet on the break date.
- Merol raised an estoppel argument. It submitted that between the date on which it served its break notice and the break date, it believed that it did not owe Avocet any sums (including default interest) under the Lease and that Avocet knew of Merol's belief. Merol argued that Avocet did not correct Merol's belief as expressed in those letters.

Can estoppel save the day ?



- Key question = did Avocet know at any point before the end of the break date, that Merol's belief that it had paid all of the sums due under the Lease was incorrect? If Avocet did have such knowledge, Avocet would have been estopped from taking advantage of Merol's mistake.
- Morgan J concluded that did not know that Merol's belief was incorrect until after the break date. He therefore found that Merol's estoppel argument could not succeed.
- Merol's non-payment of default interest meant that it had failed to satisfy all of the conditions attached to the break option and the Lease had not been terminated.
- The principle that a landlord could be estopped from taking advantage of a tenant's mistake was accepted by Peter Smith J in *MW Trustees v Telular Corporation* [2011] EWHC 104 (Ch).

Practical tips for tenants



- Pay any break premium in good time and in cleared funds.
- Instruct solicitors to conduct a forensic examination of all of the tenant's covenants within a lease so as to ensure that the scope for a landlord arguing that break conditions have not been satisfied is reduced as far as possible.
- Be conservative. If there is some doubt as to whether, for example, a payment is or is not required, it is far better to make the payment, ensure that the break of the lease takes effect, and then argue with the landlord afterwards that the landlord is under a duty to return the monies in question.
- Minimise the risk of a landlord seeking to rely on a failure to satisfy the repairing covenants by preparation: e.g.
 - Engage a building surveyor early to provide an assessment of what works must be carried out and to open discussions with the landlord about those works.
 - Prepare a comprehensive photographic schedule of condition.

Practical tips for landlords

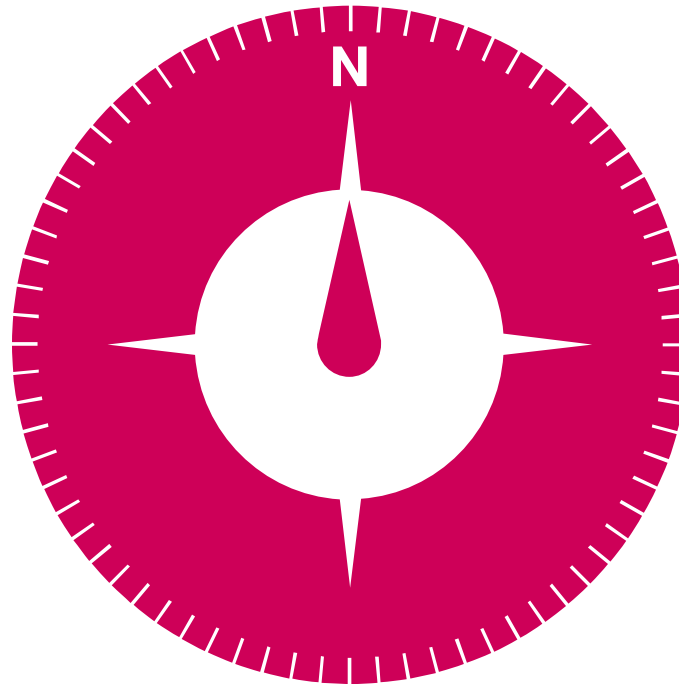


- The views expressed by Morgan J in *Avocet* and by Peter Smith J in *MW Trustees* mean that landlords have to be careful.
- There is a greater likelihood of an estoppel-based argument succeeding if the landlord does not tell the tenant of a tenant's error and give it the opportunity to correct it.
- What can a landlord do to minimise the risk of such an argument succeeding?
 - Mere silence is unlikely any longer to provide the landlord with a complete shield.
 - Write back to the tenant and explain clearly that the landlord is considering its position, that it needs to take legal advice and to carry out its own investigations and that, until it has received that advice and concluded those investigations, the landlord is unable to say whether or not what the tenant has asserted is correct.

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