

BREAK CLAUSE CONDITIONS

2020

EXPERT ADVICE FOR OCCUPIERS

Operating a break clause is not simply a case of submitting a formal notice to terminate the lease in accordance with the break clause requirements. Break clauses will almost always contain specific requirements for performance.

Failure to appreciate the true meaning may lead to severe ramifications. Neglecting to strictly comply with these pre-conditions may well render the validity of the break null and void.

The following break clause conditions have recently been tested in the courts:

Performance Conditions: There may well be a requirement to undertake specific conditions as part of lease break. These may be deemed 'absolute' or 'qualified'.
An 'absolute' condition means the tenant must comply with the obligation and the break will be invalid if there is a breach, no matter how trivial.
A 'qualified' condition means the tenant must have materially complied with the obligations. The Courts view on material compliance was to undertake more than what was "reasonable" but less than "absolute" compliance. If these conditions are not materially complied with, the break will be invalid.

Rent and all outstanding payments must be made by the break date: There is no de minimus rule when complying with break clause requirements in respect of arrears whether it be insurance or rent. No matter how trivial, a recent decision in court illustrates that any amount outstanding will still be sufficient to invalidate the break.

Payment of interest on late payments: It is the occupier's responsibility to ensure payment of interest on late payments is paid in full by the break date, even if this has not been demanded by the landlord. In a recent case, an occupier's failure to pay interest for late payment of rent was enough to invalidate a break. The amount was a mere £130.

Vacant possession: This is a standard requirement in many break clauses and should be taken seriously. There have been several cases on the subject all of which reflect on the precarious nature of such a requirement. Two examples are provided below:

1. An occupier was found to have invalidated their break by continuing to employ site security and contractors undertaking dilapidations work after the break date. The occupier was undertaking the works to reduce costs of the landlord's dilapidations claim, and were not a specific requirement of the break. The landlord had given a verbal agreement to allow the works after the break date but the judge found that this agreement was not binding and therefore did not constitute a waiver to the absolute requirement to give up the property with vacant possession.
2. More recently in 2016, two cases found that non-structural partitions left behind meant that vacant possession had not been given. Being non-structural they were capable of being removed without damage and had been installed for the benefit of the occupier rather than adding value to the property. Subsequently, the court deemed them to be a chattel rather than a fixture.

In the second case, the occupier had also left a photocopier, computer screens and reception desk and had failed to hand back key fobs. The court found that its actions constituted abandonment rather than yielding up the premises with vacant possession. By storing items at the premises it was, the Court held, deemed to be continuing to use the premises.

In both the 2016 cases the occupier's breaks were invalidated, leaving them liable to pay rent and continuing their leases.

Please see our separate vacant possession briefing note for further information.

Lessons learnt: Break clause conditions can be far more onerous than originally anticipated. When contemplating operating a break we recommend seeking legal advice on its interpretation. Also seek dilapidations advice on the subsequent liability on both the financial cost and the physical works required to comply. Break clauses should not to be taken lightly, particularly in a poor letting climate.

Landlords will look very closely at the wording of the break in order to assess whether the occupier has successfully complied with its requirements. The occupier must do the same. Careful analysis of the requirements is essential and early planning must be given if the occupier is beholden to undertake works as part of the break obligations.

Strict compliance is essential and there is no room for error. In recent judgements, the law is clear; no matter how trivial the breach, or harsh the circumstances, the courts will have no option but to find in favour of a landlord and render the break ineffective.

For more information, contact:

Alex Charlesworth, BSc (Hons) FRICS
Partner, Head of London Building Consultancy
+44 (0) 20 7152 5338
alex.charlesworth@eur.cushwake.com
www.dilapidations.net

125 Old Broad Street
London, EC2N 1AR
phone +44 (0)20 3296 3000
fax +44 (0)20 3296 3100
email info@cushwake.com
www.cushmanwakefield.com