

## Leases – break clauses – part 2

Landlords have traditionally tried to force on tenants conditions on exercising break rights and, if these conditions are not met, organisations may be left with all the burdens and obligations with respect to a leasehold property that they do not need, when they possibly also have alternative property that is operationally or financially more suitable. The courts have in the past been extremely landlord-friendly in the relatively large number of cases where disputes have arisen over breaches of break right conditions, but there are recent indications of a more realistic attitude.

There have been constant problems with the observance of conditions that a tenant must comply with in order for a break notice to be valid.

Conditions requiring the tenant to have complied with lease obligations at the time of the break notice are particularly problematic, as they can effectively require tenants to carry out repairs to the property that they would not necessarily have to do in view of statutory limitations on compensation that landlords are entitled to in cases of disrepair.

Such conditions have for some time been resisted by tenants' solicitors, but can still be found in older leases and cases where for one reason or another the tenant was prepared to put up with the risks and disadvantages of a provision that is now generally regarded as commercially unfair.

Recent court cases have however largely dealt with conditions requiring payment of rent.

The case of *Avocet v Merol (2011)* decided that where a break clause required payment of all sums due prior to the break date in order for the break notice to be valid, the notice could be invalidated if default interest was due even though there had been no formal demand for it. It does not help that there is no obligation on a landlord to indicate what is required for a tenant to comply with terms of a break right, for example by pointing out that although the tenant had partly complied with a condition relating to the break right, they needed to do more to fully comply with it.

In the case of *PCE Investors Ltd v Cancer Research UK (2012)* the court held that where a break clause stipulated that a tenant was to pay rent up to the lease termination date, the tenant had to pay a full quarter's rent on the last day of payment, notwithstanding that the exercise of the break clause terminated the underlease before the end of the quarter period.

The court however subsequently held in *Marks & Spencer v BNP Paribas (2013)* that in this type of scenario there could be an implied term in favour of repayment (after the lease has ended) of sums overpaid relating to the period after the break date.

### **What are the lessons?**

It is clear that compliance with all break right conditions must be carefully monitored in order to ensure that a break notice is fully effective. In the case of new leases, these recent cases present a strong argument for break rights with no conditions at all, or if that cannot be negotiated, a requirement for the landlord to provide information regarding whether the landlord considers that there has been full compliance with the break right to the break date.

For existing leases, it is sensible to take advice not only with regard to service of the break notice (above) but also with regard to what must be done in order to comply with any conditions.

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***PCE Investors Ltd –v- Cancer Research UK [2012] EWCH 884 (ch)***

***Marks and Spencer plc –v- BNP Paribas Securities [2013] EWCH 1279 (ch)***

[Click here to read part 1](#)

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