

WE WERE ON A BREAK!

Robert Botkai and Fiona Hallinan, of Winckworth Sherwood, give their expert advice on the workings of break clauses on leases



As Rachel and Ross on *Friends* will testify, when you break up it pays to make sure that both parties know you have broken up! The same applies to the landlord and tenant relationship.

Petrol retailers may be landlord or tenant either of the site as a whole or in respect of occupational leases/subleases for car washes, EV chargers or workshops.

The break clause

A break clause in a fixed-term lease allows either the landlord or the tenant or both to terminate the lease prior to the end of the contractual term. The right may arise on a single specific date, a number of dates throughout the term or may be exercisable at any time during the term on a rolling basis.

It is imperative that the right is exercised in accordance with the lease provisions. It is easy to unwittingly serve a notice incorrectly. Failure to serve a break correctly can result in the serving party being stuck with a financial commitment for years to come. Do not be tempted to cut corners!

How to exercise the break

First check your lease.

A break clause will state which party has the right to break and when it may do so. It will also state the notice period that must be given and it may stipulate precisely how the notice must be served.

Break clauses will typically contain conditions, in particular when the tenant is exercising the right. Any conditions attached to the right to break must be strictly performed.

Provisions and drafting differ, but a lease will typically state that at the break date:

- The tenant must have paid all the rent, or in some

cases all monies due under the lease.

Typically rent will be paid quarterly and a break date may not line up with the rent payment dates. A tenant must make sure that all rent due is paid for the full period. This may mean paying rent in advance of the break date for the period after the break date. The lease may contain a specific clause requiring a landlord to refund the overpaid rent. Without an express provision providing that overpaid rent is to be refunded the landlord is under no obligation to do so.

If a clause is drafted widely enough to include 'all monies due under the lease' this will include, for instance, service charges and insurance rent, which may be demanded close to the break date and will still need to be paid in order to comply – even if the amounts are in dispute. Pay now and argue about it later!

- The tenant must have performed all its covenants. This is a wide-reaching obligation, but particular attention should be given to the repair obligations under the lease. Look carefully at the repair, alteration, decoration and yielding up provisions that deal with the state the property is to be handed back in.
- The tenant must give vacant possession. There may be a requirement for any alterations carried out during the term to be removed.

Service of the notice

The lease may specify the notice provisions setting out the form of notice and the method of service. It will certainly prescribe the notice period.

Care needs to be taken to ensure compliance with the specific wording of the provision. 'Not less than six months' notice' and 'six months' notice' have different implications as to the timing of service.

There is no room for error here. Landlords receiving unwelcome break notices will be looking for every technicality on which to hang an argument that the notice is invalid.

So, how do you make sure that the notice is valid?

- Firstly, check your lease for specific provisions as to the form of notice and method of service. In



the absence of these, general lease provisions or statutory provisions will apply. It is advisable to take advice as early as possible in the process.

- Serve on the correct person! The landlord may not be the party that granted the lease, or even who rent is paid to. Registered addresses may have changed.
- Keep evidence of the method of posting or delivery.
- Make sure any conditions have been complied with. You may want to ask the landlord for confirmation of payments made. Consider any late payments that may have previously been made and any interest that may be due.
- Deal with any dilapidations prior to the break date and consider asking the landlord to prepare a schedule of dilapidations.

Receiving a notice

Many readers will own the freehold of their sites and have granted occupational leases. If you as landlord receive a break notice you should check carefully that the tenant has complied with the requirements of the lease.

It is advisable to seek professional advice when considering serving a break notice. A break notice cannot be withdrawn once served.

Conclusion

There are no second chances when it comes to break notices. Early advice from a specialist lawyer could save you legal fees further down the line.

To quote Ross's divorce lawyer: "I have been a divorce attorney for 23 years and never have I had so much business from one client."

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