

Andrew Walker QC



Break Clauses

- What are the secrets of favourable pre-conditions (e.g. regarding rent and vacant possession)?
- When does the landlord effectively waive compliance with pre-conditions?

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- 1) Rent paid up to date.
- 2) Compliance with all covenants (esp. repairs and alterations).
- 3) Vacant possession.

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Marks and Spencer plc v BNP Paribas
Securities Services Trust Co (Jersey) Ltd
[2016] AC 742

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Common situation:

- Rent is payable in advance on the usual quarter days.

Common break conditions:

- No rent due and unpaid on break date
- Other obligations to be satisfied on the break date (e.g. no breaches of other covenants)

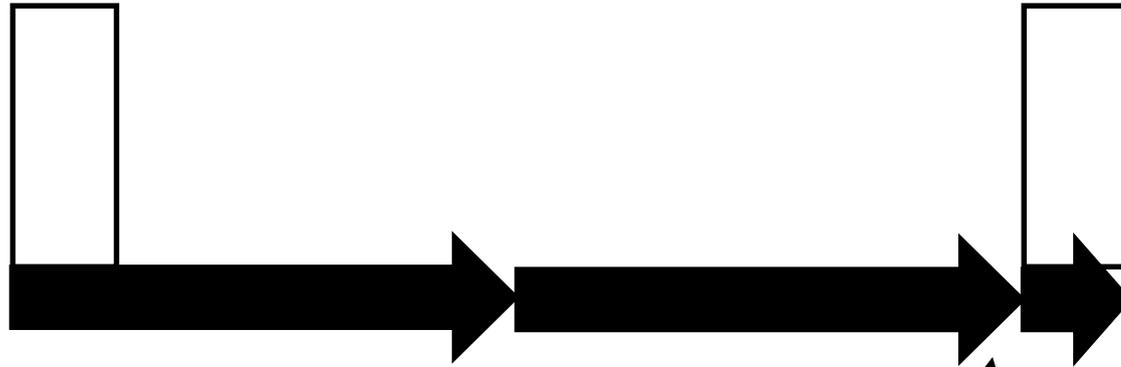
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25 December

25 March



24 Jan

24 March



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1) Make all break dates the days before the usual quarter days (i.e. 24 March, 23 June, 28 September and 24 December).

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2) Provide expressly for what is to happen to rent due before any break date which covers a period which runs beyond the break date.

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3) Ensure that the tenant is able to comply with all break conditions by the last rent day before the break date (and, ideally, say that only a proportionate part of the rent needs to be paid in that event).

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- 1) What disrepair?
- 2) What method and/or works of repair?
- 3) Enough time?
- 4) Cost justifies the risk of failure?
- 5) Other consequences justify the risk of failure?

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Removal of alterations:

- 1) Required in any event?
- 2) Required if notice given?
- 3) When can notice be given?
- 4) What form of notice is needed? Oral?

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NYK Logistics (UK) Ltd v Ibrend Estates
BV [2011], Court of Appeal

- failure to give up vacant possession
- still finishing off repair works

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Riverside Park Ltd v NHS Property
Services Ltd [2016], High Court

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Presence of chattels may affect whether vacant possession is given.

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Presence of tenant's fixtures may affect whether vacant possession is given.

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May be:

- 1) As a matter of law (not decided).
- 2) As a result of the description of the “demised premises” (decided, *obiter*).
- 3) As a result of an obligation to remove under the lease and/or a licence (decided, *obiter*).

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- 1) A chattel or a fixture?
- 2) A tenant's fixture or landlord's fixture?
- 3) Alterations too? Overlap?

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[Un]certainty

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When does the landlord effectively waive compliance with pre-conditions?

When it has said so.

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Avocet Industrial Estates LLP v Merol Ltd
[2012] L&TR 13 – came close with silence

MW Trustees Ltd v Telular Corporation
[2011] L&TR 19 – statement in e-mail

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Thank you.

Any questions?

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