

Break Options – Lessons from recent cases



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REFRESHER – THE TECHNICALITIES



Nature – what is a break clause?

- An option to determine prematurely:

“24. In its classic form an option is a unilateral (or “if”) contract. The promisor agrees to do something (typically to sell something) if the promisee does or refrains from doing something. The promisee himself does not make any promise: it is up to him whether he does or refrains from doing whatever it is that triggers the promisor’s obligation. That is why it is called an option.”

- Unilateral or bilateral
- Conditional or unconditional
- “*An option is nearly always a ticklish thing ...*”: Mackay v Wilson (1947)



Exercise of a break notice

- Conditions need to be strictly complied with
- Lewison LJ in *Siemens v Friends Life* [2015] 1 All ER 1068:

“... even trivial non-compliance with a condition on which the exercise of a break clause depends will preclude its successful exercise...”
- Requirements for giving notice must also be strictly complied with.
- Lord Hoffman in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 949 :

“If the 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.



Errors in notices

- *The 'reasonable recipient' test in Mannai* can rescue a notice if the terms of the Lease have been observed.
- It is the central message which is of importance – has the requisite information been conveyed.
- Reasonable recipient must be left in no doubt that the right to terminate is being exercised.
- Example potentially non-fatal errors :
 - Wrong language to identify right person (e.g. misspelling of name)
 - Notice specifying incorrect break date if obvious what the break date should have been
 - Notice not referring to the break clause



Ability to withdraw

- Once valid break notice served, it cannot be withdrawn (one cannot undo what has been done).
- The parties *may* mutually agree to waive the break notice. Effect → a new lease is deemed granted on the break date (*Taylor v Wildin* (1867-68)).
- BEWARE of the potential consequences:
 - SDLT
 - Release of guarantor
 - Issues with rent deposits
 - 1954 Act
 - Underleases
- Landlords –check with T what its intentions are. There may be an opportunity to re-negotiate terms before it serves the notice and prepares to exit the property.



Calculating time

- Exercisable on specific date(s) or after specified period on a “rolling basis”
- A specific notice period or a period of ‘*at least*’ a specific period? E.g:

“The Tenant may determine the Lease by giving written notice 6 months prior to the Break Date.”

- By missing out “... at least 6 months...”, real risk notice needs to be given on a particular day.
- Logistical nightmare – requires a courier; what happens if cannot deliver it to somebody or beyond 5pm; what happens if prescribed method of service (e.g., post) where one cannot be sure it will arrive on that day...
- Advice transactional colleagues to be aware of the risks. If in doubt, may need to serve multiple notices.
- Diarize the date well in advance. Do not leave until last minute. Additional time if L is overseas.



Waiver of conditions

- Strict performance can be waived by election
- Can be done orally, in writing or by conduct
- Conscious decision is required – not to be confused with estoppel or acquiescence
- Landlord must know: (1) the material facts; (2) that it has the right to choose; and (3) the legal effect of making each choice (see e.g., *H.B. Property Developments Ltd v SSE* [1998] L&TR 238)
- Note: managing agents can elect on behalf of the landlord - it is often their conduct which tenants rely on to argue a waiver
- Pointers: do not accept keys or hold them to tenant's order; return any liquidated sums; do not go into occupation; do not acknowledge the break is effective until taking legal advice



LESSONS FROM MORE RECENT CASE LAW



Wigan Borough Council v Scullindale Global Ltd & Ors [2021] EWHC 779 (Ch)

FACTS

- Council granted long lease of stately home to Scullindale for development into a luxury five-star hotel and wedding venue
- Lease contained a landlord break clause exercisable when Scullindale failed to comply with a 'Milestone'



- “(a) The 'Milestones': ...
 - (ii) *Prior to 23 May 2018 (insert date 2 years from date of Lease) to complete the Development in accordance with the Planning Permissions.*
- **"Event of Default"**
 - “means the occurrence of one of the following events: ...*
 - (b) the Lessee not achieving any or all of the Milestones defined in clause 4.6.”*
- Clause 9.2 *“following an Event of Default, the Lessor may terminate this Lease at any time by serving on the Lessee a Break Notice”.*
- Council served break notice on 16 September 2019, 16 months after alleged default.
- Scullindale contested the break.



THE CLAIM

Scullindale argued:

1. 'As good as' compliance: development had achieved a 4-star rating in April 2018 and been completed by September 2019. Completion had been delayed by the Council.

2. Notice served unreasonably late: implied term that any break notice had to be served within a reasonable time, rather than "at any time" throughout the term of the Lease.



Held:

- Even though a four-star hotel, not “in accordance with the Planning Permissions”. Milestone had not therefore occurred and there was a default.
- “*At any time*” meant just that - even if the Event of Default occurred some significant time before.
- No basis for an implied temporal restriction: clause was not unworkable as any absurdity could be avoided by a party serving notice to make time of the essence.
- Court did imply terms that: (1) Breach had to be subsisting; and (2) Landlord could not rely on its own wrong.



LESSONS

- Reinforces need for strict compliance. ‘As good as’ compliance is not enough.
- Where there is no temporal restriction, don’t assume right to break will be lost after a reasonable time after the default has occurred.
- Right to break may be lost if compliance is achieved (even belatedly) before a break notice is served – i.e, if no subsisting breach.
- Where there is no temporal restriction and a subsisting breach, defaulting party should consider forcing an election by making time ‘of the essence’.
- Party exercising the break will be unable to rely on their own wrong, but need to establish a clear causal link between the conduct and the default.



Vistra Trust Corp. (UK) Ltd v CDS (Superstores International) Ltd [2022] EWHC 3382 (Ch)

FACTS

- 21 year Lease to B&Q
- Clause 21:

“If the Tenant shall desire to determine the Term on or after 11 February 2023 and shall give to the Landlord not less than 6 calendar months prior notice in writing ...”



- **Break notice served by B&Q in 2018:**
 - 4 years before the break date.
 - By Birketts LLP, who acted for the managing agents (who in turn was an attorney for B&Q).
- B&Q then assigned Lease to CDS (Superstores International) Ltd
- CDS served s. 26 notice for a new tenancy under the LTA 1954 beginning the day after the break date.
- Section 26(4): *“A tenant’s request for a new tenancy shall not be made...if the tenant has already given notice to quit...”*
- Landlord sought declaration that CDS was not entitled to a new tenancy as its predecessor had already served a break notice.



CDS – deployed ‘kitchen sink’ style challenge, including:

- Implied term that break notice must be given a reasonable time before the break date.

Summary judgment:

- Where no earliest date is specified, it would not normally be right to imply a term that the break notice was not to be given “prematurely”.
- Other issues:
 - (1) Birketts had full authority of B&Q to give the break notice;
 - (2) Reasonable recipient would not be confused by service on “B & Q Plc” as opposed to “B&Q Plc”;
 - (3) No credible evidence to displace presumption of good service.
 - (4) s.26(4) was not limited to specific tenant *who served the notice*.



LESSONS

- Temporal restrictions: draft them in; do not rely on their being implied! Test for the implication of a term remains whether the contract would lack commercial or practical coherence without it.
- Service by and on agents: always a question of authority. Q of fact.
- Name changes: will be adjudged in accordance with *Mannai*. Check names and addresses of the parties (and any care of addresses) through Land Registry and Companies House checks.
- Check the service provisions in the lease and whether they are mandatory or permissive. If in doubt, serve by multiple methods on the landlord and its agents and obtain proofs of service.
- Check the form of notice required.



Capitol Park Leeds Plc v Global Radio Services [2021] EWCA Civ 995

FACTS

- 24 yr Lease from 12/11/21
- Break option:

“The Tenant may terminate this Lease on...2017 ...if the Tenant...gives vacant possession of the Premises to the Landlord on the relevant Tenant’s Break Date...”



- T served break notice.
- By the break date, it had stripped out a range of items including ceiling grids, ceiling tiles, ventilation ducts, office lighting, smoke detectors and much more...
- On the evidence, those items had been parts of the building itself or at least landlord's fixtures
- "Premises" defined in Lease to include "*all fixtures and fittings at the Premises whenever fixed (except Tenant's fixtures)*" and "*all additions and improvements made to the Premises*".
- Q: was there a failure by T to give "*vacant possession of the Premises*"?



High Court – Yes.

- T gave back ‘considerably less than the “Premises”’.
- Parties had drafted definition to ensure that T could not hand back an empty shell of a building which was dysfunctional and unoccupiable.

Court of Appeal - No.

- A tenant wishing to exercise a break clause has to comply fully with relevant conditions but it does not follow that the conditions should be interpreted so as to favour the landlord.
- VP alone refers to giving back the property free of “*people, chattels, and interests*”, not its physical condition
- Tenant could comply by demolishing building & handing back a patch of bare earth
- Compensation would be the appropriate remedy...



LESSONS

- When construing break clauses, need for strict compliance does not mean strict construction. Ascertain the substance of the clause – common sense interpretation.
- Test of vacant possession is more than just about giving up occupation.
- T must (i) remove all chattels and goods belonging to the tenant; (ii) remove all tenant's fixtures where required by the lease; (iii) return keys; (iv) ensure no persons of tenant (employees, contractors, security staff, subtenants or unlawful persons are in occupation on the break date).
- Take care when granting sub leases.
- Where linked with repairing / reinstatement, engage building surveyor as early as possible to advise what is needed
- Liaise with L in advance to confirm reinstatement requirements.



Compliance with other conditions

- Most difficult covenants to comply with relate to condition of the premises

“material compliance”, “substantial compliance”:

- Objective test. No discretion. Fairness and effect on L or T = not a relevant factor.
- *“Materiality must be assessed by reference to the ability of the landlord to re let or sell the property without delay or additional expenditure. Where the provision is absolute then any breach will preclude an exercise of the break clause.” (Fitzroy House [2006] 1 WLR 220)*
- No material breach if no subsisting breach on the termination date.

“reasonable compliance”:

- Prevents trivial breach resulting in loss of the option. Confers discretion on Court.
- Permissible to assess reasonableness by reference to T’s conduct throughout term.



Tips

- Tenants:
 - Engage a surveyor to advise as to breaches of lease covenants and necessary remedial works well in advance.
 - Ask L prepare a schedule of dilapidations at an early stage.
- Landlords:
 - Serve Schedules of Dilapidations 'without prejudice' to your ability to enforce the break conditions and mark them "interim" not "terminal."
- Consider whether terminal dilapidations claims can be settled in advance of the break date, in return for a release of the condition.



Condition to pay rent / other sums

- Sums to be paid? (*Dreams Ltd v Pavilion* [2020]: “any money due on completion” = crystallised liability for a given sum on relevant date, not damages).
- Rent payable in advance? Not apportionable in absence of clear express apportionment clause: *Marks & Spencer v BNP Paribas* [2015] UKSC 72.
- How is rent is defined in Lease? Does it include other payments? E.g. interest (*Avocet Industrial LLP v Merol Ltd* [2012] 1 E.G.L.R. 65), VAT (*Ventgrove Ltd v Kuehne and Nagel Ltd* [2022] SLT 1037).
- Check past payments are all up to date & ask L to confirm.
- Prior demand a precondition of liability?
- Set off? If in doubt pay whole amount on a w/prejudice basis and argue the point later.





Q&A



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