

Break clauses: A tenant's guide



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Introduction

A break clause allows a tenant to terminate their lease early, usually subject to certain conditions. This note explains how to get it right every time.

Why are tenants' break clauses so important?

They give tenants the flexibility to react to market conditions and changing needs: e.g. downsizing, upsizing or moving when premises have become over-rented or unaffordable.

However exercising a break clause can be fraught with difficulties and traps. Getting it wrong usually means losing the break and the lease continuing – which can end up being much more expensive than not being able to break at all.

Understanding break clauses

Break clauses vary considerably and each clause must be read carefully to see what is required. However, the key points to understand are:

- Break clauses are invariably conditional on doing certain things and those things can require considerable time, expense and planning.
- Typical conditions in modern leases include:
 - Service of a written notice by a given date (usually 6-9 months before the break date);
 - Payment of a "*break premium*". It is increasingly common for tenants to agree this condition (which is clear and certain) in place of a condition requiring compliance with all tenants' covenants;
 - Giving vacant possession; and/or
 - Payment of the principal rent.
- Some conditions (more usually in older leases) can be very onerous and can include:
 - Payment of "*all sums due*" under the lease. This picks up rent, service charges, insurance and any other charges (e.g. costs, or interest on any late payment of rent);
 - "*Compliance with other covenants*". This picks up all tenants' covenants. The most important are repairing, decorating and similar obligations.
- Traditionally, all conditions must be strictly complied with (i.e. 100 per cent).

Modern leases usually modify this rule by setting a lesser standard of performance (e.g. reasonable, material or substantial compliance). However, even where the standard is modified, a sensible tenant will aim to do too much rather than too little.

- The date for compliance may vary. Some conditions will have to be fulfilled at the time the break notice is served and others will require completion by the break date (or perhaps some other date).
- It is for the tenant to decide what has to be done to get the break. The landlord has no duty to assist or answer questions. That said, landlords may assist if approached in the right way and this can be helpful if there is doubt about what has to be done. If a landlord does agree something, this should be documented formally.
- Tenants should act defensively and cautiously to ensure that they do not fall into one of the common traps and thereby lose the break.

Common mistakes

These include:

- Missing the deadline for serving the break notice. Almost always fatal.
- Serving the notice on the wrong person/ address. Almost always fatal.
- Drafting errors in the notice (e.g. inserting wrong dates). Not necessarily fatal given recent case law.
- Serving a break notice and then changing your mind. This can be expensive as a notice cannot be (unilaterally) withdrawn and a landlord may take advantage of the mistake and ask for a higher rent to stay on!
- Failing to pay rent up to the break date. A particular problem arises where the break date falls on a quarter day or part way through the quarter. The Courts have held that the whole quarter's rent must be paid. In a 2001 case, the tenant paid some £1,859 a few days late (the annual rent being £82,500). This was held to be fatal. Another problem here is that the lease may define "rent" widely to include service



charges and other sums. If so, all such sums have to be paid.

- Failing to pay “*all sums due*” which can pick up unusual sums such as landlord’s costs or interest on late paid rent. In a 2012 case, a tenant failed to pay £130 of interest on late paid rent. This was held to be fatal, even though it had never been demanded by the landlord. Another problem can be the landlord demanding (dubious) service charges shortly before the break.
- Confusing a break conditional on works with terminal dilapidations and believing that a financial deal can be done after the break date. That’s fatal.
- Failing to do necessary work to the property (e.g. painting, redecorating etc). The point here is that some conditions can require very onerous work. In a 1997 case, the tenant failed to paint with three coats of paint using only two. This was held to be fatal! NB: Care should be taken as to whether reinstatement obligations must be complied with to secure a break. This will usually depend on the wording of the lease and advice should be sought on that.
- Relying on non-binding, without prejudice discussions with the landlord as releasing the need to do work. Usually fatal.
- Failure to vacate and deliver up the premises/ keys by midnight on the break date. Usually fatal. There is some uncertainty about what is meant by “*vacant possession*” and the extent to which it requires work (e.g. removing partitions, carpets etc...). Advice should be obtained on this.

How to get it right every time!

The correct approach is to know, and do, what your clause requires at the right time. In practice, that requires good advice, good systems, good planning and good management.

We suggest the following steps:

1. Instruct your agent to negotiate unconditional breaks when agreeing heads of terms. Instruct your lawyers to resist/minimise any conditions to the break.

2. If you take a lease with a break, get advice at the outset on what the break requires (i.e. what conditions apply and when) and diarise key dates in more than one diary.
3. Ensure a senior person has responsibility for implementing any break clause and ensure the key dates are in their diary. If they leave their role, ensure that someone else picks up this responsibility.
4. Instruct solicitors in good time to draft or serve the break notice. Get up to date advice on other conditions.
5. Pay any rent or other sums due (e.g. any premium) on or before the relevant date. If there is uncertainty about what to pay, one solution is to ask the landlord with a view to agreeing what has to be paid. If something is agreed, document this and ask the landlord to acknowledge receipt of all payments.
6. If works are necessary:
 - Instruct a building surveyor in good time to advise on what is required. Ideally this should be done before serving any notice so that the cost of complying is known before you serve notice to break.
 - Draw up a schedule of work including costings and a timetable. Allow time for: discussions with the landlord, getting legal and surveying advice on any problems, moving to your new premises, doing the work, finding the unexpected, clearing the premises and leaving it empty and tidy.
 - If you negotiate a deal, document it and make sure that it is clear in its effect: is it confirming the entire break or just agreeing certain conditions (e.g. works)? Do not let negotiations drift beyond the date where the works need to start and then find that the landlord drives a harder bargain or backs out of negotiations completely. So set the date for starting works and, if you don’t reach a deal by that date, start the works. You can always stop if you do a deal.
 - If you are doing the work, allow sufficient time. This means taking account of tendering the work, selecting a contractor, vacating the property to allow the work to be done, doing/ supervising the work, dealing with unexpected

problems, getting further advice, allowing for other eventualities (e.g. delivery of unusual items) and clearing, cleaning and vacating the property. Any necessary work must be done before the break date and all workmen and tools etc must be out.

- Keep the landlord advised of what you are doing, if appropriate. If consents are needed for works, apply in good time. Once the works are completed, invite the landlord to inspect the premises and agree that you have complied with your obligations. Try to get something in writing or review with advisers.
7. Vacate the premises (including all workmen, tools, furniture, etc.) before the break date. Try and agree in advance with the landlord what items should be removed and what can remain – and document it. Take photographs and let the landlord know that you have vacated, and hand back the keys.
 8. Double check well before the break date that all conditions have been or will be satisfied and that nothing has been missed.
 9. Golden rule: if in doubt about anything, err on the side of caution.

If this all sounds expensive, it can be. But it will be much more expensive to lose the break and find yourself paying rent, service charges, insurance and rates on two properties. And be assured that landlords are very willing to run a technical point to keep a tenant on the hook – especially in a weak rental market.

What happens if things go wrong?

Some mistakes are fatal (i.e. the break will be lost and the lease will continue); some are not.

If you think you’ve made a mistake, get advice as quickly as possible to see if the situation can be retrieved. For example, if it is a question of doing work, it is surprising how much work can be done in a short period. We had a case where £3.5 million of work was done in around 6 weeks from start to finish and the break was secured. Alternatively, it may be possible to do a deal which, though painful, is better than ongoing liability.

The worst case scenario is that the break is lost and the lease continues. Even if this happens, all may not be lost:

The landlord might miss the issue.

- It may still be possible to do a deal of some sort. The longer you delay, the worse the deal.

You may be able to assign or sublet the lease.

What can you do today?

We suggest the following:

- Appoint someone to monitor and manage lease breaks. Ensure they read this client guide.
- Review all your leases to diarise relevant break dates. Make note of any that require urgent action and deal.
- Draw up a management timetable for all relevant breaks and diarise as appropriate.
- If in doubt, get professional advice.

Further guidance

We will be producing further guides on break clauses which will focus in more detail on some of the issues raised above, including:

- Service of break notices.
- Doing work to get a break, the [Fitzroy](#) case on “substantial compliance” and related issues.
- Reinstatement obligations and break clauses.
- Vacant possession and breaks.
- Payment of rent and other money sums to get a break.
- Documenting deals in advance of a break.

For further information on this subject please contact:

Mario Betts

Senior Associate

T + 44 (0) 20 7074 8139

mario.betts@lewissilkin.com

Brian Kilcoyne

Partner

T + 44 (0) 20 7074 8068

brian.kilcoyne@lewissilkin.com