

GIVE US A BREAK!

As we enter another uncertain economic year, tenants' break clauses in leases continue to attract often unwelcome scrutiny. In this article we consider the implications of a handful of recent cases and offer some tips on how to avoid common problems.

GET THE NAME RIGHT

In *Baker Tilly Management Ltd v Computer Associates UK Limited (Ch D (Peter Prescott QC) 11/12/2009, as yet unreported)*, the tenant sought a declaration that it had validly served notice to quit under its lease of commercial premises. The lease had been granted to Baker Tilly Services Limited, but by the time of the notice to quit the tenant had changed its name to Baker Tilly Management Limited. The specific requirements of the break clause had been satisfied, but the notice was served in the tenant's old name. The landlord sought to avoid termination of the lease by claiming the notice was invalid because it should have specified the tenant's current name.

The High Court held that the actual words used on their own were not determinative.

The crucial issue was what these words would mean to the recipient of the notice in the context of the particular transaction.

From the perspective of the reasonable landlord, would he understand what was intended by the notice?

A distinction had to be drawn between the tenant as an entity and the label that was attached to that entity.

The tenant entity had not changed, it was merely its name that was now different. So when the notice was served it was still the same legal person. Accordingly, the reasonable landlord had to be considered to understand the effect of the notice, notwithstanding the discrepancy in the name used.

REFER TO ALL CURRENT TENANTS

In the case of *The Prudential Assurance Company Limited v Exel UK Limited & Another [2009] EWHC 1350 (Ch)*, the High Court had to decide whether a break notice intended to be served by joint tenants, but referring only to one of the tenants in the notice, was valid. A warehouse was let to two group companies, one of which, by the time of the notice, was trading, the other dormant. There had been previous correspondence between the parties' solicitors which was unrelated to the break, but was material in the context of what the reasonable landlord would have clearly and unambiguously understood from the contents of the break notice.

The judge found that the notice was invalid because it was not clear and unambiguous. The break clause had to be exercised by both tenants together, and the failure to refer to the dormant tenant meant that the landlord could not tell from the notice whether, for example, there had been an unauthorised assignment or if the trading company was seeking improperly to exercise the break for its own benefit.

Whilst the judge was satisfied that the solicitors were in fact authorised by both tenants to serve the notice, this was not made clear in the notice to enable the landlord to safely rely on it being sufficient to bring the lease to an end.

WHO CAN EXERCISE THE BREAK?

Norwich Union Life & Pensions Limited v Linpac Mouldings Limited [2009] EWCH 1602 (Ch) concerned the exercise of a break which was expressed to be personal. Linpac Mouldings Limited (**Linpac**) was the assignee under two leases of industrial premises granted in 1986. At the time of the assignment, the landlord gave Linpac a personal right to determine the leases; subsequently the leases were assigned to a group company, Linpac Automotive Limited (**Automotive**). Some time later, Automotive went into administration and the administrator sought the landlord's consent to re-assign the leases to Linpac.

The landlord refused consent to the administrator's application on the ground that the main purpose of the re-assignment was to enable Linpac to exercise the break clause. Automotive nevertheless re-assigned the leases without consent and Linpac then purported to give notice to terminate the leases to the landlord. In reaching its decision, the court had to consider two critical questions. First, was Linpac entitled to exercise the break even though it was no longer the tenant? If the answer to the first question was no, then would a re-assignment of the leases to Linpac be effective to restore the break right?

The court found for the landlord on both issues. It held that the purpose of a break clause is to entitle the tenant in possession to terminate the lease. There could be no commercial sense in allowing a former tenant to exercise the break to the detriment of the tenant in possession. Similarly, there could be no commercial sense in a finding that the parties intended a right which was personal when granted could be revived by subsequent reacquisition of the lease. This would cause uncertainty both for the landlord and to any prospective purchaser of the reversion. Had Linpac intended to be able to exercise the break in the future, it could have retained the lease and sublet the premises.

IS THE NOTICE IN TIME?

The consequences for a tenant leaving service of a notice until the last minute can be catastrophic. In *Orchard (Developments) Holdings plc v Reuters Limited [2009] EWCA Civ 6*, the Court of Appeal had to decide whether a right to break had been validly exercised. The terms of the break clause were favourable to the tenant, requiring only six months' prior notice to be given and that vacant possession of the premises be provided at termination. There was no issue over the requirement for vacant possession, but the landlord claimed that the provisions for service of notices under the lease had not been met.

The lease provided that any notice would only be valid if given by hand or sent by registered post or recorded delivery, unless the receiving party or its agent acknowledged receipt. The last day for service of any notice under the break clause was 30 July 2005. On 29 July 2005 (a Friday), a process server was instructed to serve the notice by hand but it was posted through the wrong letterbox. Further copies of the notice were sent by fax on both 29 and 30 July 2005, which had to be acknowledged by the landlord or its agent in order to be effective. Both faxes arrived but only after the landlord's office had closed for the week.

The landlord refused to acknowledge receipt of the faxes until well after the break date had passed, at which point the tenant claimed that the notices had been retrospectively acknowledged. Alternatively, the tenant claimed that the landlord was not entitled to frustrate the notices provision in the lease by refusing to acknowledge receipt. The Court of Appeal disagreed, and held that ineffective notice had been given.

The landlord was under no duty to acknowledge receipt in view of the more formal methods of service prescribed by the lease. There could also be no retrospective acknowledgment of the notices, and two of the three judges expressed a view that no valid acknowledgment could be given after the deadline for serving notice had passed.

PRACTICAL CONSIDERATIONS

These cases give just a brief insight into some of the pitfalls that surround break clauses. If you are a tenant under a lease, always instruct a solicitor in good time to prepare and serve the notice on your behalf. Consider early whether there are specific pre-conditions which must be complied with in order for the break to be effective – this will enable you to ensure that any rents to be paid are up to date and give sufficient time to carry out any required repairs. Remember that strict compliance is required to avoid the notice being defeated.

As a landlord recipient of a notice you may wish to consider taking legal advice as to whether the notice is in any way defective, either on its face or because it has been served incorrectly. Subsequently, you may need to take further professional advice as to whether any conditions to the exercise of the break have been properly complied with. With so much at stake, an invalid notice could enable you to eliminate void costs and the time and expense of having to find a new tenant for premises in what remains an uncertain market.

This article offers general guidance, it reflects the law as at February 2010. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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