SERVING BREAK NOTICES: AVOIDING THE PITFALLS

Camilla Lamont

The cost of getting it wrong

1. Compared with various types of statutory notices where complicated prescribed information is often required, serving a contractual break notice should be a relatively straightforward exercise. All that is usually required is a notice given by the tenant to the landlord that informs the landlord that the tenant is purporting to exercise a contractual right to break the lease in accordance with its terms. Yet time and time again, cases reach the courts where the determinative issue is as to the validity of a break notice. Why is that so? And what, if anything, can the draftsmen of notices do avoid the pitfalls others have succumbed to?

2. The failure to serve a valid notice in time can have drastic consequences for obvious reasons. Breaks are not often rolling and the tenant may lose the opportunity to break the lease for a further 5 or 10 years. The loss involved can quite often be staggering. It is therefore perhaps not surprising that so many cases reach the courts, particularly when the economy is in recession. It is part of the natural economic cycle that a recession will result in an increase in the numbers of tenants seeking to break leases in an attempt to extract themselves from over rentalised positions. Sir Kim Lewison, interviewed at the start of the economic downturn in the Estates Gazette on the subject of the effect of the recession on property litigation is quoted as saying "*there will no doubt be the usual rash of break clause cases*"[1]. That prediction has turned out to be accurate, with several cases reaching the courts in recent years concerning the validity of the exercise of a tenant's break. Many of these cases concern the question of whether or not a valid notice has been served in the first place.

[1] Article by Tina Desai, Estates Gazette (31.01.09)

3. Break options come in different shapes and forms and depend on the drafting of the lease in question. However they invariably require the service of a notice by the tenant notifying the landlord that it seeks to exercise the break in accordance with the lease terms. The exercise of the break is also frequently made conditional upon other matters, such as payment of outstanding rent, the giving up of vacant possession and in some cases (although rarer now) compliance by the tenant with other covenants in the lease, including compliance with its repairing obligations. These are issues that Nic Taggart and Tom Weekes will be looking at in more detail. The focus of this paper is on avoiding the pitfalls in drafting and serving a break notice.

4. This is an area of law where technicalities do unfortunately matter. In Hexstone Holdings Ltd v AHC Westlink Ltd [2010] EWHC 1280 (Ch) the validity of the notice was challenged by the landlord on the grounds that the notice had not been given by the tenant but rather by an associated group company. The tenant submitted that the landlord's arguments were "*unattractive and opportunistic*" but Edward Bartley Jones QC (sitting as a deputy high court judge) rejected that submission in the following passage, which could usefully be cited by a party running a technical point in future:

> "[The tenant] was, by clause 7 of the Underlease, given a contractual right which it had to exercise in accordance with the terms of that contractual right and certain basic principles of law where agency was involved. There is nothing "unattractive and opportunistic" in a landlord saying that a contractual right has not been exercised in accordance with its terms (nor in a landlord saying that the requirements of the general law in respect of the service of notices by agents have not been fulfilled). It may, perhaps be, that the requisite "general agency" could have been established in this case by AHC by different evidence. But there is nothing "unattractive and opportunistic" in [the landlord] saying that [the tenant] has failed to adduce such evidence at trial."

Validity of break notices: applying the *Mannai* test

5. The break clause will need to be examined to ascertain what the contents of a break notice must state in order for the notice to be valid. However, generally speaking, a break notice must

simply, but unambiguously, communicate particular *meaning* – namely, that the tenant wants to exercise his entitlement, conferred by the break clause, to determine the lease (see Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749). For the purpose of ascertaining whether the notice has succeeded in doing so: "The construction of [the break notice is to be] approached objectively[2]. The issue is how a reasonable recipient would have understood the notice. And in considering this question a notice must be construed taking into account the relevant objective contextual scene[3]" (see Lord Steyn in Mannai at page 767).

6. A break notice *is* likely to succeed in communicating its central message (namely that the tenant wants to exercise his right, conferred by the break clause, to determine the lease) even if the break notice fails to refer to the break clause[4] or the break date[5]; or does not name either the landlord or tenant.

7. It will be a question of fact whether an inaccuracy or error in the contents of a break notice has, as a result of obscuring the notice's central message, invalidated the notice.

8. Break notices have been held valid notwithstanding that they have misidentified the break date: see Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 (12 January rather than 13 January); and Peer Freeholds Ltd v Clean Wash International Ltd [2005] EWHC 179 (Ch), [2005] 1 EGLR 47 (22 August rather than 7 November).

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[2] Any *subjective* interpretation placed on the notice by the server or the recipient should be disregarded. So a break notice might *not* be valid, on the ground that it contains an error or inaccuracy that might have misled the "reasonable recipient" (who must be in "no doubt" as to how a notice was intended to operate), even though the actual recipient was not misled in any way (see Ravenseft Properties Ltd v Hall [2001] EWCA Civ 2034, [2002] 1 EGLR 9). Some authorities have suggested that, even if a notice falls to be interpreted by reference to how it would have been understood by a reasonable recipient, the actual recipient's subjective understanding of (and reaction to) a notice might nevertheless provide evidence about how the reasonable recipient would have interpreted the notice; with the result that the Courts, when interpreting a notice, are entitled to have regard to the actual recipient's subjective understanding of (and reaction to) the notice. However, in Lancecrest v Asiwaju [2005] EWCA Civ 117, [2005] 1 EGLR 40 a majority of the Court of Appeal held that, for the purposes of interpreting a notice, "to rely in any way upon the reaction of the actual recipient is unsound in principle, and could well lead to inconsistency and unfairness" (per Neuberger LJ at page 44).

[3] The factual background against which a break notice will fall to be interpreted can include such things as covering letters (M&P Enterprises (London) Ltd v Norfolk Square Hotels Ltd [1994] 1 EGLR 129); other notices (Barclays Bank v Bee [2001] EWCA Civ 184, [2002] 1 WLR 332); and rent demands and and previous litigation (Lay v Ackerman [2004] EWCA Civ 184, [2005] 1 EGLR 139). The non-factual background against which a notice will fall to be interpreted can include the state of the law or proved common assumptions that, as it happened, were quite mistaken (BCCI v Ali [2002] 1 AC 251, per Lord Hoffmann at page 269).

[4] Giddens v Dodd (1856) 3 Drew 485.

[5] Allum & Co Ltd v Europa Poster Services Ltd [1968] 1 All ER 826.

9. There have been several cases concerning whether a tenant's break notice was invalidated on the ground that it has misidentified the tenant or tenants. In Prudential Assurance Co Ltd v Exel UK Ltd [2009] EWHC 1350 (Ch), [2010] 1 P&CR 7, Jeremy Cousins QC (sitting as a Deputy Judge of the High Court) set out (at page 136) the following principles governing the resolution of such an issue: The following principles emerge from the authorities:

> (1) To be effective a break notice served by or on behalf of a tenant must clearly and unambiguously communicate to the landlord that the person entitled to exercise the break provision is determining the lease on a particular date...
>
> (2) If someone other than the tenant gives the notice without stating that he acts as an agent, the notice will be valid provided that the giver of the notice was authorized to give it, and the circumstances are such that the landlord can act upon the notice safely in the knowledge that it will be binding upon the tenant...
>
> (3) An objective approach is to be taken to construing a break notice. What has to be considered is how a reasonable person, in light of the background which could reasonably have been expected to be available to the parties, would have understood the notice...
>
> (4) A mistake in the notice, even as to the identity of the person giving it, will not necessarily invalidate it, provided that in all the circumstances its meaning is clear, the mistake is obvious, and the recipient can safely rely on it".

10. Break notices which misidentified the tenant were held to be invalid in the Prudential Assurance case (in which the notice stated that it had been served on behalf of only one of the two tenants); and in Lemmerbell Ltd v Britannia LAS Direct Ltd [1998] 3 EGLR 67 and Procter & Gamble Technical Centres Ltd v Brixton Plc [2003] 2 EGLR 24 (in which break notices stated that they had been served, not by the tenants, but by companies in the same group as the tenant). On the other hand, in Townsend Carriers Ltd v Pfizer Ltd (1977) 33 P&CR 361 and Havant International v Lionsgate (H) Investment [2000] 2 L&TR 297, in which the break notices were stated to be served by a company in the same group as the tenant, the break notices were held to be valid.

11. Whether the misidentification of the *landlord* in a tenant's break notice invalidates the notice will, again, depend upon whether the mistake prevents the break notice conveying its central message: see, for recent decisions, MW Trustees Ltd v Telular [2011] EWCA 104 (Ch) (in which the misidentification of the landlord would not have invalidated the notice) and Standard Life Investments Property Holdings Ltd v W&J Linney Ltd [2010] EWHC 480 (Ch), [2011] L&TR 9 (in which the misidentification of the landlord did invalidate the notice).

12. It is important to appreciate that the *Mannai* case itself was one where the break clause in the lease in question did not require that the notice itself specify the correct termination date. As Lord Hoffmann said at 776

> "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. But the condition in clause 7(13) related solely to the meaning which the notice had to communicate to the landlord"

13. Of course the lease may contain mandatory requirements of "the blue paper kind". In such cases the mandatory requirement must be strictly complied with and *Mannai* will be of no assistance in the event of non compliance. For example, in Claire's Accessories UK Ltd v Kensington High Street Associates LLC [2001] PLSCS 112, a landlord's break notice was ineffective even though it had been served on the tenant's employees at the premises because the lease required all notices to be served on the tenant at its registered office. This demonstrates the importance of reading the lease as a whole (and not just the break provision in question) before serving a notice. It is crucial to look to see what, if any, are the prescribed requirement of service of notices more generally. In Orchard (Developments) Holdings Plc v Reuters Ltd [2009] 16 EG 140, if reliance on a faxed notice was to succeed it was essential that the landlord be shown to have acknowledged receipt in writing at the very latest before the break was to take effect. This had not been the case and so the purported break was ineffective. Similar reasoning applies to cases where the notice is given by or to the wrong party. In these cases, the error is a "blue paper kind" and it matters not what the reasonable recipient would have understood by the notice

The Golden Rules

14. If there were a list of golden rules to be followed in drafting and serving break notices they would in my view include these:

- Adopt the right mindset by assuming that the validity of your notice will be brought into question in subsequent litigation;
- Allow yourself plenty of time;
- Read the Lease before doing anything (and then read it again);
- Draw up a check list of requirements before drafting the notice;
- Make no assumptions and do not be tempted by short cuts;
- Have the notice checked by at least 2 fee earners;
- Double check that there have been no material changes (as to identity of parties to lease and or their addresses) between date of drafting and date of service of the notice;
- If in doubt, adopt a cautious approach;
- Serve several copies of the notice (in the hope that at least one method will suffice);
- If the validity of your notice is brought into question in any way serve another notice without prejudice to the first as soon as possible (if that is an option); and
- Try and get the landlord or its solicitors to acknowledge receipt of and effectiveness of a notice if you can.

Getting the parties right

15. This falls into two parts: who is required to give the notice and on whom is the notice required to be served? This is perhaps more difficult that one would imagine at first sight. Further, does the relevant contractual provision require that the name of the landlord/ tenant be actually specified in the notice? Even if it does not, it is usually good practice to include such information.

16. Usually the notice has to be given to "the landlord" or "the tenant". As we all know both reversions and unexpired residues can change hands numerous times during the duration of

the term and the original parties to the lease may not have any current interest. It is therefore important to get it right. Indeed the cases coming before the courts recently demonstrate that the most frequent "clanger" is indeed the failure to ensure that the notice is served on or by the right person.

17. If the lease, as is normal, requires the notice to be given by the tenant to the landlord, and in fact the notice is not so given, it is not permissible to fall back on *Mannai* principles of interpretation. In these cases, it does not matter if the recipient might have thought that the notice was validly given if in fact it was not. This requirement is therefore of the "blue paper" kind identified by Lord Hoffmann in *Mannai*, although misnomers in the notice may be saved by *Mannai* in an appropriate case.

Notice not given to the landlord

18. A leading Scottish case illustrates the danger of relying on what managing agents say and or on documents such as rent invoices etc. In Ben Cleuch Estates Ltd v Scottish Enterprise [2006] CSOH35; [2006] PLSCS 57 the tenant, Scottish Enterprise, was held to have failed to terminate its lease effectively because it had served the break notice on the wrong party. One might therefore readily conclude that the tenant only had itself to blame. However, the facts warrant closer examination.

19. The tenant's lease contained a break clause that entitled it to terminate on one year's notice. The clause contained a number of conditions or requirements: in particular, in order to terminate the lease on 2 February 2006, the tenant had to give a written notice *to the claimant landlord* prior to 2 February 2005.

20. The actual landlord was the claimant, Ben Cleuch Estates Ltd, which was a subsidiary company of another company, B, which had been established as part of joint venture to invest funds in commercial properties. The claimant landlord had changed its name but the tenant was not told and invoices were sent in respect of rent by managers stating to be "acting as agents for B". Perhaps not surprisingly Scottish Enterprise served the notice on B.

21. Even though the notice had come to the attention of Ben Cleuch Estates Ltd, it was held at first instance by the Court of Session (Outer House) that the notice was not validly given because

full compliance with the terms of a contractual break clause was necessary to effect the break and there was no such compliance since no notice had been given to the claimant landlord[6]. On appeal to the Court of Session Inner House, this part of the reasoning was upheld. It was expressly held that it mattered not how the notice would be construed to the reasonable recipient landlord as the notice had quite simply not been served on the landlord at all. However, on appeal the harshness of the decision was mitigated in that the Inner House held that the actual landlord, Ben Cleuch Estates Ltd, was personally barred in all the circumstances from denying that B was the landlord and therefore from denying the validity of the break notice. This represents a fair result in light of the fact that the rent invoices served on the tenant had specified that B was the landlord and the tenant had relied on that in serving the break notice on B. On the facts one would expect a similar result in the English courts through the operation of ordinary principles of estoppel.

22. This case illustrates the strictness of the principle that where the exercise of an option is made conditional, the conditions will generally be construed as conditions precedent which must be strictly complied if the option is to be validly exercised. It also illustrates how important it is to research the true position before serving any notice. An estoppel argument may not be open to the tenant on the facts, in which case it will be held to have invalidly exercised the break.

23. Service on the wrong landlord will also invalidate a break notice in this jurisdiction. In Standard Life Investments Property Holdings Ltd v W&J Linney Ltd [2010] EWHC 480 (Ch), a notice was held to be invalid because it had been served on the wrong party. In that case the original landlord had disposed of its reversion (by way of an overriding lease) to Standard Life before the tenant purported to exercise a break option. The tenant served the notice on the original landlord and not on its current landlord, Standard Life. Under the break option the notice had to be served on "the landlord".

[6] There is currently some debate as to whether or not the *Ben Cleuch* decision would go the same way in the English and Welsh courts. My own view is that the harshness of the decision stems from the fact that Ben Cleuch got the notice indirectly because it shared directors and registered office with B. In England the position might be distinguished. In *Townsends Carriers Ltd v Pfizer Ltd* (1977) 33 P&CR 361 at page 366 Megarry V-C said that "*I do not think that a requirement to "give" notice is one that excludes the indirect giving of notice. The question is whether the notice has been given, not whether it has been given directly. If the note emanates from the giver and reaches the ultimate recipient, I do not think that it matters if it has passed through more hands than one in transit*." However this reasoning was rejected on appeal by the Court of Session (Inner House) in *Ben Cleuch* [2008] CSIH 1.

24. Lewison J rejected an argument that service on the original landlord would suffice merely because the original landlord was defined as "the landlord" in the Lease. The parties to the lease must have contemplated that the reversion would change hands. A former landlord would have no interest in checking whether the conditions applicable to the exercise of the break clause had been complied with and would have no interest in communicating with the current landlord. One such condition was the giving of vacant possession, which could only be given to the current landlord. It could not be contemplated that the tenant would move out of the premises and return the keys to the current landlord without having given any notice of its intention to do so.

25. Further, Lewison J rejected an argument based on the fact that a copy of the notice had been served on a third party whom the tenant claimed was acting as the landlord's managing agents. There was no evidence that this third party had any decision making power under the terms of the lease such as to entitle the giver of the notice to rely on certain provisions in the lease regarding service on persons with such power. Further the notice was not addressed to the landlord and it was not reasonable for the third party to have realised that this was a mistake. The reasonable recipient of the letter and the notice would not have understood that it was meant to be addressed to the current landlord.

26. In MW Trustees Ltd v Telular Corporation [2011] EWHC 104 (Ch), a break notice had been served by the managing agent who had actually read the lease and appreciated that it had to be served by special delivery post. This she did, but unfortunately she did not appreciate that there had been an assignment of the reversion and therefore she served the wrong party. Had it not been for a subsequent waiver of this defect by the new landlord, this error would have invalidated the notice. On the facts the landlord was held to be estopped from denying the effectiveness of the notice.

Notice not given by the tenant

27. Similar considerations apply where the notice is given by the wrong party. There is a distinction here between those cases where the notice has simply not been given by the tenant or a person authorised by the tenant at all. In these cases, *Mannai* will never come to the rescue. In other cases the notice might have been given by an agent with the authority of the

tenant. The issue then arises as to whether misnomer regarding the identity of the tenant (or the failure to make the agency clear in the case of an undisclosed agent) passes the *Mannai* test.

28. In Prudential Assurance Co Ltd v Exel UK Ltd and another [2009] EWHC 1350 (Ch); [2009] PLSCS 200 the landlord granted the two defendant companies, which were part of the same group, the tenancy of a warehouse commencing in April 2002 and expiring in April 2012. The second defendant was a dormant company and a wholly-owned subsidiary of the first defendant. By clause 7.2 of the lease, the defendants were entitled to determine it in March 2007 by giving the claimant not less than nine months' written notice and provided that: (i) they had paid the rents reserved up to the date of the expiry of the notice; and (ii) on such expiry, they delivered up the premises with vacant possession. Once the notice expired, the term would end but without affecting the rights of either party against the other in respect of any previous breach of covenant.

29. In June 2006, a solicitor purporting to act under the break clause on behalf of the defendants sent the claimant a break notice that referred only to the first defendant. The claimant therefore took the view that the notice was invalid since it had been served without the authority of both defendants, as tenants. The court had to decide a number of issues. This paper deals only with the issue whether the notice was effective under the break clause.

30. The notice was held to be ineffective. In order to be effective, a break notice served by or on behalf of a tenant had to communicate clearly and unambiguously to the landlord that the party entitled to exercise the break provision was determining the lease on the permitted date. If a party other than the tenant gave the notice without stating that it acted as an agent, the notice would be valid provided that the giver of such notice was authorised to do so, and the landlord could act on the notice safely in the knowledge that it would be binding upon the tenant.

31. An objective approach was to be taken when construing a break notice. What had to be considered was how a reasonable person, in the light of the facts that could reasonably have been expected to be available to the parties, would have understood the notice. A mistake in the notice, even as to the identity of the party giving it, would not necessarily invalidate it, provided that its meaning was clear, the mistake was obvious and the recipient could safely rely on it.

32. However, in this case the notice was not a valid exercise of the break clause since it would not clearly and unambiguously have been understood by a reasonable recipient to be an effective notice. Its terms would generate doubt as to whether it had been served on behalf of the second defendant because the terms of the notice suggested that, although the second defendant was known to have been a lessee, the notice was not being served on its behalf. Material both in the notice and extraneous to it suggested that the omission of a reference to the second defendant in the notice was not accidental.

33. Likewise the fatal error in Hexstone Holdings Ltd v AHC Westlink Ltd [2010] EWHC 1280 (Ch) was the fact that the break notice had not been served by the tenant, but by an employee purporting to act for an associated company of the tenant. In that case the tenant company had been taken over by the Stobart Group. A letter was written to the landlord informing it that the tenant would change its name and be known as Edie Stobart Ltd. However, that name change never happened and Edie Stobart Ltd was in fact a separate company in the same group. A break notice was served in the name of Edie Stobart Ltd by a Mr. Nixon, an employee of that company. This point was picked up immediately by the landlord who claimed that the notice was invalid. The judge in that case held that, unless saved by some principle of the law of agency, the notice must be invalid since it was not given by the tenant under the underlease but by a third party.

34. In that case it was sought to be argued that Mr. Nixon and or Edie Stobart Ltd were agents for the tenant. There was a very complicated corporate structure in that case. The problem was that Mr. Nixon simply gave the notice in the name of Edie Stobart Ltd because he considered that company controlled the tenant. However, he could not point to any authority having been given expressly by the directors of the tenant and there was no evidence to establish general agency. This case demonstrates the importance, if you act for a tenant in a similar position, of clarifying the basis of the instructions and adducing full evidence as to the chain of authority, particularly in group company situations. In *Hexstone*, it may have in fact been the case that authority had been given, but inadequate evidence was given at trial to satisfy the court that Mr. Nixon had authority to do that which he had purported to do.

35. However, even if an agency relationship had been established in that case, the notice would not have been saved because the notice failed to make any reference to the fact that the giver

of the notice was acting as an agent. Therefore the reasonable recipient could not have safely acted on the notice in the knowledge it would be binding. The reasonable recipient would not have known of the agency and so would not have known whether the actual tenant had authorised it. Further, the judge in *Hexstone* held that if a notice is given by the wrong person (which is not saved under principles of agency) it will not be saved by *Mannai*. A notice given by X without the authority of Y cannot be treated as a notice given by Y simply because the reasonable recipient would think that it was given by Y.

36. In one recent misnomer case, a break notice was held to be saved, applying *Mannai*. In Baker Tilly Management Ltd v Computer Associates UK Ltd (11 December 2009, unreported). Baker Tilly Management Ltd was the tenant who applied for a declaration that it had validly exercised the break option on its lease. When the lease was granted the claimant tenant's name was "Baker Tilly Services Ltd". By the time the notice was served, the tenant had changed its name to "Baker Tilly Management Ltd" but the notice was erroneously served using the tenant's old name. It was therefore a classic misnomer case. Peter Prescott QC (sitting as a deputy of the High Court) held that the notice was valid. A distinction had to be drawn between the thing and the label attached to it. In that case the tenant had undergone no material change, it had simply changed its name. The landlord recipient had to be taken to know this and accordingly the break notice, despite the disparity in the names used by the tenant, was valid. It would not have been confusing to the reasonable recipient.

Making sure you get the identity of the landlord and tenant right

(i) *Registered Land*

37. Where title is registered, the position is quite straightforward. The simplest way is to obtain up to date official copy entries from HM Land Registry to identify the relevant "landlord" or "tenant". Be careful not to rely on historic office copy entries on the client's file. The position might have changed since your client took an assignment of the term and or reversion, even if only a few months before. Get up to date entries that cover you in respect of the time when the notice is served.

38. Even then, complications can arise in respect of the period in between assignment and completion by registration. This is best illustrated by the case of Brown & Root Technology Ltd

v Sun Alliance Assurance Co Ltd [2001] 1 Ch. 733 which concerned the validity of a break notice served by the assignor of the term after assignment but before completion by registration. The point in that case was that the right to break was non assignable and therefore the question was whether the transfer (albeit not completed by registration) rendered the break option redundant. The Court of Appeal held that as the transfer had not been completed by registration, the legal estate remained with the subsidiary who was entitled to exercise the break. This is a direct consequence of the deeming provisions in s.22(1) of the LRA 1925 (and now LRA 2002, s.11(3) and 12(3)) whereby the registered proprietor is deemed owner.

39. In Mount Cook Land Ltd v The Media Centre (Properties) Ltd (No. 2) [2006] PLSCS 89 (County Court, HH Judge Hazel Marshall QC), Mount Cook transferred its interest in the property to its associated company, Mount Eden. The assignment had not been completed by registration when Mount Cook issued forfeiture proceedings. However the registration had been completed when Mount Cook served those proceedings. It was held that at the time of service Mount Cook had no right to elect to forfeit by serving proceedings because it was no longer the landlord. It would follow from this decision that Mount Cook was entitled to issue. Therefore, the appropriate person to serve a section 146 notice is the registered proprietor at the time of service even if there has been an assignment not yet registered.

40. However, certain dicta in Scribes West Ltd v Relsa Anstalt (No. 3) [2005] 1 WLR 1847, might render the only safe course of action to serve on (or perhaps more accurately on behalf of) both the assignee and the assignor in the post assignment / pre registration period. In that case there had been a transfer of the freehold reversion between two entities, from Relsa Anstalt to Relsa Barkers, of which notice had been given to Scribes, the tenant, but the transfer had not been registered. Relsa Barkers re-entered the premises on the grounds of non payment of rent, notwithstanding that it was not registered proprietor. It was held that Relsa Barkers was entitled to re-enter when it did, on the basis that section 141(2) of the LPA 1925 governed the position (for old leases) with respect to the transfer of the right to collect rent under a lease on the assignment of the reversion. That section provides that the right to take advantage etc of such a covenant is vested in "*the person from time to time entitled . . . to the income of the whole or any part of the leased land*." Carnwath LJ held the word "entitled" does not, of itself, import a distinction between legal and equitable interests. It connotes simply an enforceable right to the relevant income and, as equitable assignee, Relsa Barkers had a right

to receive rent as an enforceable right as against the assignor. Therefore both Relsa Barkers and Relsa Anstalt had the right to the income. The result is a bit of an oddity. On that analysis, the safest course would be to serve notices on (or on behalf of) **both** the assignor and or assignee of the term/ reversion as appropriate.

(ii) *Personal break clauses*

41. In some cases the break option might be drafted in such a way as to make it personal to the current tenant. It will usually require express words or clear implication for a break option to be construed as being personal to a particular tenant: see Gemini Press Ltd v Parsons (QBD, unreported, 24 April 2012). A question arises whether it can be exercised following assignment by the assignor or even on re-assignment to the tenant expressed to have the benefit of the break option. Following Aviva Life and Pensions UK Ltd v Linpac Mouldings Ltd [2010] EWCA Civ 395, [2010] L & T R 10 it remains the case that a personal break provision will rarely be construed as being exercisable once the person with the benefit of it has assigned the lease. It is not impossible to draft leases that have this result, but it would require very clear words in order for the court to so construe it. Of course, such wording is likely to be unfavourable to a landlord or any assignee of the tenant. It will be important, particularly where there is a proposed assignment, for these issues to be considered at the outset and the right to break exercised by the original tenant prior to assignment, if that is desired.

(iii) *Unregistered Land*

42. Unregistered title is more difficult and there is, unfortunately, no real substitute to getting the relevant title documentation and going through it, tracing the conveyancing history and looking for any notices of assignment etc. If notice of assignment has been given, then the tenant cannot rely on s.23(2) of the LTA 1927 which deems service on the original landlord good service if no notice of assignment has been given.

(iv) *Company House searches*

43. It is also good practice to do a company search at Companies House against the company number since the name of a company and or its registered office might have changed. The one constant will be the company registration number. Watch out for sneaky changes of

name. It is not unheard of for companies in a group to swap names which can be very misleading. Check the name against the number and in doubt the number prevails.

v) *Joint tenants and landlords*

44. If there are joint tenants, the notice should be addressed and served on or by all of them. For example, section 25 notices addressed to one of two joint tenants have been held to be invalid[7]. Similarly joint landlords should join together in giving a notice[8] and should be jointly served.

When can or does the notice have to be given?

45. Again issues of timings of notices are very important, especially if the right to serve a notice is not "rolling" but rather can only be exercised at one point in time or before a certain date.

46. As a general rule one should get in the habit of diarising key dates in leases such as those in break clauses and option provisions so as to allow plenty of preparation time. As before, the question of when a notice must be served is a matter governed by the contractual provisions themselves.

47. It you are required to give at least 6 months' notice before the expiry of the (say) 3rd year of the term, make sure that the notice is served in plenty of time. Likewise if the notice must be given between certain dates, make sure it is not served prematurely. There may be interesting points as to the construction of a break clause which requires, "***Six calendar months' notice*** *in writing* ***immediately prior to the expiration of the term*** *hereby granted*. Does that mean "not less than 6 months" or "6 months, not a day more or less"? It should be noted that the authors of *Barnsley's Land Options say this at 9-032*,

> "A notice given before the appointed time may be ineffective. Care must be taken where an option requires notice to be given "six months before the expiration of the term". It may not permit the tenant to serve his notice at any earlier time."

[7] Booth Investments Ltd v Reynolds (1974) New LJ 119
[8] Pearson v Alyo [1990] 1 EGLR 114, CA

48. If possible it would be sensible, when faced with such a provision, to make sure that service is effected on the day in question. However, my own view is that the court is unlikely to construe such a provision as requiring service on a particular day although it might need to imply a term to ensure that notice is not given very prematurely.

49. In Biondi v Kirklington and Piccadilly Estates Ltd [1947] 2 All ER 59, the written request for a renewal was to be made "6 calendar months before the expiration of the term". The term of the lease was 35 years. The lessee purported to rely on a notice which had been served by his predecessor a mere 10 days after the commencement of the lease and sought specific performance. Roxburgh J said, at p. 60

> "The phrase: "On the written request of the lessees made 6 calendar months before the expiration of the term hereby granted"- i.e., Feb.8, 1946 – is capable of at least four different meanings: (i) made on Aug. 8, 1945; (ii) made at any time before Aug.8, 1945; (iii) made on or a reasonable time before Aug. 8, 1945; and (iv) given so as to take effect on Aug. 8, 1945."

50. The judge went on to say that only construction (ii) would have availed the plaintiff so the ratio of his decision is purely confined to the rejection of that construction on the basis that no long interval of time was contemplated between the making of the request and the granting of the further lease and also on the basis that under the terms of that agreement, breaches were only to be taken into account as at the date of request. The construction contended for by the lessee would have allowed it to renew based on a notice served 10 days after the lease commenced regardless of breaches at the end of the lease some 35 years later.

51. Roxburgh J did not go on to state which of the other three constructions he preferred but he did say this, at p. 61,

> "I admit that the other three constructions also involve difficulties. It would not be easy to hold that the notice had to be given on one particular day and no other, and the remaining two constructions cannot be readily extracted from the language used. But, in my judgment, any one of these three is to be

> preferred to that for which the plaintiff contends as doing less violence to the good sense and language."

52. Some comfort can be derived from the indication that it would not be easy to hold that the notice had to be given on one particular day. The difficulty is that the lessees' approach requires the insertion of an implied term (that notice would be served a reasonable time prior to the term date). This is why Roxburgh J stated that construction (iii) could not be readily extracted from the language used.

53. The *Biondi* case was again referred to in a subsequent decision, Multon v Cordell [1986] 1 EGLR 44. In that case the leases provided for the options to be exercised by the "written request of the tenant made three months before the expiration of the term hereby created". The leases were for a term of 35 years. The parties seem to have assumed that notice was not required to be given precisely 6 months before the expiration. In that case notices had been given some 3 years before the expiration of the leases and the question put to the judge by the parties was as to whether that period was "reasonable" in light of the *Biondi* case. HHJ Thomas (sitting as a High Court judge) found that a notice was not valid because it had been given too far in advance.

54. An issue of timing arose recently in Hexstone Holdings Ltd v AHC Westlink Ltd [2010] EWHC 1280 (Ch). In *Hexstone* the court rejected a submission that a break notice had to be served on (or to take effect on) a particular day. The relevant break option in that case provided as follows:

> "7.1 Subject to the pre-conditions (as hereinafter defined) being satisfied the Tenant may determine the Term on 31 October 2009 (time being of the essence for such date) by giving to the Landlord six months' prior written notice (time being of the essence for such notice) ..."

55. Counsel for the landlord submitted that as time was expressly stated to be of the essence, the notice had to be given on, or at least so as to take effect from, 30 April 2009 and that date only. The deputy judge rejected this submission (although the point is obiter because the landlord won on its primary case which was the notice had not been served on the landlord at all). He

said that on any objective analysis of the words used, it would be a commercial absurdity to suggest that the parties intended that the break notice had to be given on 30 April 2009 and only on that date (or if given earlier it must be expressed only to take effect on 30 April 2009). The words in parenthesis were, albeit surplusage, merely emphasising that the notice had to be given at least six months in advance of the termination date. Even though this construction involved the words being surplusage, the clause as a whole was not happily drafted in other respects. This case demonstrates the considerable reluctance of the courts to construe a break notice as requiring service on a particular day. In the *Hexstone* case, the difficulties implicit in the giving of an extremely premature notice would not have arisen as the relevant underlease was only entered into on 7 January 2008 in any event. Had those considerations applied, the court might have been more willing to construe the clause as requiring service on a particular day, in light of the express words making time of the essence.

Compliance with conditions required at date of notice

56. Another important point to consider is whether the break clause is expressed to be conditional in any way. Such conditions must be strictly complied with: see Finch v Underwood [1876] 2 Ch 310. If the tenant is given a privilege (whether a right to renew or break) which can be exercised in certain circumstances and on certain terms, those conditions must be strictly complied with.

57. Consider when compliance with the condition is required because in some circumstances it may be required at the time of service of notice. For example, the lease may require payment of a premium at the time of exercise of the break. Therefore arrangements will need to be made to discharge these conditions before the notice is served. Disputes can arise as to when the compliance is required: is it the time of the giving of notice or the time of termination, or both? Ultimately it is matter of construction of the relevant clause in question[9].

[9] *Finch v Underwood* (1876) 2 Ch. D 310 (date of notice); *Simons v Associated Furnishers* [1931] 1 Ch. 379 (determination of term); *Robinson v Thames Mead Park Estates* [1947] (date of notice); *West Country Cleaners (Falmouth) v Saly* [1966] 1 WLR 1485 (expiry of lease); *Bassett v Whitely* (1983) 45 P & CR 87 (date of new lease)

How is the notice to be given?

58. At common law, actual physical receipt of a notice is required. Therefore, merely putting a letter in the post is insufficient[10]. Or leaving a notice at the recipient's house is insufficient unless it can be proved that the notice came into the hands of the tenant or his properly authorised servant. In *Holwell Securities Ltd v Hughes*[11] a notice to exercise an option was sent to the D's solicitors. The solicitors told him that they had been served with the notice. It was held that there was no proper service. Russell LJ said[12] that: *"A person does not give notice in writing to another person by sitting down and writing in out and then telephoning to that other saying "Listen to what I have just written*." The date of service at common law will be the date when the notice is received.

59. In addition, there are important statutory provisions which provide for additional methods of service. The most important point about these provisions is that they *deem service* to have been effected and so the risk of non receipt is placed on the intended recipient of the notice as opposed to the giver (as is the position at common law). They are "intended to assist the person who is obliged to serve the notice, by offering him choices of mode of service which will be *deemed* to be valid service, *even if in the event the intended recipient does not in fact receive it*"[13].

60. The most important statutory provisions relating to the service of contractual notices are contained in section 196(3) and (4) of the Law of Property Act 1925:

> "(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagor, or other person to be served, or, in the case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building

[10] *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWCH 1252. [2003] 1 WLR 2064, per Neuberger J at page 2075.
[11] [1974] 1 WLR 155.
[12] At page 159.
[13] *Galinski v McHugh* (1988) 57 P&CR 359, per Slade LJ at page 365 (in relation to section 23(1) of the *Landlord and Tenant Act 1927*).

comprised in the lease or mortgage, or, in the case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned by the postal operator (within the meaning of the Postal Services Act 2000) concerned undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.

(6) This section does not apply to notices served in proceedings in the court."

61. Under the general law of landlord and tenant, it is possible for good service of a landlord's notice to be effected by serving it on the duly authorised agent of the tenant (and vice versa)"[14]. However, great care should be taken to ensure that an agent is duly authorised (whether expressly or by implied and or ostensible authority) to accept the notice in question. This particularly applies to solicitors. As Walton J in *Re Munro*[15] warned:

> "It is, of course, a common fallacy to think that solicitors have an implied authority on behalf of their clients to receive notices. They may have express authority so to receive them, but in general a solicitor does not have any authority to accept a notice on behalf of his client."

[14] *Galinski v McHugh* [1989] 1 EGLR 109, per Slade at p.111, and *Yenula Properties Ltd v Naidu* [2003] L&TR 9, per Robert Walker LJ at pages 116-117.
[15] [1981] WLR 1358.

62. If you are proposing to serve on an agent (in particular solicitors and or managing agents), it is good practice to get written confirmation to make sure that he or she has authority to accept service so that you do not later get in dispute as to whether that person had the requisite authority, as the cases cited above demonstrate.

63. Of course, if you slip up, there may be arguments to be made as to whether the agent, by reason of his general retainer had implied and or ostensible authority to accept the notice in any event (which is usually a question of fact and degree). Also, the principal will usually be bound if he asserts that the agent has authority even when he does not. However, it is better not to "go there" in the first place.

64. Before serving any notice, it is important to check the Lease to see whether it contains free standing provisions regarding service. Some contractual provisions can restrict and or extend the permitted methods of service. It is important to ensure that a notice has been served by a method permitted by the Lease.

65. It would take clear words for a Lease to be taken as restricting a method of service permitted at common law. For example in a recent case, Truegold International Ltd v Questrock Ltd [2010] EWHC 966 (Ch), an issue arose as to whether an option notice had been validly served or not. Provisions in the lease providing for service on solicitors were held to be simply permissive such that service on the client directly at its registered office in the BVI was effected service. In any event, on the facts, the solicitors had also been served in time. The judge pointed out that the relevant party may, at the time for service, have no solicitors acting for it. For another example where the service provisions in the lease were construed so as to allow other permitted methods of service see Warwick Ltd v GPS (Great Britain) Ltd [2006] PLSCS 210.

66. The recent case of The Hotgroup Plc v The Royal Bank of Scotland Plc (as Trustee of the Schroder Exempt Property Unit Trust) [2010] EWHC 1241 (Ch) demonstrates the danger of failing to read the provisions of the lease regarding service. In that case the break clause itself provided that the tenant's break could be exercised upon giving not less than 9 months' prior notice to the landlord, RBS. A notice was served in time on RBS, who held the reversion on trust for SEPUT. However, the lease also contained an unusual separate clause which provided that a break notice would not been "deemed" to have been served on the landlord

unless it was also served on the beneficiary, SEPUT's, property manager, Schroder Property Investment Management Ltd ("SPRIM"). A notice had not been served on SPRIM in time.

67. The tenant ran a technical argument that the reference to "deemed service" in the lease only referred to cases where the service on the landlord relied upon was deemed, rather than actual service. Charles Hollander QC (sitting as a deputy) rejected this argument, holding that "deemed" in this context meant "treated". In other words, unless a copy of the notice were served on SPRIM, the notice would not be treated as having been served on the landlord. In most cases a recipient will not know if the service is actual, deemed, or both actual and deemed. On occasion it may be fortuitous whether actual or deemed service could be relied upon and it should make no difference. The commercial purpose of the clause was to ensure that the notice did not gather dust in the landlord's office but came to the attention of the person with the actual responsibility for the management of the property, namely SPRIM.

68. There has been another fairly recent case in which the Court of Appeal held that the tenant had failed to effectively serve a break notice in accordance with the provisions of the lease. To a large extent it turns on its own facts but it does demonstrate the importance of focussing on the detail of the service provisions. In Orchard (Developments) Holdings Plc v Reuters Ltd [2009] 16 EG 140, the tenant's representatives had faxed and posted (by hand) a notice, that had to be given more than 6 months' before the relevant break date in question. However the posting was ineffective because the notice had been put in the wrong letter box. Therefore the tenant had to rely on the fax. However the lease provided that if such method of service was to be valid, receipt of the notice had to be acknowledged by the landlord. The tenant sought to rely on an acknowledgement in a solicitors' letter that had been written during the course of proceedings after the break date in question. The tenants' counsel contended that the requirement for receipt was evidential only. However the Court of Appeal disagreed and held that the break notice had not been validly served. Properly construed, the lease did not permit a subsequent "receipt" given after the break date to effectively put an end to the lease retrospectively. Such a result would offend against the requirement of certainty. The lease provided that receipt went to the essential question of validity of the notice and this was not merely evidential. The three Lords Justices in that case appear to have been divided as to whether the "receipt" had to be given before the last date on which the notice had to be served or whether it would have been sufficient if it had been given in the 6 month period between the time for service of notice and the date in the lease on which the break was to operate.

69. Whilst this case does depend on its own interpretation, it is illustrative of the importance of considering the lease terms (including those as to service) very carefully in order to ensure that the notice is given in accordance with them.

70. The case also raises interesting questions as to the duties imposed on landlords to acknowledge receipt in such cases on request. It is certainly sensible for the giver of a notice to ask for such acknowledgement, which might preclude any subsequent argument that the notice was not validly served, as was the case in MW Trustees Ltd v Telular Corporation [2011] EWHC 104 (Ch). In Orchard (Developments) Holdings Plc v Reuters Ltd [2009] 16 EG 140 case Rix LJ (at para. 52) seems to give some indication that he might have held that the landlord owed a duty of care to provide a receipt within a reasonable time of request, if that notice was given prior to the last time for service. This goes against general orthodoxy that the recipient of a notice owes no implied duty to accept receipt or to raise any issue as to invalidity before time for service of a notice has expired: see MW Trustees Ltd v Telular Corporation [2011] EWHC 104 (Ch) and PCE Investors Ltd v Cancer Research UK [2012] EWHC 884. However in this case the notice was faxed at the very last minute and so there was no question of the landlord having failed to give a receipt in time. Further it was common ground between the parties to the appeal that there was no obligation on the landlord to respond. This dicta may be picked up on in future cases to argue that in some cases the lease should be construed so as to impose such a duty on the recipient of the notice to acknowledge receipt on request so as to reflect "*commercial reality and honest dealing*". The circumstances in which it may be appropriate to treat one party as being under a "duty to speak" were recently explored in Avocet Industrial Estates LLP v Merol Ltd [2011] EWHC 3422 (Ch) and PCE Investors Ltd v Cancer Research UK [2012] EWHC 884, the former of which is the subject of an appeal. Tom Weekes will be considering that line of argument in more depth in his talk.

A checklist

71. It will readily be apparent from the above, that a tenant seeking to exercise a break must get his house in order at the earliest opportunity. The following is a useful checklist:

i. The break clause should be examined in detail *at the earliest stage* so that the tenant knows what it has to do (detailed advice at the time of the transaction will enable the tenant and its team to diarise key dates);

ii. The tenant should ask itself, "when must the notice be served and what are its requirements?" This will require the tenant's representative to read the terms of the lease in full, not just the break provision. In particular the service provisions should be examined. If in doubt as to who to serve, serve everyone. Further, does the tenant need to have complied with other covenants at the time of notice?

iii. In drafting notices, check and check again. Do full searches of the Land Registry and Companies House on the day of service. Check company numbers as well as names. Do not rely on historic evidence of ownership. If serving on an agent, ensure you have evidence of express authority to accept service. If acting for a tenant, ensure that the person giving the instructions in fact has the correct authority from the tenant, especially he or she is purporting to act for several companies in a group.

iv. If compliance is required, when is it required and to what objective standard?

v. If compliance is required, what are the outstanding breaches (if any)? The tenant should obtain expert advice as to any disrepair and as to the works necessary to ensure compliance to the standard required by the break clause. A record should be kept as to the state of the premises before and after works are done. It would be wise to get the landlord involved but do not expect it to cooperate. Push on regardless.

vi. It is vital that the tenant allows itself ample time to carry out the works and to hand back the premises with vacant possession in time (allowing for inevitable slippage).

vii. If required by the clause, the tenant should ensure that it yields up in good time having paid all outstanding arrears.

Landmark Chambers
180 Fleet Street
London EC4A 2HG
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clamont@landmarkchambers.co.uk