

Q&A: What tenants have to do to get a break

By Megan Davies and Aaron Walder | 05-11-2019 | 11:29

Question

My company has a long lease of a retail unit, which contains the following break option for us to terminate the lease:

“The Tenant may terminate this Lease at the expiry of the 10th year of the Term by giving not less than six months’ notice to the Landlord in writing and provided that: 1) the Tenant has paid all sums due to the Landlord under this Lease; and 2) the Tenant has yielded up the Premises with vacant possession in accordance with clause 5.2, before the Break Date.”

Clause 5.2 confirms that: “Following the expiry of a notice served pursuant to clause 5.1, the Lease shall determine and the Tenant shall yield up the Premises in accordance with clause 4.18.”

Clause 4.18 contains our yield up obligations and also covers reinstatement to its original condition if so required by our landlord. When we moved into the unit we carried out a number of alterations including the installation of partition walls, suspended ceilings, and air conditioning.

The 10th anniversary of the term is next year and we anticipate that the reinstatement works would take a number of months to complete. Do we need to reinstate the premises for the break to take effect?

Answer

The scope of a break option and its conditions depend on the terms of each lease. Following the recent decision in *Goldman Sachs International v Procession House Trustee Ltd and another* [2018] EWHC 1523 (Ch); [2018] EGLR 33 it is arguable that the break condition does not extend to the yield up and reinstatement provisions in clause 4.18.

However, the break clause should be considered in the context of the lease as a whole and formal legal advice should be sought.

It would be prudent to approach the landlord as soon as possible to try and agree what steps need to be taken in order for you to satisfy the break conditions. Ideally, this would be recorded in a suitably (and carefully) drafted settlement agreement.

If the landlord does not engage in such discussions then you may wish to get a determination on the scope of the break conditions to gain certainty ahead of the break date.

Explanation

Generally, if a break option is conditional then the conditions need to be complied with strictly, as even trivial non-compliance can invalidate the break and result in the lease continuing beyond the break date. This is why it is prudent to plan ahead so there is

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sufficient time to (a) ascertain what the requirements of the break option are; and (b) comply with them.

The first condition in the break clause is for “all sums due to the Landlord under this Lease” to have been paid “before the Break Date”. This is widely drafted. The lease should be checked to ascertain what sums will be payable before the break date. The payment history of all sums due throughout the term should also be checked carefully as “all sums due” may include default interest on late payments. In *Avocet Industrial Estates LLP v Merol Ltd* [2012] 1 EGLR 65 the failure to pay such interest (£130) by the break date meant the break did not take effect.

Remember, where rent is payable in advance and a break date falls part way through a payment period, the tenant must pay the full period’s rent and will not be entitled to a refund for sums relating to the post-break period unless there is an express apportionment to that effect in the lease.

The second condition requires you to yield up the premises with vacant possession in accordance with clause 5.2, which then refers to the yield up and reinstatement obligations in the lease.

Vacant possession is a common break condition, and there are numerous cases dealing with the question of whether vacant possession has been given. In *Riverside Park Ltd v NHS Property Services Ltd* [2016] EWHC 1313 (Ch); [2016] PLSCS 222 the tenant left the premises without removing demountable partitions which it had installed. The court held that the partitions, which were not fixed to the structure of the building and could be removed without damage, were chattels and substantially deprived the landlord of its enjoyment of the premises, so vacant possession had not been given.

Therefore, you may need to obtain advice from a surveyor as to your ability to remove the partitions, suspended ceilings, and air conditioning without damage. If these items are not fixed to the structure, it is likely they will need to be removed in order to give vacant possession and comply with the break clause.

In *Goldman Sachs*, the break option was similarly drafted. It required the tenant to yield up the premises with vacant possession and then referred to the clause in the lease containing the yield up and reinstatement provisions (clause 11). Clause 11 did not set out clearly what the tenant had to do to comply with them. The question, as it is here, was whether the break was conditional on reinstatement. The court held that the natural and ordinary meaning of the break clause was that the tenant only had to give vacant possession for the break to take effect. If the landlord had wanted clause 11 to be strictly complied with as a break condition then this should have been made clear. Given the lack in clarity as to what was needed to comply with it, it was inappropriate for it to be used as a strict measure of the break pre-condition.

Following *Goldman Sachs*, it is arguable that the break clause in your lease requires you to give vacant possession but does not extend to reinstatement in order for the break to take effect. However, the break clause should be considered in the context of the lease as a whole and we would recommend that you obtain formal legal advice as part of your exit strategy.

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It would also be sensible to approach the landlord to agree what steps you need to take to satisfy the break conditions. There is no obligation for the other party to confirm what steps are required for the break to take effect so, in the absence of agreement, the only way to get certainty may be to apply to court for a determination.

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