

Break Clauses

The terms of a break clause can be heavily negotiated between two parties when entering into a lease and can often amount to a deal breaker. Break provisions allow either the landlord or tenant, or both parties, to end the term of a lease prematurely by serving notice on the other. Before a tenant can determine a lease by exercising their break clause they will most likely be under an obligation to pay all rent owed and to ensure they are not in breach of other covenants in the lease. If the tenant fails to comply with these conditions then the landlord could be entitled to prevent the tenant from determining the lease early. This is where potential disputes can arise and litigation be pursued.

So how can a landlord, or tenants, protect their position? Well as is always the case when it comes to the drafting of lease terms, clarity and certainty are key. It is essential that express wording is used to adequately set out the parties intentions. A landlord will want to ensure that they are not left with empty premises that are not collecting any rents. On the other hand, a tenant will not be happy to pay for premises that they are not occupying or using.

Problems arise when a lease allows a tenant to terminate partway through a quarter. The question asked when rents are due in advance, is whether the tenant is liable to pay for the remainder of the quarter's rent or whether the rent can be apportioned to the specific date of termination? This is a question that unfortunately there does not appear to be a definitive answer to.

If terms relating to when rent is to be paid up to are unclear the courts may consider the wider terms of the agreement in an attempt to draw out the intentions of the parties within the commercial context of the lease. They may look at the rent reserved clause which could provide an indication of whether rent could be deemed payable even after the term has ended. This will depend on the actual wording that is used. Other clauses in the lease may also provide guidance as to how the break provisions should be read.

To avoid or minimise the potential for litigation it is advisable to draft specific terms which deal with payment of rent when exercising a break. The terms should be drafted stating that rent must be paid 'up to' or 'up to and including' a specific date, depending on whether the landlord requires rent to be payable for the whole remainder of the quarter or just up to the actual date of termination. Where possible reference to specific sums, or how rent is to be apportioned, should set out to ensure absolute certainty.

A landlord will obviously want a tenant to be liable to pay rents for the rest of the quarter so that they are compensated for having lost their tenant. A tenant will only want to pay rents up to the date they actually leave the premises, as otherwise they will be paying for something they are not using. Whichever terms are agreed will depend on the bargaining position of the parties. However, clearly drafted terms will be of benefit to both parties as a landlord will know how much they are entitled to should the tenant break midway through a quarter, or on a quarter day, and likewise a tenant, should they decide to break, will know in advance how much rent they are likely to have to pay to in order to comply with the break provisions.

The rent payable when a tenant exercises their break may not be the only hurdle they will have to negotiate in order to successfully break. A landlord could be entitled to prevent a tenant from determining the lease if they are in breach of one of their other covenants in the lease, for example a repair covenant. Therefore a tenant may well have a few hoops to jump through before they can actually end their term prematurely.

What this illustrates is that exercising break provisions within a lease is not always as straightforward as it initially may seem, for both the landlord and tenant. Therefore clear, precise terms will ensure that each party knows where they stand and will hopefully negate the need to go down the road to litigation.

Contact us

Please feel free to contact us if you would like further information on any aspect of our work.

Our friendly team is always on hand to help and advise you. We can be contacted directly on:

01942 777777

www.stephensons.co.uk

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