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Break clauses in commercial leases: business briefing

This business briefing highlights the practical issues that a tenant should consider when exercising a break clause in a commercial lease.

What is a break clause?

- A break clause can be included in a fixed-term lease allowing either the tenant or landlord to terminate the lease early.
- Exercising a break clause brings the lease to an end. However, where the landlord breaks the lease, legislation is in place that may allow the tenant to remain in the property after the lease has ended.
- Depending on how the lease has been drafted, the right to break the lease may:
 - arise on one or more specified dates; or
 - be exercisable at any time during the term of the lease on a rolling basis.
- A break clause may only be exercised if any conditions attached to it have been satisfied (for example, providing vacant possession). A break clause will be strictly construed by the courts and any conditions must be strictly performed.

Practical issues for tenants to consider when exercising a break clause

- Once a break notice has been served, it cannot be withdrawn unilaterally, so a tenant must be sure that they intend to break the lease. Any mutual waiver of the notice will be deemed to constitute the grant of a new lease, which takes effect from the date of expiration of the break notice.
- Tenants should comply with all the relevant requirements in the break clause and keep evidence of their compliance to help protect their position.

- Serve the break notice in good time and strictly in accordance with the terms of the lease.
- Keep evidence of the method of posting or delivery of the notice. If there are no service provisions in the lease, the tenant could request that the landlord acknowledges receipt.
- If the notice is being served by an agent, make sure the landlord is aware of the existence of the agency and its authority.
- Consider carrying out a compliance audit with a surveyor's advice before serving the break notice. A tenant can then take steps to remedy any breaches to ensure compliance with its covenants.
- Pay any outstanding sums due, even if these are in dispute. Payment can be made on a "without prejudice" basis and the matter disputed later.
- Check whether default interest may be due on past arrears. Unless the tenant has received a demand from the landlord, they may have difficulty knowing precisely how much default interest is due. Therefore, tenants should try to estimate the amount due and err on the safe side. The cost of doing so is likely to be far less than the cost of remaining bound under the lease.
- Ask the landlord for confirmation of the steps required to comply with any conditions. Ask the landlord to prepare a schedule of dilapidations in relation to any repair works. A schedule of dilapidations is a list of items that are in need of repair and that the tenant has responsibility for, due to the repairing obligations under a lease.
- If a tenant agrees to carry out works to the property before the break date, be careful to ensure that the works are completed and vacant possession is given by the break date.
- Consider asking the landlord to accept the break notice on payment of an agreed amount as liquidated damages for any outstanding breaches of covenant. Liquidated damages are a fixed or determined sum agreed by the parties to a contract to be payable on breach by one of the parties.
- Ensure that any waiver of a condition by the landlord is not made "without prejudice" and that it is clear to which condition(s) the waiver applies.

Property Litigation

Lee is head of the Property Litigation department at Ellisons and acts for a wide range of clients including property investment companies, portfolio owners, property owners, occupiers and individuals.

He has extensive experience in all forms of commercial and residential property and landlord and tenant disputes, including lease renewals, disrepair claims, possession claims, covenant breaches, and insolvency related issues.

Lee has a wealth of experience of higher court and county court litigation, tribunals, adjudications, and alternative dispute resolution including mediation.

‘Lee Pearce heads the property litigation team. Sources comment that he has an *"authority and gravitas which in combination with his ability makes him a strong ally and a feared opponent."* (Chambers and Partners 2013)