Break notices

A Paper for The White Paper Conference Company

Commercial Property Leases Conference 5 October 2016

Guy Fetherstonhaugh QC

FALCON CHAMBERS

Introduction

1. The last couple of years has seen no signs of a slackening in the flow of disputed break clause cases coming before the courts. The reasons are obvious: there is little standardisation in the wording of such clauses, allowing landlords to insert apparently innocuous wording that contains traps for the tenant, and the increased focus that recent authorities have brought to bear upon break clauses is often too late for those tenants for whom the trap has already been sprung.

2. Although the decided cases treat with all aspects of break clauses, including the attempts made on behalf of tenants to comply, often vainly, with stringent conditions precedent, this paper concentrates upon break clause notices, and in particular upon the pitfalls associated with the language in which such notices may be written.

A brief recap

3. The typical (tenant's) break clause will contain all or some of the following ingredients:

   (a) a requirement that written notice of the intention to terminate the lease be served a stated period (usually 6 months) prior to the putative termination date;

   (b) a requirement that the notice be expressed to terminate the lease on the putative termination date;

(c) a requirement that the notice contain certain information;

(d) a requirement that the notice should be given by the tenant to the landlord;

(e) a requirement that the giving of the notice should be carried out in a particular manner;

(f) a requirement that the tenant should, "up to" or "by" the putative termination date have complied with its covenants (a topic outside the scope of this paper).

4. The common theme that emerges from the many authorities on the topic is that break clauses must be strictly complied with. This observation applies to all six of the ingredients referred to above.

5. Examples in relation to each ingredient:

(a) Di Luca v Juraise (Springs) Ltd [1998] 2 EGLR 125: exercise of option ineffective because notice received two days late;

(b) Peaceform Ltd v Cussens [2006] 3 EGLR 67: clause required 3 months' notice to be given; less than 3 months given; notice held invalid;

(c) Siemens Hearing Instruments Ltd v Friends Life Ltd [2014] 2 P & CR 5: notice omitted certain stipulated words; notice invalid;

(d) MW Trustees Ltd v Telular Corp [2011] L & TR 19: notice given to predecessor in title of landlord (although tenant saved by an estoppel); Vanquish Properties (UK) Ltd Partnership v Brook Street (UK) Ltd [2016] EWHC 1508 (Ch): notice purportedly given by limited partnership; notice invalid;

(e) Levett-Dunn v NHS Property Services Ltd [2016] 2 P & CR DG 18: notice to be served at last known place of abode or business; notice valid;

(f) Legal & General Assurance Company Ltd v Expeditors International (UK) Ltd [2007] 2 P&CR 10, per Lloyd LJ: "*It is common ground that, in general, conditions attached to a break clause, as with any other option provision, must be strictly complied with, so that even a day's delay in giving vacant possession or a shortfall in the payment of rent of a few pounds would be fatal*."

Clear and Present Dangers in Break Clauses

6. These are the sorts of things that go wrong with break clause notices:

   (a) Laymen think DIY is acceptable;

   (b) Nobody reads the lease carefully enough;

   (c) Those that do have no concept of how strict is the law concerning break clauses, and as a result are not literal-minded enough;

   (d) Those that are don't establish a single line of communication and responsibility;

   (e) Incorrect assumptions are made regarding the identity of those serving and being served with the break notice.

7. In practice, these problems may be grouped under two headings: (a) getting the break clause language right; and (b) observing the technical requirements regarding service.

(a): Getting the notice language right

8. In Spurling Ltd v Bradshaw [1956] 1 WLR 461, Denning LJ said:

> "Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

9. Unhappily, this sentiment does not apply to break clauses. In most cases, however, all that is needed is care, common sense, and a literal mind. Children are usually better at this than lawyers.

10. Take Siemens Hearing Instruments Ltd v Friends Life Ltd [2014] 2 P & CR 5. For reasons that had become redundant by the date of exercise of the option, the break clause in that case stipulated that any notice given by the tenant exercising the right to break "*must be expressed to be given under section 24(2) of the Landlord and Tenant Act 1954*". For reasons unexplained (but perhaps because of this redundancy, rather than inadvertence), the draftsman of the notice omitted those words. The Court of Appeal held that the notice was invalid. Lewison LJ ended his judgment with this warning:

> "The clear moral is: if you want to avoid expensive litigation, and the possible loss of a valuable right to break, you must pay close attention to all the requirements of the clause, including the formal requirements, and follow them precisely."

11. The result is unsurprising, in view of the decision of the House of Lords in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 949, in which Lord Hoffmann famously said:

> "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."

12. Particular care should be exercised, accordingly, where the break clause requires not merely that the notice should terminate the lease on a particular date – but also that the notice must say so. In Mannai itself, the lease was for a term of 10 years from and including 13 January 1992. The break clause said that the tenant could determine the lease by serving not less than six months' notice in writing to expire "on the third anniversary of the term commencement date" (ie ***13*** January 1995) The tenant gave notice to the landlord to determine the lease on ***12*** January 1995.

13. As we know, the House of Lords held that the notice was valid, notwithstanding the erroneous date, for the reason that it would have been readily understood by the reasonable recipient of the notice that the tenant intended to terminate the lease on 13 January.

14. However, had the break clause stipulated that the notice had to *say* that the lease was being terminated on 13 January, then the tenant's error may well have been fatal.

15. So, if a break clause says that the notice should contain a sentence saying that the moon is made of green cheese, and the tenant omits that sentence, then the notice will be invalid. In effect, that was what happened in Siemens.

16. Moral: (1) if the break clause does not prescribe the contents of the notice, then avoid mention of dates; but (2) if it does, then follow the wording of the break clause to the letter. In every case, the approach to follow should be to analyse the wording of the break clause, to see what exactly must be set out in the notice, and then faithfully follow the wording, repeating it word for word where appropriate.

17. Enough of language – now to the other technical requirements concerning service.

(b): Service requirements

18. Break clauses more often than not appear in clause 8 of the lease. Sometimes the break clause will itself dictate the way in which the notice must be served. Often, however (and here is another trap for the unassuming tenant), the service requirements will be set out in another clause entirely – usually (but do not depend upon this) clause 7. In such circumstances, if clause 7 contains words to the effect that any notice under the lease must be served in accordance with that clause, then it is well arguable that the notice requirements in that clause will be imported into the break clause, with the result that any failure to comply with those requirements will invalidate the notice *even if it actually reaches its target*.

19. At their simplest, the notice requirements will say that the notice must be in writing, and must be served by the landlord upon the tenant at a particular address. Even this simple requirement can pose problems:

    (a) What if the landlord has transferred its reversion?

    (b) What if the address has changed, or is unavailable (eg closed for the weekend) on the last date for service, or is overseas, and not easily contactable or verifiable?

    (c) What if the tenant is an unusual organisation, such as a limited partnership?

20. As to (a), the prudent Solicitor whom the tenant has consulted will not rely upon the information the tenant gives concerning the identity of the landlord, but will enquire further – for often the "landlord" is nothing more than the managing agent who has been demanding rent, and who may well not be authorised to receive service of notices. The prudent Solicitor will carry out a Land Registry search to ascertain the identity of the landlord, and/or will ask the landlord or its Solicitors for confirmation. The tenant may be able to depend upon s.23 of the Landlord and Tenant Act 1927, which facilitates valid service when the identity of the landlord has changed without the tenant being informed, but (i) it is not certain that this extends to a contractual notice, as opposed to a statutory notice (see the discussion of this point in the Levett-Dunn case); and (ii) the tenant will not thank its Solicitor for embroiling it in controversy rather than safe certainty.

21. As to (b), the prudent tenant's Solicitor will have made these points to the tenant, and will carry out research to ascertain where exactly service is to be effected, and how proof of service is to be recorded. Again, it will be worth involving the landlord in this process. The landlord will either be helpful, in which case the problem will be solved; or else it will be obstructive, in

which case the tenant will have the sympathy of the court should the matter become litigious. The tenant who does nothing to help itself will receive no such sympathy.

22. As to (c), consider the facts before the court in the Vanquish case. There, the landlord (which in this case wished to exercise a redevelopment break clause) was a limited partnership. An LP cannot hold property and has no legal personality, and acts through its general partner (as prescribed by the Limited Partnerships Act 1907). Strictly speaking, therefore, the lease was granted to the LP, "acting by its general partner". The break clause in the lease simply required the notice to be given by the landlord, while the notice clause added that any such notice had to be signed "by or on behalf of the party giving such notice".

23. The break clause notice that was served was given by Solicitors said to be acting for the LP, and stated that the LP gave notice. The tenant contested the notice on the ground that the LP had no entitlement to give notice – only the GP did – and there was no reference to (or signature by) the GP in the notice. The tenant therefore contended that the notice was void, because it failed to comply with the break clause. In the alternative, the tenant submitted that the notice was ambiguous, and would not have allowed the reasonable recipient safely to conclude that the notice must have been served on behalf of the GP.

24. Chief Master Marsh upheld the tenant's alternative contention, and declared the notice invalid. An appeal against his decision was later compromised, and accordingly the opportunity for the point to be tested in the Court of Appeal did not materialise.

25. Whether the decision is right or wrong, the message is clear: take every precaution in relation to break clause notices, and follow the language of the break clause to the letter.

Falcon Chambers **GUY FETHERSTONHAUGH QC**

Falcon Court

London EC4Y 1AA **5 October 2016**