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# COMMERCIAL LEASES IN EXCEPTIONAL CIRCUMSTANCES

DJB SEMINARS: THE LEGAL SERIES  
30TH JUNE 2020

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**A DJB Lawyer**

## **OUTCOME FOCUSED TRAINING INFORMATION**

**Lecture is aimed at:** Property professionals and fee earners involved in both contentious and non-contentious property work

**Learning Outcome:** To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of service to the client.

**Satisfying Competency Statement Section:** B – Technical Legal Practice

For further information please see <http://www.sra.org.uk/competence>

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# THE CORONAVIRUS ACT 2020

## COVID19 AND COMMERCIAL LEASES

As a consequence of S.82 of the Coronavirus Act 2020, forfeiture of non-payment of rent in commercial leases was suspended until 30 June 2020. On 18 June 2020, this time period was extended to 30 September 2020. It is very likely that this period will be extended further. Some tenants seem to be under the impression that this gives rise to a rent holiday and that the rent has been suspended. This is not so. The rent will still be due and after the moratorium period will once more be available. Commercial Rent Arrears Recovery might be available in relation to occupied premises (see later). It might also be possible to draw down from any rent deposit with the agreement of the tenant that the rent deposit account will be topped up at a later stage, thus alleviating any cash flow problems. Serving a statutory demand as a preliminary to bankruptcy proceedings may also be possible although this may be seen by many landlords as pouring good money after bad due to tenant's lack of creditworthiness. The section also allows a demand for rent to be made without waiving the right to forfeiture for non-payment of rent but not for other breaches. S.82 only applies to commercial leases within the Landlord and Tenant Act 1954 and so will not apply to leases of six months or less in duration or to licences.

Forfeiture other than for non-payment of rent is also still available, for instance for disrepair and for breach of a keep open clause. It seems highly likely that in these circumstances a court would be prepared to grant relief from forfeiture, at least temporarily, in view of the difficulty in vacating a property. This would once more be due to social distancing.

It might be suspected that the biggest problem in relation to forfeiture for non-payment of rent when it becomes available, or for other breaches, might be the difficulty in finding a new tenant, especially at the same rent, in the current climate. In addition, there are major issues in relation to business rates liability. For the year 2020/21 the retail, hospitality and leisure sectors can claim full business rates relief regardless of the Rateable Value of the premises. However, if the premises are empty for more than three months (or six months for industrial units and warehousing) then with exceptions full business rates liability will once more be due. A landlord may think it expedient to at least temporarily forego rent rather than effect forfeiture due to the business rates implications.

Alternatively, the tenant may wish to exercise a break clause. Many breaks will have a condition precedent that the tenant must give up vacant possession. With social distancing this may not be possible. What the attitude of the courts may be in this circumstance is yet to be seen.

### **Rent**

There will be no reduction in the rent unless there is a force majeure clause which is unlikely. Moreover, rent suspension provisions usually only apply in the event of damage or destruction. Likewise, most insurance policies which cover rent only apply in relation to damage or destruction. The tenant may opt in to a provision covering closure due to a notifiable illness.

If the landlord closes the premises then there may be a possible claim for breach of quiet enjoyment or derogation from grant. However, the lease will probably contain provision that the rent must be paid without deduction or set off and a separate claim would have to be made.

Since 1 March 2020, Commercial Rent Arrears Recovery was only available if there were 90 days of rent arrears and not, as previously, 7 days. On 18 June 2020, the level of rent arrears was extended to 187 days. Commercial Rent Arrears Recovery is not available for unoccupied premises.

### **Possession Proceedings**

As of 27 March 2020, there is a stay on any possession proceedings in England and Wales for 90 days. This does not apply to trespassers or to an application for an interim possession order. The period of the stay has been extended to 23 August 2020.

### **The Corporate Insolvency and Governance Act 2020**

This received Royal Assent on 25 June 2020 and came into force on 26 June 2020. Amongst other things it temporarily bars the making of a statutory demand if the reason for any debt is the Coronavirus pandemic. Likewise, in similar circumstances a winding up petition cannot be made. These provisions are back dated 27 April 2020.

The Act will also introduce the concept of a Restructuring Plan whereby creditors can apply to restructure a business, for instance in relation to rent by a 75% majority. In some respects, this is similar to a Company Voluntary Arrangement, but will be overseen by the court and applies to secured, and not merely unsecured, creditors.

### **Service Charge Liability**

If the landlord needs to carry out deep cleaning of the common parts, they will be able to do so if the lease allows charging for good estate management or where there is provision requiring compliance with notices served by a competent authority.

The landlord may still have to provide services, subject to social distancing, but most leases require the landlord merely to use their reasonable endeavours.

## **KEEP OPEN CLAUSES**

With user covenants the Courts are willing to award damages for breach against a tenant who ceases to carry on his trade (see, for example, **Transworld Land Co Ltd v J Sainsbury plc [1990] 2 EGLR 255**). However, the Courts are not prepared to grant mandatory injunctions forcing the tenant to stay open for business (see **Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1997] 23 EG 141**). Consider the use of the **Contracts (Rights of Third Parties) Act 1999** to increase a tenant's exposure to damages (e.g. by requiring the tenant to covenant not just with his landlord but also with the other tenants in the centre).

If the covenant is positive:

- The tenant should try to qualify the obligation to allow closure for normal business reasons, for example, for repair or refurbishment and perhaps an assignment.
- Consideration needs to be given to what amounts to the normal business hours of the shopping parade.

#### **SHB Limited v Cribbs Mall (April 17<sup>th</sup> 2019)**

SHB are in liquidation and are successors to BHS. They occupied a prime site at Cribbs Causeway in Bristol and held a 125-year lease. The landlord wanted to effect forfeiture for breach of a keep open clause. The tenant argued that they should be entitled to release as the loss involved would be so great and they should be given a substantial time in which to be given the opportunity to assign the lease. The Court decided that three months delay in order to attempt an assignment should be sufficient.

**Note: S.82 of the Coronavirus Act 2020** - There is a moratorium on forfeiture for non-payment of rent until 30 September 2020. This may be extended further but it does not apply to breaches other than non-payment of rent. Forfeiture will still be available after the moratorium period is over and rent will still be owed. Landlords wishing to go down this route must be careful not to waive any breach and must be careful of business rates liability on empty properties.

**Note:** If the premises have to close under the Health Protection Regulations 2020, there would be a defence to breach of a keep open clause as the tenant has to be comply with statute. Planning law has been relaxed temporarily whereby pubs, restaurants and cafes can now operate as takeaways. Check the user covenants as there can still be a breach.

# BREAK CLAUSES

## CONDITIONS TO EXERCISING THE CLAUSE

### Conditions Precedents

If conditions precedents are prescribed the tenant must fulfil them strictly. It is common for an option to provide that the tenant must have paid all the rent and performed all the covenants. If this form is chosen even a trivial breach of covenant will defeat the tenant's option (**West Country Cleaners (Falmouth) Ltd v Saly [1966] 3 All ER 210; Bairstow Eves (Securities) Ltd v Ripley (1992) 65 P & CR 220**). However, a breach for this purpose means a subsisting breach, not a 'spent' breach in respect of which the landlord no longer has a cause of action (**Bass Holdings Ltd v Morton Music Ltd [1987] 2 All ER 1001**). The strict approach was questioned but nevertheless applied in **Kitney v Greater London Properties (1984) 272 EG 786**. In almost all cases an obstructive landlord will be able to find some subsisting breach of covenant on the tenant's part and thereby defeat the option. This form may, therefore, work hardship to tenants, particularly where there is a genuine dispute as to liability. The tenant's adviser should, therefore, insist that the requirement be that the tenant shall have reasonably performed his covenants. In such a case the exercise of the option will be good if the tenant has performed his covenants to the extent that a reasonably minded tenant would have done (**Gardner v Blaxill [1960] 2 All ER 457**). The inclusion of the word 'reasonably' gives the court a discretion which will be exercised in the tenant's favour where, for example, he has made one or two late payments of rent but not where he has been persistently in arrear throughout the term (**Bassett v Whiteley (1982) 54 P & CR 87**).

In one case, a tenant who had decorated using two coats of paint instead of the three coats required by the lease lost its right to break as a result (**Osbourne Assets v Britannia Life (1997)**).

The draftsman should next consider whether the conditions are to be fulfilled at the time of the service of the notice or at the end of the term. If they are to be fulfilled at the time of the service of the notice then, for example, the landlord may not be able to rely on a breach of covenant to decorate 'in the last year of the term' since no breach of that covenant can be positively asserted until the expiry of the complete year. On the other hand, if the conditions are to be fulfilled at the expiry of the term, the tenant will have the opportunity to remedy any breach of covenant between the service of the notice and its expiry (**Simons v Associated Furnishers Ltd [1931] 1 Ch 379**). This latter form is fairer to both parties.

If there are joint tenants, both must exercise the clause: **Re: Viola [1909] 1 Ch 244**. In **Prudential Assurance v Excel [2010] L&TR 7** the solicitor served notice stating that one of two joint tenants, Excel, intended to break the lease. It was held that, as both joint tenants were associated companies, the solicitor had authority to act on behalf of both. However, it would not have been clear to a reasonable recipient landlord that both tenants were taking part and the break was void. It would have been better not to state the tenant by name.

### **Reed Personnel Services Plc v American Express Ltd [1997] 1 EGLR 229**

Reasonable performance of the terms of a repairing covenant as a condition precedent to the



exercise of a break clause might include, e.g. applying one coat of paint instead of two or retaining a good carpet where there is an obligation to replace. The cost of repair was not a factor to be taken directly into account.

#### **Commercial Union v Label Ink [2001] L&TR 29**

Where a rent cheque was in the post but not received until after the break date, there was held to be non-compliance with a condition precedent.

#### **Fitzroy House, Epworth Street v The Financial Times [2006] EWCA Civ 329**

This is the latest in a long line of cases on conditions precedent prior to exercising a break and, indeed, an option to renew. If a lease contains an absolute condition of compliance with terms of the lease before the break can be exercised then no solicitor may allow this to be accepted as any landlord will be able to find a minor breach, usually in relation to dilapidations, which allows the tenant to be held to the lease. More commonly, therefore, a lease will require material or substantial or reasonable compliance with the terms of the lease. This was the case in the present scenario. The question for the court was: what does material compliance actually mean?

This case involved a very valuable site on the outskirts of the City of London. The cost of failure for the tenant if he was held to the lease and had to pay the remaining rental was in the region of £3.5 million.

A break clause was dependent on material compliance with the terms of the lease. The court stated that not every defect had to be remedied. Regard should be had to the age, type, location and use of the premises in determining what was expected.

The landlord could only refuse consent if it was fair and reasonable to do so. The purpose of limiting the right to break was to enable a landlord to preserve its legitimate interest in being able to re-let speedily, thus maintaining the value of the reversion.

The Court of Appeal has now partly reversed this decision. There is a difference between reasonable compliance, where a reasonably competent surveyor's report may be relied upon, and material or substantial compliance where this is not so. Here, the test as to whether the landlord loses rental is the appropriate one.

A better solution, it is suggested, and one which is becoming increasingly acceptable to landlords, is to allow the tenant to break the lease without conditions. If needs be, the tenant may still be sued for antecedent breaches. Some landlords put forward a defence to this line of reasoning that the tenant may not be worth suing. This rather begs the question: if the tenant were not worth suing, why would the landlord wish to keep him? The Court of Appeal partly reversed this decision. If reasonable compliance is required then a report from a reasonable surveyor is satisfactory but for material compliance the test is whether the landlord is losing rent.

#### **William Page v BNP Paribas (2008) 4 September (unreported)**

As a condition precedent to exercising the break, the tenant had to comply with repairing obligations. The tenant was a dormant company and the obligations were carried out by an associated company. The break was still valid.

**Note:** It is also suggested that a tenant intending to break the lease should make sure that they have fire asbestos risk assessments under the Regulatory Reform (Fire Safety) Order 2005 and Control of Asbestos Regulations 2012 in order to comply with the lease terms.

**Avocet Industrial Estates LLP v Merol Ltd and another company [2011] EWHC 3422**

A condition precedent to exercise the break clause was that the rent had to be up to date. Over the previous six years the tenant had on a few occasions been late in payment of the rent and interest had accumulated, although the landlord had not demanded this. As the interest had not been paid at the break date the tenant had not effectively brought the lease to an end. Here, the tenant's interest amounted to £130; the cost to the tenant in extra rent was £300,000. On occasion the landlord had demanded rent but not always. The landlord held £20,000 of rent deposit but this was irrelevant as was the fact that the tenant had asked the landlord to confirm that no other money was owed. The landlord's agents did this but there was no estoppel as they themselves did not realise that the £130 was owed.

**Note:** Leave to appeal to the Court of Appeal was given, however, the case now seems to have been settled.

**Quirkco Investments Ltd v Aspray Transport Ltd [2011] EWHC 3060 (Ch)**

It was stated that, dependent on the terms of the lease, any insurance premium which was reserved as rent may have to be paid for the whole year if the payment date fell before the break day. In **PCE Investors Ltd v Cancer Research UK, [2012] EWHC 884 (Ch)** the Court of Appeal held that a break could not be exercised when the break day fell between rent days and the whole quarter in advance had not been paid. It is essential in these circumstances that the tenant is only responsible for basic rent or, as a lesser alternative, the lease deals with apportionments after the break date.

**Canonical UK Ltd v TST Millbank [2012] EWHC 3710 (Ch)**

The tenant had to pay the rent quarterly in advance and also had to pay a one-month penalty in order to exercise the break. They paid two months rent and claimed that the third month could be offset against the penalty. It was held that, on an interpretation of the clause, this was not so and the break was not successfully exercised.

**Marks & Spencer v BNP Paribas [2015] UKSC 72**

The Supreme Court has now heard this case. The tenant, Marks & Spencer, had to pay rent quarterly in advance and also insurance charge and a car parking licence in advance. They also had to pay monetary payments owed to the landlord as a condition precedent for exercising their break clause. There was also a premium payable in relation to the exercise of the break. The break did not correspond with a quarter day. The tenant paid the rent and other monetary payments in advance and then claimed that it must be implied that they could recover back money relating to the period beyond the break date.

The High Court agreed with this but on appeal the Court of Appeal disagreed. The Supreme Court has now agreed with the Court of Appeal. There is no scope for implication of such a term, especially as the parties had agreed in great detail the terms of the lease and not expressly included

anything. Lord Neuberger also confirmed that the case of **Ellis v Rowbottom [1900] 2QB 740** was correct in that the Apportionment Act 1870 applied to rent payments in arrears but not in advance.

**Gemini Press v Cheryl Lindsay Parsons [2012] EWHC 1608**

Where a break clause could be exercised by a named tenant, a successor was not entitled to exercise the break.

## VACANT POSSESSION

Another common condition is that the tenant must give vacant possession. This point arose in the case of **JIS (1974) v MCP Investment Nominees**. The original deal required the landlord to take a leaseback of shop units in a mixed-use development but the landlord successfully argued that the sublet units meant that the vacant possession requirement had not been satisfied.

Although the exercise of a right to break will determine any sublease, the subtenant may have security of tenure under the Landlord and Tenant Act 1954.

### **Mourant Property Trust Ltd v Fusion Electronics Ltd [2009] EWHC 3659**

A break clause contained conditions precedent requiring that the tenant would give up vacant possession, pay the rent due and not be in other material breach. On the termination date the tenant had retained keys in order for contractors to access and finish repair works. The break was void.

### **NYK Logistics (UK) Ltd v Ibrend Estates [2011] EWCA 683**

The break clause required vacant possession. The tenants gave notice and cleared the premises. Arrangements were made to surrender keys and the tenant agreed to carry out some repairs. The landlord did not collect the keys on the date and the contractors did not complete the repairs until six days afterwards. The tenant had not given up occupation and could not break the lease.

See the Code for Leasing Business Premises. The Code suggests that conditions precedent should not be used with the exception of the basic rent being up to date, the tenant giving up occupation and any subleases ending.

### **Riverside Park Ltd v NHS Property Services [2016] EWHC 1313**

The tenant was required to give up vacant possession as a condition of exercising the break clause. The premises contained a large number of partitions, floor coverings and kitchen fittings which were not removed. The court decided that, as they were not substantially attached and could readily have been removed, they were fittings belonging to the tenant who had therefore failed to vacate and could not exercise the break. The court went on to say that even if they had been fixtures there was no provision in the lease whereby they had been part of the demise. They were therefore tenant's fixtures which should have been removed. The court held decided that the existence of the partitions prevented the landlord from fully covering possession and therefore the condition precedent had not been satisfied. A better bet for the tenant would be to insist on a condition precedent that they give up occupation or to clearly include in the licence to alter provision as to what happens. In the current climate, it may be very difficult to give up vacant possession. The court's attitude in these circumstances is unclear.

### **Goldman Sachs International v (1) Procession House Trustee Ltd and (2) Procession House Trustee 2 Ltd (2018)**

To constitute a condition precedent to exercise a break the provision must be clear. Here, vacant possession was required to exercise the break but not reinstatement at the end of the lease.

### **Sirhowy Investments v Henderson [2014] EWHC 3562**

Planning permission for a second hand car business was granted subject to conditions that a scheme would be agreed with the local authority in relation to turning facilities to enable car transporters to unload cars without causing obstruction to the highway. Three years after the lease had been granted the council served notice for a breach of a planning condition. On this happening, the tenant was entitled to serve a break notice if they could show that they had acted reasonably in procuring the scheme. However, the tenant had breached a condition as to exercising the break in that they had failed to keep the premises in good and substantial repair as part of a fence had fallen down.

## TIME FOR EXERCISING THE CLAUSE

### **Trane (UK) Ltd v Provident Mutual Life Assurance Association [1994] EGCS 121**

A lease was expressed to commence on 28 August 1981. It was executed on 6 January 1982. There was a break clause exercisable after 10 years on giving six months' notice.

The tenant was assured by the managing agent of the landlord that the notice must expire in January 1992. The tenant served notice but the landlord refused to accept it. The judge agreed that the notice should have been given to expire in August 1991, i.e. the tenth anniversary of the date of commencement. However, the landlord was estopped from denying his managing agent's representation even though given 'without prejudice'.

The tenant would thus have won but for the fact that there was minor disrepair at the date of exercise of the break clause.

### **Micrografix v Woking 8 Ltd [1995] 37 EG 179**

The break clause to determine the lease was exercisable on 23 June 1995. The tenants erroneously stated in the notice that the lease would determine on 23 March 1994 and referred to the relevant clause in the lease.

Held: the mistake was obvious to someone with the landlord's knowledge. The landlord would not be misled by the wrong date. The notice was valid.

### **Mannai Investment Co v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945, HL**

The tenant entered into a ten-year lease of office premises subject to a right to exercise a break clause terminating on the third anniversary of the commencement date.

The commencement date was 13 January. The notice to break was expressed to terminate on 12

January. The House of Lords reversed the decision of the Court of Appeal by a 3:2 majority. Break clauses should be treated no differently from notices to quit periodic tenancies.

As long as a reasonable receipt of the notice made clear what was intended, the notice was valid. It was sufficiently clear that the tenant intended to exercise the option to break.

Reference to the clause allowing the break would presumably be sufficient, at least in the case where the lease contains only 1 break. Mistakes are still made, however, e.g. where breaks are served in the name of the wrong tenant in particular where there is an associated company in occupation.

#### **MW Trustees Ltd and others v Telular Corporation [2011] EWHC 104**

A lease provided for a tenant to terminate it by giving six months' written notice by hand or special delivery to the landlord. The tenant served an invalid break notice as it was addressed and sent to the former landlord.

The tenant subsequently emailed the new landlord attaching a copy of the original notice. The landlord forwarded the email to its managing agents who confirmed to the tenant that they accepted the notice and were happy for the tenant to terminate the lease. However, they asked the tenant to re-address the notice to the landlord.

The tenant prepared a replacement notice but it was not received by the landlord. The landlord argued that no effective break notice had been served. The High Court held that:

- Applying the principles in **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] UKHL 19**, a reasonable recipient would not have been misled as to the tenant's intention to terminate the lease even though the notice was addressed to the wrong person. On the court's construction of the lease, although notice had to be given to the landlord, it did not need to be addressed to the landlord.
- Although the lease did not permit service by email, the landlord was estopped from challenging the validity of the notice.

#### **Hotgroup plc v Royal Bank of Scotland [2010] EWHC 1241**

In the absence of an estoppel it is essential to give the break notice to the correct person. Here the terms of the break required notice to be served on the landlord's management company. The notice was served on the landlord and was invalid.

#### **Siemens Hearing Instruments v Friends Life [2014] EWCA Civ 382**

Here a break notice had to be served in accordance with S.42 of the Landlord & Tenant Act 1954. The notice did not refer to the section and was held to be void.

#### **Baker Tilly Management Ltd v Computer Associates UK Ltd (2009) 11 December**

In this case, the claimant was tenant under an underlease. The lease had originally been granted to Baker Tilly Services Ltd. The lease included a break clause allowing the tenant to determine it by service of a notice on its landlord. The tenant served a notice which complied, in all material respects, with the requirements of the underlease. However, in between the grant of the lease and

the exercise of the break right the tenant had changed its name to Baker Tilly Management Ltd. The break notice was served in the original name of Baker Tilly Services Ltd. Was the notice valid? Applying the 'reasonable recipient' test, the court held that it was.

**Dun & Bradstreet Ltd v Provident Mutual Life Assurance [1998] E EGLR 175**

The tenant had become a wholly owned subsidiary of another company. The break was served by the head company. The notice was void as there was no clear agency. Moreover, as a rent penalty had not been paid, there had also been a failure to comply with a condition precedent.

**Orchard (Developments) Holdings plc v Reuters Ltd [2009] EWCA Civ 6**

The lease set out provisions as to the service of a break notice whereby, if recorded delivery was used, the notice would be served on receipt by the landlord. However, if any other form of notice was used then the receipt had to be acknowledged. The break was received but receipt never acknowledged and the service was therefore invalid.

# SUBLETTING AND TERMINATION OF THE HEAD LEASE

## **Pennell v Payne [1995] QB 192**

It was accepted that on termination of the head lease by notice the sublease will also end. The House of Lords in **Barrett v Morgan [2000] 1 All ER 1** followed this decision even though the head tenant and landlord had colluded in giving notice so as to terminate an undesirable subletting. The head tenant may be faced with a claim for non-derogation from grant, however. In relation to a business lease within the Landlord and Tenant Act 1954, termination of any head lease will merely accelerate a statutory continuation.

## **PW and Co Ltd v Milton Gate (2004)**

Termination of the head lease by means of a break clause was expressed to be subject to the continuation of any subsisting subleases (these being outside the 1954 Act). Nevertheless, the subleases came to an end and the tenant was successfully sued for not breaking the lease with a certain amount of floor space let.

## PERSONAL BREAKS

### **Linpac Mouldings Ltd v Aviva Life [2010] EWCA 395**

Release is subject to a qualified covenant against assignments and the original tenant had a personal break clause. The original tenant assigned the lease and now wanted an assignment back to themselves. The landlord refused on the grounds that they might exercise the break.

Contrast **Harbour Estates v HSBC (2005)** where, on the facts, a personal break was held to be assignable.

Following **Oil Property v Olympia & York 1994**, and **Max Factor v The Wesleyan Society [1995]**, this was a good reason for refusing consent. In any case it will require clear wording for the break to be exercised after a re-assignment.

Tenants who have personal break clauses may consider subletting instead of assignment.

**Note:** **Brown & Root v Sun Alliance [1997]**. Where the lease was of sufficient duration to require substantive registration by an assignee, the tenant was still the legal tenant of the lease for the purpose of exercising a personal break until the assignee applied for registration. It is submitted that the tenant would still be legal tenant for all purposes until the assignee had applied for registration. It is, therefore, essential that both landlord and tenant police the fact that the assignee has applied for registration.



# INADVERTENTLY ALLOWING A BREAK

## **Forfeiture**

### **B&Q v G S Fashions Estates [1993]**

The tenant openly parted with possession and the landlord served a Section 146 notice and commenced forfeiture proceedings. The tenant did not claim relief and the court held the lease to be forfeited once the notice had been served.

This constitutes a highly effective means of breaking a lease if the landlord is off his guard.

## **Members Voluntary Winding Up**

### **Re Paramount Airways Limited No. 3 [1994]**

Where a tenant voluntarily winds up a business even though credit worthy, the landlord will have a claim as a creditor. However, damages will be limited to lost rent for the remainder of the term. Moreover, the landlord will have to mitigate his loss by attempting to find another tenant and any gains in terms of reduced management costs will also be taken into account. A sum of money will also be reduced from damages based on the possibility of the business having been wound up without sufficient funds to pay the rent. In the present case the level of damages was substantially less than half of the actual rent forgone. Once more this constitutes an effective way of terminating a lease early.

# REMOVING ENTRIES ON THE REGISTER

Substantively registered leases will be noted against the landlord's title and leases for more than 3 or 7 or less years may also be noted in order to protect easements. These should be removed by the tenant.

If the tenant leaves without serving a break, then an attorney clause may be used in order to clear title. Alternatively, if nobody is in occupation the Land Registry may accept peaceable re-entry for non-payment of rent. It may be difficult to re-let for a further 6 months, however, as a tenant may seek relief from forfeiture.

# OTHER METHODS OF TERMINATION OF THE TENANCY

## **Expiry of Term**

1. A lease for a fixed period determines automatically when the fixed period expires. In such

circumstances there is no need for the landlord to serve a notice to quit.

2. The tenant may have an option to renew the lease provided he complies with the terms of the option, e.g. to observe and fulfil the covenants in the lease. The tenant may also lawfully remain in possession where he is:
  - a. A tenant of business premises protected by the **Landlord and Tenant Act 1954 Part II**; or
  - b. A tenant of a dwellinghouse protected by the **Rent Act 1977** or by the **Housing Act 1988**.

### **Notice to Quit**

1. A lease for a fixed period need not be determined by a notice to quit unless the lease expressly so provides. In all cases a notice to quit is required for the determination of periodic tenancies, e.g. yearly, monthly or weekly tenancies. At common law the notice to quit need not be in writing, **Timmins v Rowlinson (1765)**, though this is subject to statutory qualifications.
2. The length of the notice required is dependent upon the express terms of the periodic tenancy or those implied by the general law in the absence of express terms. The following length of notice is appropriate in these particular periodic tenancies:
  - a. Six months' notice must be given to terminate a yearly tenancy;
  - b. One quarters' notice must be given to terminate a quarterly tenancy;
  - c. One months' notice must be given to terminate a monthly tenancy; and
  - d. One week's notice must be given to terminate a weekly tenancy.

Statutory provisions must be taken into account in determining the notice to be given. As will be seen below, this depends on the purpose of the tenancy.

Note: The notice must expire on a period of the tenancy.

The general law rules have been amended greatly by statute, the main amendments being:

### **Business Tenancies**

The **Landlord and Tenant Act 1954 Part II** does not allow leases of business premises to be determined by a notice to quit. A tenancy of business premises can only be brought to an end by the procedure in the 1954 Act and the tenant is entitled to not less than six but not more than twelve months' notice.

### **Sight and Sound Education v Books [1999] 43 EG 161**

Where the tenant who vacated premises weeks before the end of the termination of the s25 Notice and had been in occupation for the previous 14 years lost his right to double compensation for disturbance under s37 LTA 1954 at the end of the lease and the landlord uses s30(l) (e), (f) or (g) for opposition to a new tenancy.

## Surrender

1. If the tenant surrenders his lease to his immediate landlord and the landlord accepts, the tenant's lease merges with the landlord's reversion and comes to an end.
2. An express surrender should be by deed but a surrender for value which is evidenced in writing or supported by an act of part performance would be effective in equity by analogy with the doctrine in **Walsh v Lonsdale (1881)**.
3. Surrender by estoppels may arise where the tenant or landlord or both do an act which shows an intent to end the lease and it would be inequitable for them to rely on the fact that no express surrender deed had been accepted by the landlord.

Note: **Implied surrender:**

### **Beegas Nominees v BHP Petroleum [1999] 77 P & CR 14**

Where the assignee agreed a stepped rent which was outside the scope of the original lease, this did not bind the original tenant: following **Friends Provident v BRB [1996] 1 All ER 336**. This is now enshrined in **s.18 LT(c)A 1995**. However, the original lease was not impliedly surrendered by the variation. For there to be such a surrender there must be a change in the demised premises or the term of the lease. In these situations, landlords' advisers should ensure that e.g. a separate lease is granted if the demise is increased or a reversionary lease is used to increase the term. Otherwise the landlord may find that he has lost his sureties.

### **Cricket v Shaftesbury Ltd [1999] All ER 283**

S.43(3) LTA 1954 expressly excludes short term leases 6 or less months duration from its scope. However, if the total duration of occupation under a series of leases exceeds 12 months the exclusions will not apply.

Here, the occupier was given two purported licenses for 5 months each followed by a tenancy at will. The total time in occupation was for over 12 months. The landlord claimed that even if the tenant had leases, they were short-term and within the S.43(3) exclusion. The Court held that as a tenancy at will does not attract business security (**Wheeler v Mercer [1956] 3 All ER 631**) the total term was less than 12 months and the tenant was excluded. A periodic tenancy implication on payment of rent can be rebutted in the circumstances: see **Javad v Aqil [1990] 2 ELGR 82** and more recently, **London Baggage Co. v Railtrack [2000] EGCS 57** where there was a tenancy at will on the tenant holding over and paying rent, pending negotiations for a new lease.

To be sure, an express tenancy at will may be agreed. The above presents a convenient way of allowing a tenant in occupation, and allowing the landlord a rental pending negotiation for a lease.

Note: Be sure of having exclusion notices available at the end of the fixed term and enter into a tenancy at will if there is a gap whilst a new lease is negotiated – be careful also with implied surrender and re-grant by adding to the term or duration as this would require new exclusion notices.

## Deeds of Variation and Guarantors

### Holme v Brunskill [1878]

It was held that where a tenant surrenders the lease or a part thereof without the guarantor's consent the agreement will come to an end. Likewise, if the landlord allows the tenant to pay the rent late without the consent of the guarantor in writing, the guarantor's liability will also be discharged.

### Howard de Walden v Pasta Place [1995] 1 EGLR 79

A revocable licence to widen permitted use also without the consent of the guarantor also brought the guarantee agreements to an end. Any variation of the lease, unless they are insubstantial or incapable of adversely affecting the tenant, will have this effect.

More recently in the **Topland Portfolio No 1 Ltd v Smiths New Trading Ltd [2014] EWCA Civ 18** (21<sup>st</sup> January (2014) Court of Appeal), 20 years previously the tenant obtained permission to alter the premises without any formal guarantor's consent. Subsequently the tenant went into administration. The Court of Appeal has confirmed that as the guarantor was not a party to any supplemental documents, the guarantor was not liable.

## Merger

Merger would occur in the following circumstances:

- a. Landlord leases land to tenant and landlord's reversion and tenant's lease later pass into the hands of X.
- b. Landlord leases land to tenant and tenant later acquire landlord's reversion.

## Disclaimer

The major example of disclaimer arises under **s315 Insolvency Act 1986** which provides that a tenant's trustee in bankruptcy in whom an onerous lease has been vested can disclaim the lease.

The effect of disclaimer in such a case as between landlord and tenant is that the lease is at an end but this does not affect the rights of third parties. Thus, if the tenant had mortgaged his lease to E, the court may make an order vesting the lease in E. In **Hindcastle v Barbara Attenborough (1986)** the House of Lords held that disclaimer by the tenant will not affect liability of any guarantors, who may still be sued. See also **Shaw v Doleman (2009)** liability under Authorised Guarantee Agreements will also continue after a disclaimer.

## Frustration

The House of Lords in **National Carriers Ltd v Panalpina (Northern) Ltd. (1981)** held that the doctrine of frustration can apply in rare cases to a lease of land. The event would have to be such that no substantial use, permitted by the lease and in contemplation of the parties, remained available to the tenant.

A contract will be terminated by frustration if there is an unforeseen intervening act which renders substantial performance of the contract impossible. In **National Carriers v Panalpina (Northern) Ltd [1981] AC 675** the court recognised that frustration might apply very rarely to leases. However, this was not the case here even though for the majority of the 10 year lease the local authority had closed the access road to the premises.

#### **Canary Wharf v European Medicines Agency [2019] EWHC 335 (Ch)**

The tenants had a 25-year lease of premises in London paying £14m per annum in rent. They were relocating to Amsterdam after Brexit. The court accepted that this was an unforeseen intervening event but decided that the lease was not frustrated. Most notably as they should have negotiated a break clause. EMA were given leave to appeal to the Court of Appeal but the case has not been settled and they have assigned to WeWork, an American office provider.

There have been some suggestions that the Coronavirus pandemic may result in leases being frustrated. In the light of the above, this seems unlikely except in relation to very short leases.

## FORFEITURE AND PEACEABLE RE-ENTRY

The landlord may peaceably re-enter the premises. See **Billson v Residential Apartments [1992] 1 AC 494**. However, if the tenant is using the premises as a dwelling, a court order must be obtained under s.2 of the Protection from Eviction Act 1977. There may also be a criminal offence of violent entry committed under s.6 of the Criminal Law Act 1977.

Forfeiture may not be an effective remedy in a downward market, in particular in view of the payment of full business rates for empty properties. See **B&Q v GS Fashions (1994)**, a tenant does not have to seek relief from forfeiture in which case the lease will be terminated on service of a notice.

A better alternative may be illustrated by the case of **Hemingway v Dunraven Securities [1995] 09 EG 233**. Here, an injunction was ordered preventing an unlawful subletting. In this situation, the original tenant's lease will continue.

See also **Innovative Logistics -v- Sunberry Properties [2008] EWCA CIV 126**; the company, who held a thirty-year lease, was in administration. The administrators granted a six-month licence of the premises for storage without consent. The landlord obtained an injunction. The Court of Appeal set aside the injunction as, when a company is in receivership, not merely do the landlord's interests have to be taken into account in deciding any remedies available but also those of other tenants.

### **Goldacre (Offices) Ltd v Nortel Networks Ltd [2009] EWHC 3389**

Rent falling due under the lease during administration will amount to a cost of administration, even if only a part of the premises is being used to pay the creditors. There is no element of discretion to this and it will apply whether or not the landlord has requested rent.

### **Leisure Norwich II v Luminar Lava Ignite [2012] EWHC 951**

Here, the High Court confirmed that rent due prior to administration was not a cost of administration.

### **Re Games Station Limited (also known as Jervis v Pillar Denton Limited) [2014] EWCA Civ 180**

On 26 March 2012, a group of companies went into administration. A pre-pack sale to a new company enabled the new company to take over the business and occupy more than half of the stores under a licence from the administrators.

Under the leases of those stores the tenant was due to pay rent on the usual quarter days. Rent was therefore due on the March quarter day, which was the day before the administration.

The administrators decided not to make those March rent payments relying on the following cases.

**Relying on Goldacre and Leisure Norwich above.**

In the instant case the administrators paid the rents that fell due for subsequent quarters as expenses of the administration.

In the first instance, on an application by the administrators for directions as to payment of rent, the judge had followed the above decisions and held that rent falling due before administration was simply provable as a debt in the administration but rent due in a period when administrators were using the property amounted to an administration expense. The landlord appealed to the Court of Appeal.

The Court of Appeal allowed the landlord's appeal.

Lord Justice Lewison, delivering the judgment of the court, said that the Goldacre and Leisure (Norwich) decisions had left the law "in a very unsatisfactory state" as administrators would either end up paying "more than the true benefit" of their use of the property or less – depending on the timing of the administration.

In **United Dominions Trust v Shellpoint Trustees [1993] 4 All ER 310**, the court accepted that a sub-lessee and mortgagee could also claim relief under s.146 LPA1925. This may be highly desirable, in particular, where there is merely a ground rent paid as only rent arrears may be found and not mesne profits after the date of forfeiture. In **Escalus Properties v Robinson [1996] QB 231** a subtenant and mortgagee can also claim under s.145(2) if service charge is reserved as rent. In this case only service charge arrears must be found. If service charge is not reserved as rent then the court has a discretion as to whether to order relief under s.146(4).

In **High Street Investments v Bellshore (1996)** an equitable assignee was able to take the benefit of s.146(2).

If a landlord expressly or impliedly waives his right to forfeit the lease, he loses his right to re-enter in respect of the breach concerned though not as regards subsequent breaches. The two essentials of waiver are that:

- a. the landlord is aware of the commission of an act of forfeiture by the tenant; and
- b. the landlord does some positive act which is a recognition of the continuance of the tenancy.

Thus, if the landlord:

- i. accepts or sues for rent falling due after a right to forfeiture arises;
- ii. distrains for rent whether due before or after the breach; or
- iii. grants a new lease to a defaulting tenant.

Each of these acts is strong evidence that he has elected not to forfeit the lease. It is important to distinguish between continuing and non-continuing breaches of covenant as the waiver applies only to the particular breach in question. Once the landlord has unequivocally and finally elected to treat the lease as void, or by serving a writ for recovery of the land, no subsequent receipt of rent or other act will constitute waiver. See **Chrisdell Ltd v Johnson (1987)**, where continued acceptance of rent by the landlord was not held to amount to waiver in circumstances where the landlord accepted representations from the tenant believing them to be true when in fact they were not.

### **Leasehold Property (Repairs) Act 1938**

This applies to all proceedings for damages or forfeiture where the lease was granted for seven years or more and three years or more are unexpired. The Act applies to a “covenant or agreement to keep or put in repair during the currency of the tenancy” (see **Starrokat Ltd v Burry (1982)**). Where the Leasehold Property (Repairs) Act 1938 applies the landlord cannot proceed without first serving a notice under s146 of the LPA 1925 which must inform the tenant of his right to serve a counter-notice. If the tenant serves a counter-notice no further proceedings can be taken without leave of the court.

A notice under s146 of the LPA 1925 must contain the following information:

- a. specify the breach of covenant complained of;
- b. if the breach is capable of remedy, require the tenant to remedy the breach; and
- c. in any case, require the tenant to make monetary compensation for the breach.

The court may not give leave under the 1938 Act unless the landlord shows that the immediate remedying of the breach is required:

- a. to prevent substantial diminution in the value of the reversion;
- b. by any Act or bye law;
- c. in the interests of any sub-tenant;
- d. because it can be remedied at an expense that is relatively small in comparison with the much greater expense if the work was postponed; and
- e. because it would be just and equitable to grant leave.

### **Jervis v Harris (1996)**

It was settled that if the landlord reserves the right to enter, carry out work and charge, the claim is in debt and is thus not covered by the Act. In **Associated British Ports v C H Bailey (1989)** the House of Lords held that to proceed with action the landlord had to show the case that he would succeed on a balance of probability in a full case. He failed as the lease still had a 94-year term left, equipment in disrepair would be obsolete anyway.



**Note:** By reserving the right to enter and carry out works, the landlord will render himself potentially liable under s4 defective Premises Act 1972. Whereby any person to be affected by repairing breaches may sue. The duty arises whenever a landlord has or should have knowledge of a breach and so regular inspections must be made.

A form of special relief in respect of internal decorative repairs is available under s147 of the LPA 1925. The court may have regard to all the circumstances of the lease and may wholly or partially relieve the lessee from liability for such repairs.

# THE RATING (EMPTY PROPERTIES) ACT 2007

The provisions came into force on 1 April 2008. An empty commercial property will pay full business rates after 3 months. Industrial units and warehousing will pay full business rates after 6 months. Charities are now subject to 100% relief as are community amateur sports clubs, Listed Buildings and buildings of companies in liquidation, receivership or administration. As previously, for full business rates not to apply, property must be occupied for more than 6 weeks within the billing period. The Government will also allow changes to the structure of the building to make it unmarketable and thus avoid full business rates although both of these provisions will be reviewed at a later date.

## **Business rates and the Budget 2020**

If the Rateable Value is less than £51,000 in pubs or the retail sector the premises may be entitled to a 30% exemption from business rates. In England, it has been announced that for the rating year 2020/21 for premises in the leisure and hospitality sector there will be no business rates liability regardless of the rateable value. If the premises are empty full business rates liability will be incurred after three months.

## **Exemptions from the Business Rates Charge**

After the initial three- or six-month rate free period expires, an empty property is liable for 100% of the basic occupied business rate charge unless: -

1. The rateable value of the property is less than £2,900. (Less than £2,600 from 1 April 2011 to 31 March 2017 and less than £18,000 in 2010/11).
2. The owner is prohibited by law from occupying the property or allowing it to be occupied.
3. The property is kept vacant because of action taken by or on behalf of the Crown, or any other local or public authority, to prohibit occupation of the premises or acquisition of them.
4. The property is included in the schedule of monuments compiled under s.1 to the Ancient Monuments and Archaeological Areas Act 1979.
5. The property is the subject of a building preservation notice within the meaning of the Planning (Listed Buildings and Conservation Areas) Act 1990 or is included in a list compiled under section 1 of that Act.
6. The owner is entitled to possession only in his capacity as the personal representative of a deceased person.
7. One of the following insolvency or debt administration situations exists:
  - A bankruptcy order within the meaning of section 381(2) of the Insolvency Act 1986;

- The owner is entitled to possession of the property in his capacity as trustee under a deed of arrangement to which the Deeds of Arrangement Act 1914 applies;
- The owner is a company subject to a winding-up order made under the Insolvency Act 1986 or which is being wound up voluntarily under that Act;
- The owner is entitled to possession of the property in his capacity as liquidator under s112 or s145 of the Insolvency Act 1986;
- The owner is a company in administration under the Insolvency Act 1986 or is subject to an administration order.

There are also no business rates to pay on an empty property if:

- It is held by a charity and appears likely to be next used for charitable purposes.
- It is held by a community amateur sports club and appears likely to be next used for the purposes of the club.
- It is a newly-built non-domestic property completed after 1st October 2013 and before 30th September 2016.

### **Business Rates & Empty Properties**

#### **John Laing & Son Ltd v Kingswood Assessment Committee [1949] 1 KB 344 at p350.**

Here, the court accepted that occupation for business rates purposes had four aspects:

1. Actual occupation.
2. Beneficial occupation.
3. Exclusive occupation.
4. Occupation must not be too transient.

#### **Kenya Aid Programme v Sheffield City Council [2013] EWHC 54 (Admin)**

It was accepted that occupation by a charity for storage purposes in two adjoining warehouses could avoid business rates liability even though only 25% and 30% of the floor area was actually occupied. The Charity Commission subsequently warned charities that they should not be involved in avoiding business rates.

#### **Makro Properties Limited v Nuneaton & Bedworth Borough Council [2012] EWHC 2250 (Admin)**

The court accepted that storage of 16 pallets for 6 weeks every 3 months was sufficient to avoid business rates.

**Principled Offsite Logistics Ltd v Trafford Borough Council [2018] EWHC 1687 (Admin)**

It was held that Empty office premises attract full business rates after 3 months but if premises are occupied for more than 6 weeks in any 3-month period business rates can be avoided. Here, POLL were given 43-day leases to occupy premises for the sole purpose of avoiding business rates. They paid a peppercorn rent and received 20% of the avoided business rates. This was held to be sufficient occupation and there need not be any specific purpose. The rates were avoided.

**Rosendale Borough Council v Hurstwood Properties (A) Ltd & Others [2019] EWCA 364 (Ch)**

Special purpose vehicle companies were set up with no assets. They then went into liquidation or were struck off the company's register for non-production of accounts and the lease went to the Crown under bona vacantia. As premises of companies in liquidation and as the Crown do not pay business rates on empty properties, no rates were payable.

**Kenya Aid Programme v Sheffield City Council [2013] EWHC 54**

Premises were held to be occupied wholly or mainly for charitable purposes even though the charity only occupied 25 to 30% of the surface area. The occupation did not have to be efficient or economically viable. Business rates were therefore avoided. The case was referred back for a decision as to whether the use was wholly or mainly for charitable purposes.

**Public Safety Charitable Trust v Milton Keynes Council [2013] EWHC 12 37**

The court reiterated the need for the use to be wholly or mainly charitable; having wi-fi points for use by the charity was insufficient. The Charity Commissioners have also warned charities as to their responsibilities in relation to business rates relief.

**Sunderland City Council v Stirling Investment Properties LLP [2013] EWHC 1413**

Here, a 43-day lease for the tenant's occupation for his bluetooth equipment was satisfactory as a lease of more than six weeks in duration. As the premises were warehousing this allowed six months of empty business rates liability to be avoided.

## OTHER EMPTY PROPERTY ISSUES

Note that insurance may be vitiated if the property remains empty for a period of time. Insurers should be notified and specialist insurance obtained.

Once a former landlord comes into control of the premises, he will be liable to carry out fire safety and asbestos risk assessments under the Regulatory Reform (Fire Safety) Order 2005 and Control of Asbestos Regulations 2012. Not to do so is a criminal offence and may also vitiate buildings insurance. If the property is empty the insurance may be increased dramatically. Also check whether there is a provision in the lease whereby the landlord must be notified if the property is empty.

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Published June 2020

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