

# RADCLIFFE TALKS REAL ESTATE

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**Break clauses and**  
**Capitol Park Leeds plc v Global Radio**  
**Services Ltd**



Radcliffe  
Chambers

# WHAT IS A BREAK CLAUSE?

- Clause in a lease giving the parties the right to end the lease early
- Similar to an option
- Any CONDITIONS attaching to the break must be strictly performed

United Scientific Holdings Ltd v Burnley Borough Council [1978]  
AC 904

Siemens Hearing Instruments Ltd v Friends Life Ltd [2015] 1 All  
E.R. (Comm) 1068

## WHO CAN EXERCISE?

- Lessor/ Lessee/ Both?
  - Not specified – only the lessee: Dann v Spurrier (1803) 127 ER
- Successors in title?
  - Max Factor Ltd v Wesleyan Assurance Society (1997) 74 P&CR 8;
  - Olympia & York Canary Wharf Ltd v Oil Property Investments Ltd (1995) 69 P & CR 43
- Joint owners
  - All have to join in giving notice:
    - Lessees: Hounslow LBC v Pilling [1993] 2 E.G.L.R. 59.
    - Lessors: Right v Cuthell (1804) 5 East. 491
- Legal not beneficial owner: Brown & Root Technology Ltd and Another v Sun Alliance and London Assurance Co Ltd [2001] Ch 733

## WHO MUST BE SERVED?

- Joint lessors/lessees have to be served
- Agents cannot be served unless authorised to receive the notice

## HOW?

- Check express requirements of the break clause/lease on mode of service
- Section 196 Law of Property Act 1925
  - Unless contrary intention expressed
  - Wandsworth LBC v Attwell [1996] 1 E.G.L.R. 57
- common law requires that notice communicated to the other party

# FORM OF A BREAK NOTICE

- TIMING

Time is of the essence:

United Scientific Holdings Ltd v Burnley Borough Council [1978]  
AC 904

- WORDING

- must comply with any stipulations set out in the break clause
  - mandatory form of break notice?
  - Mandatory form of words?

Siemens Hearing Instruments Ltd v Friends Life Ltd [2015] 1 All E.R.  
(Comm) 1068

- Otherwise clear and unambiguous words

# MISTAKES

- If within time – serve another notice!
- Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 74

“Even if such notices under contractual rights reserved contain errors they may be valid if they are ‘sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate:”
- 2 stage process: Trafford Metropolitan Borough Council v Total Fitness UK Ltd [2002] EWCA Civ 1513
  - What does the notice mean?
  - Does it comply with the contractual requirements?



# MISTAKES

- ADDRESSEE
- Mistake not fatal
  - MW Trustees Ltd v Telular Corporation [2011] L.&T.R. 19
  - Townsends Carriers Ltd v Pfizer Ltd (1977) 33 P. & C.R. 361
  - Havant International Holdings v Lionsgate Investment [2000] L.&T.R. 297

BUT

- Mistake meant notice invalid
  - Lemmerbell Ltd v Britannia LAS Direct Ltd [1998] 3 E.G.L.R. 67



## PRE-CONDITIONS

- Conditions are required to be strictly performed

Reed Personnel Services plc v American Express Ltd [1997] 1 EGLR 229

- ABSOLUTE REQUIREMENTS

- All rent or other sums due under the lease are paid
- all tenant covenants performed/complied with
- The tenant must give vacant possession.

Spent breaches not relevant: Bass Holdings Ltd v Morton Music Ltd [1988] Ch. 493

BUT even “trifling” disrepair cannot be overlooked Finch v Underwood (1876) 2 Ch. D. 310

# PRE-CONDITIONS

- QUALIFIED CONDITIONS
  - No MATERIAL breach of tenant's covenants/repairing obligation
  - No SUBSTANTIAL breaches

Fitzroy House Epworth Street (No.1) v Financial Times [2006] 2 E.G.L.R. 13

Objective test - materiality is to be assessed by reference to the ability of the landlord to relet or sell the property without delay or additional expenditure

Reasonable compliance – less onerous but plenty of scope for dispute?  
Gardner v Blaxill [1960] 1 W.L.R. 752

# CAPITAL PARK V GLOBAL RADIO

- Capitol Park Leeds Plc v Global Radio Services [2021] EWCA Civ 995

What constitutes vacant possession where tenant is required to deliver up vacant possession on the break date?

The Premises were defined as

*".....including all fixtures and fittings at the Premises whenever fixed except those which are generally regarded as tenant's or trade fixtures and fittings and all additions and improvements made to the Premises and any Outside Parts and any signage erected by or on behalf of the Tenant upon the Estate and references to the Premises include any part of it".*



# CAPITAL PARK V GLOBAL RADIO

- First instance judge determined:
  - Empty but devoid of essential fixtures and fittings
  - dysfunctional and unoccupiable
  - Tenant had deliberately stopped works in hopes of negotiating settlement but the clock had run down
- Landlord argued that definition of premises expressly included landlord's fixtures and fittings and the absence of essential fixtures and fittings mean that the tenant had failure to deliver up vacant possession of the PREMISES

# CAPITAL PARK V GLOBAL RADIO

- Court of Appeal decision
  - Obligation to give vacant possession is NOT concerned with physical state of the premises but ensuring that premises vacant of 3 things:
    - People
    - Chattels
    - legal interest

Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264 ,  
Chattels: physical impediment substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property

## GOOD NEWS

- First instance decision caused concern that break clauses might be even more onerously construed
- No longer a concern following CA decision
- CA expressly stated that the fact that the conditions attaching to a break have to be strictly complied with DOES NOT mean that a break clause has to be strictly construed in favour of the lessor/adversely to the tenant
- Other recent decisions favourable to tenants:
  - Wigan Borough Council v Scullindale Global Ltd and others [2021] EWHC 779 (Ch)
  - Court implied a term that landlord's break could only be exercised when an event of default persisted



# HOW TO PROTECT A TENANT OBLIGED TO COMPLY WITH THEIR COVENANTS?

Finch v Underwood (1876) 2 Ch. D. 310.

Mellish LJ:

“In a case like this, if a tenant wishes to claim the benefit of such a covenant he should send in his surveyor to see what repairs are needed and should effect the repairs which the surveyor certifies to be requisite. The court would be inclined to give credit to a survey thus honestly made, and would lean towards holding the condition precedent to have been complied with.”

1. get expert advice early to identify exactly what is required to validly exercise the break clause
2. get a surveying well in advance of any deadlines
3. consider erring on the side of caution if there might be a dispute about the standard of repair
4. try to agree a schedule of works with the landlord
5. consider trying to agree a cash payment, to waive compliance with the repairing obligations/tenant's covenants
6. instruct trustworthy contractors, and have the works properly supervised
7. ask the landlord's surveyor to inspect the completed works, and to state whether or not he is satisfied with them.

# UNCERTAINTY?

- Ask the Court for a declaration

Goldman Sachs International v Procession House Trustee Limited,  
Procession House Trustee 2 Limited [2018] L. & T.R. 28

If the landlord wishes to impose a precondition on the tenant he should make it quite clear in the drafting of the clause what the tenant is required to do

- Contra proferentum rule described as
  - A principle that still survives
  - But a make weight argument
  - Landlord the proferens benefiting from the precondition



## RICS LEASE CODE

- RICS Code for Leasing Business Premises (1<sup>st</sup> edition February 2020) provides

2.3 Any break rights or options for renewal for either party should be clearly specified, including the dates (or range of dates) when a party can end the lease, the length of prior notice to be given and any pre-conditions for the break being effective.

2.4 Unless the parties have agreed stricter conditions in the heads of terms, a tenant's break **should be conditional only on the tenant paying all basic rent payable on any date before the break date, giving up occupation and leaving no subtenants or other occupiers**. Disputes about the state of the premises, or what has been left behind or removed, should be settled later, as at normal lease expiry.

2.5 Leases should require landlords to repay any rent, service charge or insurance paid by the tenant for any period after a break takes effect. Repayment of service charges may be deferred until the service charge accounts are finalised.

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