

Time to take a break?



You are negotiating a new commercial lease. Flashforward a few years and the future of the economy is uncertain. You may be a tenant who needs to 'get out' or you may be a landlord who is thinking about selling the building free from occupiers. What next?

Let's flashback to the initial negotiations. It's important for both commercial tenants and landlords to have adequate rights to end leases early, if required. It's therefore crucial that the terms of a break clause are considered at the very outset.

A break clause allows either a landlord, tenant (or both) to end the lease early, either on a specific date (fixed) or at any time after a specific date (rolling).

Beware of the bear traps!

Tenants, you need to be thinking about minimising any preconditions in the break clause that may restrict your ability to end your lease. Landlords, you will want to ensure you are left with an empty premises, with rent paid up to date and no serious breaches of covenant.

The usual conditions found in break clauses are as follows:

1. **Vacant Possession** – this requires the tenant to remove all of their fixtures, fittings, belongings etc at the end of the lease term. The courts are known to construe this pre-condition very strictly and for example, leaving a bag of rubbish in the property can be interpreted as not giving vacant possession. The more favourable variation of this condition is for the "tenant to give up occupation of the premises and leave no continuing subleases". For landlords this should give comfort that the premises will be returned free from any occupants.

2. **Payment of rents in advance** – the landlord will usually require payment of all rents reserved by the lease to be paid up to and including the break date. Where the condition is not limited to just the annual rent, this will also include payment of service charge, insurance rent and interest etc. Such sums could be in dispute and not resolved by the break date. Tenants would have to ensure that all payments were made in full and on time in order to meet this condition. It is therefore recommended that the condition is limited to only the annual rent payable, as this amount and payment date will be known. It is also important to remember to include a provision for the refund of any annual rent, insurance rent and service charge which the tenant has paid in respect of the period after the break date. This is a reasonable position and shouldn't prejudice the position of the landlord – the landlord will have other remedies for non-payment of rent.
3. **Compliance with covenants** – the tenant will be precluded from exercising the break if it has breached any covenant in the lease, no matter how minor or trivial. The compromise position here is to limit compliance to a "material breach of covenant which has not been remedied within a reasonable period of the tenant having received notice of the breach". From the perspective of the landlord, you will have remedies under the lease for breach of covenant, so your position should not be weakened by accepting this.

It is also important to note that the Code for Leasing Business Premises in England and Wales 2007 provides that the only pre-conditions to tenants exercising any break clauses should be that: "they are up to date with the main rent, give up occupation and leave behind no continuing subleases". Remember however that compliance with the Code is not mandatory and negotiations will ultimately depend on the bargaining power of the parties.

Is it too late?

You may wonder what to do if you are a party to a lease which doesn't include a break clause. Well, all is not lost. Although there is no contractual obligation for either party to agree to bring the lease to an end early, you can try to negotiate terms for a surrender of the lease. This may be accepted on the basis of a financial payment as an incentive from the party who is proposing the surrender. Alternatively, you may find yourself in a position where both parties want to exit. In such circumstances a surrender could be achieved in the absence of a premium.

Tips for landlord and tenants

1. Take legal advice before agreeing heads of terms and (for tenants) ensure that the heads of terms do not refer to any pre-conditions in relation to termination of the lease
2. Instruct a solicitor to draft/negotiate the terms of your new lease
3. If you are considering exercising your option to break, leave enough time to consider the requirements, instruct a solicitor to serve this notice on your behalf and be clear on any deadlines that apply.

For more information in relation to leases of commercial property for either landlords or tenants, please contact our [real estate team](#).



[Chehraz Fox](#)

Partner