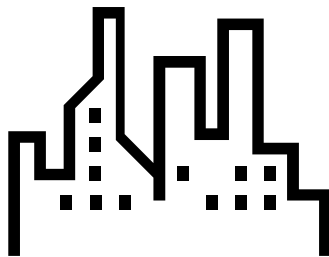




Break Clause Compliance



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The recession has led to an increasing number of tenants exercising the break option in their lease. However, in a sparse letting market and with business rates to pay on empty buildings, landlords are looking to ensure that the conditions of the break option are strictly met. The break notice needs to be given by the tenant in whose name the lease is vested and if the lease is registered at Land Registry, the leasehold proprietor. The notice must be served on the landlord, and if the landlord's interest is registered at Land Registry, then the registered proprietor of that interest. This may seem straightforward but many break notices fail because of the change in the name of the landlord or tenant, or because of a change in the ownership of the landlord's or tenant's interest in the lease. Service of the notice on the landlord's agent will not suffice. A search of Land Registry will reveal the identity of the correct current landlord and tenant in most cases. The notice itself should recite the exact wording of the break clause and then give the required notice that the tenant is exercising the break option. If the break date is actually specified then this date should be set out in the notice. If not, it is usually sufficient for the tenant to give notice according to the wording in the break clause.

Specifying an incorrect break date could invalidate the break notice. The lease will usually provide where, when and how the break notice must be served. Subject to the precise provisions relating to service of notice in the lease, ordinarily if the landlord is a company, the break notice can be served at the landlord's registered office. Service can be by hand or by registered post. The lease may also provide for when the notice is deemed to have been served, and this is important to know to ensure that any period of notice, i.e. 6 or 12 months, is actually given.

On Condition
Break clauses often specify other conditions which need to be met before the break option will be effective. As a starting point, care must be taken to see whether the condition needs to be satisfied at the time of service of the notice; at the break date itself or at both dates. One condition which is common is that the tenant must pay all of the rents up to the break date. The definition of what constitutes the rents in the lease can often be widely drafted and the tenant will need to ensure that all of the rents as described in the lease are paid by the break date. One topical issue with regard to the condition relating to the payment of the rent is that landlords are demanding the full quarter's rent to be pay-

able on a quarter day, even if the break date falls partway through a rental quarter. Payment should be made by the break date so the method of payment must be considered. If payment is made by cheque for example, then payment should be made well in advance of the break date in order to take into account the time that it takes for any cheque to clear. Another fairly common condition is that a penalty payment must be made to the landlord. Again care must be taken to ensure that the landlord is in actual funds prior to the break date, and that any VAT payable has also been paid. The most difficult of all the conditions to comply with is the condition that the break will only be effective if the tenant has materially complied with all the covenants in the lease. This will include the tenant ensuring that its dilapidations and reinstatement obligations are met. It will also require the tenant to comply with its other obligations in the lease. A landlord is not under any obligation to give any guidance to the tenant as to whether this condition has been met, and several cases have gone before the courts recently where landlords have argued that the break is not effective because the tenant has not carried out all of the works that are required to be undertaken.

(Continued on page 4)

Dilapidations Claims

Dilapidations claims are particularly prevalent at present due to the state of the property market. Many tenants are vacating premises, which they have occupied for some time and are in a state of considerable disrepair. Pursuant to S.18(1) of the Landlord and Tenant Act 1927, a landlord's claim for damages for a failure to repair cannot exceed the actual diminution in value of the premises resulting from the disrepair. The diminution in value is the difference at lease expiry between the value of the property in and out of repair.

As a result a tenant may be able to rely on the diminution in value test so as not to be liable in damages for all or any of the costs of repair or reinstatement of alterations.

*Commercial Property Journal -
April - May 2010*

C.P. Comment:

It is in times like these that a landlords attitude to repair and maintenance may have serious implications. A Full Repairing Lease provides, on the face of it, a cast-iron guarantee that a tenant who is solvent must keep/put the premises into a good state of repair. So, the temptation to rely on this "ultimate" contractual arrangement and ignore repairs until the lease ends is understandable.

However as the article makes clear - there are risks and they are magnified in a challenging market. Quite apart from the fact that your tenant may not last until the lease end (Woolworths, First Quench !), at lease end you have to prove damage in order to get a Court

Judgement - a poorly located property, in bad repair, in a recession may mean that the difference in value is substantially less than the actual cost of works.

The remedy ?

Most leases provide for the tenant to keep in repair and decorative order during the term.

The prudent landlord will ensure that annual inspections are carried out, to identify disrepair, and to notify the tenant to remedy. If the tenant does not, the landlord can go in and do the work. You may still have to go through the Court to enforce payment, but, your claim is a debt under the lease rather than damages, so no argument or analysis is required, proof of expenditure will suffice for the Court to uphold your claim.

Rise In VAT Will Put Pressure On Retail Sector

The rise in VAT to 20% next year will place further pressure on an already struggling retail sector, experts have warned.

The widely anticipated VAT rise - confirmed by Chancellor George Osborne on the 22nd June - is expected to cause consumer spending to drop by billions. Industry leaders said that this would cause pain to landlords and retailers in secondary locations and could lead to a renewed increase in the number of administrations.

Richard Fleming, UK head of restructuring at KPMG, said: "Retailers and property businesses, such as secondary shopping centres, have struggled to cope with the drop in demand. Those retailers teetering on the brink may find that the VAT rise pushes them over the edge. While we have seen a lull in insolvency numbers in recent

months, we expect this trend to reverse, particularly in industries where improving consumer demand is vital."

Steven Law, president of insolvency body R3, agreed. He said that retailers would find themselves between "a rock and a hard place" as they struggle to work out whether taking on the extra tax burden or suffering the inevitable fall in consumer demand, if they pass it on, will damage their bottom lines more.

In a bid to protect profits, retailers may put extra pressure on landlords, calling for lower rents or scaling back their property requirements.

British Property Federation chief executive Liz Peace said: "Retail landlords will see further downward pressure on rents, which will mean less cash for new development and investment in deprived

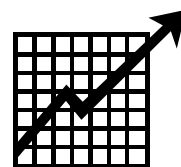
areas."

Ian Parish, head of retail at BNP Paribas Real Estate, added: "This could herald a more difficult time for retailers, which will filter through to a reduction in new store openings - something the property industry doesn't need at the moment."

Estates Gazette - 26th June 2010

C.P. Comment :

It is always hard to accurately predict the result of tax increases or decreases. The 2.5% reduction in VAT of about 18 months ago had very mixed reviews as to its impact. However it seems likely that this increase will make life harder for some retailers.



Property Management

Good estate management is the cornerstone in making any investment deliver its purchase business plan targets. Investment property is appraised on cash flow, and assumptions provide the required returns. The only way to achieve this return (or ideally exceed it) is to collect rents on time, keep units let and maximise rental income. Saying you are proactive in management is probably the most overused phrase in the sector. What actually matters is putting this into practice and this is achieved by getting rent in, reducing outgoings and ensuring occupancy stays at, or close to, 100%.

The core elements to achieving value for money are basic good management practices of ensuring high-quality services are supplied; collecting service charge funds

through active credit control; accurately budgeting annual expenditure; and swiftly auditing and delivering of accounts. The benefit of good cash flow management is more key than ever before. For an investor with bank interest payments to meet, it goes without saying that much is at stake if there are delays in receipt of rent.

Commercial Property Journal - June-July 2010

C. P. Comment :

The key management function is of course the maximisation and the collection of rents. But there is far more to the management of a property investment than administering the income stream. The investors base return is eroded

if he doesn't recover all the costs that his lease allows and I have consistently come across landlords who miss the opportunities - recovery of insurance premiums, of the cost of re-valuing periodically for insurance purposes; the cost of dealing with tenants requests for consent or to assign; the cost of having to remind tenants of their obligations under the lease, for example to repair; ground rents payable by long leasehold residential properties typically above commercial lettings.



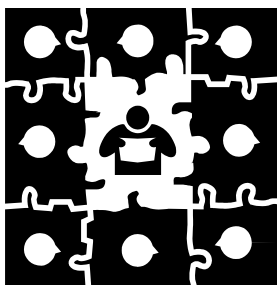
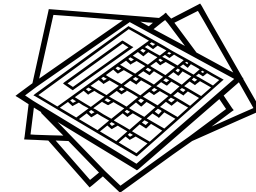
How We Can Help You

Diary Administration



As property managers we are well equipped to react to important dates within leases, typically there will be rent review dates but may

also include fixed rental uplifts, break options and of course tenants decorating covenants. Whilst you may not be ready to relinquish full management of your property to us, why not let us administer the diary? We can alert you to all the important dates in good time and there will be no charge for this service.



The Culshaw Partnership
one company for all your
property needs

Property Management

Rent Reviews/Lease Renewals

Investments ~ Sales & Lettings

Dilapidations ~ Rating

Planning ~ Survey & Valuation

Landlord & Tenant Disputes

The services we offer are listed here please contact us to see if we can be of assistance with any property issues you may have. See page 4 for all our contact details .

Service Charge Recovery

Question:

As a landlord of premises that are let on long leases, how can I ensure the due recovery of service charge?

Answer:

You should be aware of the terms of the lease and all statutory requirements, follow procedures and comply with legislation carefully even if you think that some of the detail involved is unnecessary.

Statutory requirements

Service charge demands must contain the name and address of the landlord and an address in England and Wales at which it can receive service of notices.

A summary of rights and obligations that complies with the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 (SI 2007/1257) must accompany any demand for payment of a service charge.

A tenant may withhold payment until this has been served. Section 19 of the Landlord and Tenant Act 1985 provides for reasonableness in respect of service charges in that they must be reasonably incurred and any services or works carried out must be of a reasonable standard.

Failure to comply with regulations

In the event of non-compliance,

costs are limited to £250 for each tenant in the case of works and £100 for each tenant in each accounting period in the case of a long-term agreement. Procedures differ for public notices.

Estates Gazette - 19th June 2010

C.P. Comment :

Clearly this is a potential mine-field and failure to adhere to the rules can be costly. From a simple delay which may have implications for the cost of borrowing, to an outright inability to recover the lions share of a bill, the landlord stands to lose a lot if the regulations are not followed.

Break Clause Compliance (cont)

(Continued from page 1)

Leaving a radiator system in place at the break date which should have been removed was enough for one landlord to argue that the break had been invalidated.

Getting a good building surveyor on board to assist with compliance with this type of break condition is essential. The building surveyor will also see whether a negotiated settlement can be reached with the landlord. The settlement would be on the basis that the landlord accepts that the break conditions

have all been met in return for a payment from the tenant.

Handover

As the break date approaches, any payment should be made in good time and arrangements made with the landlord for a final inspection of the property. The keys should be handed back and the meter readings taken. The successful exercise of the break will often release the tenants from a further five years of rent and other charges for the property. For the landlord it often ladders them with an empty

building with high insurance risks. As such, a tenant who is considering exercise of the break option should be under no illusions as to the attention to detail which it must take to ensure the successful exercise of its break.

RICS Business - June 2010

C.P. Comment :

Whatever your perspective it is important to have good advice and get it right first time.

Market Indicators

For sometime now the two tired Market has returned with a vengeance. Prime well let properties command good prices and are in strong demand. Less prime, secondary properties on short leases are hard to find, hard to sell and this is replicated in their value.

Contact :

Partners: John Tookey or Justin Fowler

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