

Property

Break Clauses in Commercial Leases

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Break clauses provide a valuable option for a Tenant to surrender a Lease to the Landlord ahead of completion of the full term without penalty. These clauses usually appear in leases held for five to ten years and on occasion in leases of up to twenty five years, often giving the Tenant the option to break the Lease at years three, five or ten.

This is particularly relevant for commercial tenants who have entered into Leases in the period from 2007 to 2009, as the date for exercise of such break clause may be close to hand.

Break clauses can be useful tools in providing commercial flexibility in a challenging marketplace. However in light of recent developments in the law, care must be taken to ensure the effective exercise of the Break.

Most importantly, Tenants should adhere strictly to all conditions applicable to the exercise of the clause to ensure certainty in effecting the break. Compliance with some but not all conditions will enable the Landlord to challenge the exercise of the break clause. This obligation of strict compliance has found favour in the English courts (notable in the recent case of *Advocet Industrial Estates LLP v Merol* [2011] EWHC 3422 (Ch) whereby a surrender of a lease was held to be void due to a deficit in interest paid under a damages provision which amounted to £130).

In Ireland, although a final decision has not yet been given in the case, similar questions have arisen before the courts in the case of *O'Brien -v- BT Communications*. Conditions of exercise of the break clause in this Lease included 12 months' notice of exercise of the break together with the payment of damages in the amount of six month's rent on the date of exercise of the break. The Landlord was notified of BT's intention to exercise the break option on 16th May 2011, however BT neglected to pay the damages specified in the Lease on this date. Instead, BT Communications paid the Landlord €1,178,927 on May 25th. This was €5,000 less than the six month's rent as specified in the Lease. The Landlord later received a cheque for the outstanding €5,000 on July 6th 2011. On these facts the Landlord has refused to accept that the lease has been validly terminated and should the Court agree with the Landlord the lease would run for a further 15 years at considerable cost to the Tenant.

Bearing the above in mind, those Tenants considering the exercise or inclusion of a break clause in any agreement should take care to ensure that the break is effectively exercised and to minimise the risk of challenge by the Landlord.

The following tips may be helpful in this regard:

- At the outset, conditions attached to the break clause should be negotiated with the Landlord. As a matter of contract the break clause cannot be amended at a later date without the consent of both parties. These conditions should be both achievable and realistic for the Tenant to benefit from an efficient surrender of the Lease.
- Take care to consider all conditions of the break to ensure breaking the lease is a good commercial and financial decision. These conditions can encompass anything from the

payment of a financial sum to the Landlord, reinstatement of the premises to its original condition and, perhaps less immediately obvious, conditions relating to payment of VAT.

- Importantly for any Tenant who is an assignee of the leasehold interest in the property, the full extent of conditions agreed to by the original Tenant may not be immediately obvious. Nonetheless these will have to be satisfied in order to exercise the break clause.
- Exercise of a break clause should be considered and reviewed with legal representation well in advance to allow for an approach which minimises delay and disruption to business upon surrender.
- Even where the Tenant does not seek to surrender the Lease, the presence of a break clause in a Lease may still prove an important tool in negotiations with the Landlord in respect of rent.

In conclusion break clauses in commercial Leases are becoming increasingly popular, however consideration of the implications of exercising the break on a practical level and strict compliance with the conditions attached are important to ensure an effective transition for the Tenant.

This note is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. It is given wholly without any liability or responsibility on the part of Eugene F. Collins Solicitors and does not replace the necessity to obtain legal advice.

For further information on this topic or generally in relation to property law please contact Mark Walsh, mwalsh@efc.ie or your usual Eugene F. Collins contact.

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