

Property

# Breaking Up Is Hard To Do

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You may think that exercising your break clause is easy. What tenants may not know is that in every clause of your break option, there is a possible pitfall - if you do not deal with your break option properly, you could potentially fall foul of its terms resulting in a detrimental outcome.

### Strict interpretation of a break option

Even trivial non-compliance with a condition on which the exercise of a break option depends will preclude its successful exercise, especially where the condition or requirement is clearly mandatory and unambiguous.

More recently, given the increased amount of breaks being exercised by tenants, more case law has come to light identifying how strict this interpretation really is. The case law is mainly UK based and, as a persuasive authority in the Irish courts, is very much relevant to tenants here.

The following are examples of issues which have been scrutinised in recent judgments and which should be borne in mind by the tenant when exercising a break.

- **Notice** - it must be drafted as provided; if for example the break notice is to be sent on blue paper it will not be acceptable if written on pink paper.
- **Service of the notice** - service should be made exactly in accordance with the lease and in as many ways possible (e.g. by hand, registered post, ordinary post, fax and email). However, if relying on the latter methods, the notice must be receipted by the landlord to ensure effective service no matter when receipt actually occurs.
- **Payment of a penalty on the break date** - if the lease stipulates an exact amount to be paid on an exact date, failure to do either will result in non-adherence and the break option will be lost even if such payments are a few days late or a few euro short.
- **Vacant possession** - the property must be returned vacant of people and the landlord must be able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, which includes all tenant belongings, fixtures and fittings
- **Non-payment of interest (even if not demanded)** - failure to pay interest on late payments of rent can be fatal to the proper and valid exercise of the option, even if such interest is historic.
- **Repair** - unless the want of repair is trifling, a tenant must comply with a repairing covenant in order to properly exercise an option. Agreeing dilapidation obligations from the outset is paramount.
- **Payment of rent until the break date** - where rent under a lease is payable quarterly in advance, the entire quarter should be paid even if the break date occurs during the relevant quarter. In addition, there should be no expectation for reimbursement from a landlord for any overpayment made beyond the break date.

This list is not exhaustive and it is recommended that tenants seek legal advice in relation to the exercise of a break option to ensure the best outcome.

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