

Break notices for commercial tenants – beware of the common pitfalls

Due to numerous recent issues affecting the property market more and more break notices are being served by commercial tenants. At the same time, more and more tenants are seeking break rights in their new leases in order to provide them with flexibility when it comes to their real estate.

25 February 2021

Due to numerous recent issues affecting the property market (including the pandemic, Brexit and the huge increase in internet shopping), more and more break notices are being served by commercial tenants. At the same time, more and more tenants are seeking break rights in their new leases in order to provide them with flexibility when it comes to their real estate.

It is important to be aware of the potential pitfalls which await as a tenant when you serve break notices, as failure to comply with the lease conditions could lead to the break being invalid. This, in turn, could result in you having to stay at the premises (and, more importantly, be liable for the rent etc.) for the remainder of the contractual term. Here we discuss just a few of the most common conditions:

Common conditions requested by a landlord could include:

- Service of written notice;
- Payment of all rent due under the lease;
- Giving up vacant possession of the property; and
- Performance of all covenants in the lease.

Pitfalls to be aware of

Service of written notice: you must provide the requisite notice and strictly comply with the terms of the lease. Even if the terms seem non-sensical, such as a requirement for the notice to be served on blue paper or sent by carrier pigeon, they must be complied with. You must also be aware that the break cannot be withdrawn once it has been served.

Payment of rent: you should check the wording of the lease to ensure what sums you are required to pay. For example, is rent defined as just 'base rent' or does it include service charge, insurance or even interest on any late payments. You must also check the lease for the last relevant rent (or rents) payment date before the break date because if the break date falls mid-quarter (or mid-month), any apportioned rent could invalidate the break.

Vacant possession: despite being a commonly used term, the phrase 'giving up vacant possession' is not completely clear-cut. Generally speaking, it means that a landlord must be able to re-let the property unhindered but you will need to check the terms of your lease on a case-by-case basis to ensure all items are removed (or kept) to comply with this condition.

All covenants: if you have this break condition in your lease, it is practically impossible to comply with as even a trivial breach will invalidate the break. You should try at all costs to avoid any such clause in a new lease as it could end up with the tenant, ultimately, paying a lump sum to the landlord to waive this condition of the break.

Summary

When negotiating a lease, as a tenant you should always take legal advice and pay careful attention to the break clause conditions before agreeing them, ensuring that you're aware of all of the potential risks associated with each condition and that they are commercially acceptable.

The above risks are just some of the issues you may face and so if you are a tenant requiring advice, please contact Bradley Roberts.

Contact



Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

Related expertise

Real estate for retail