Hardwicke Building

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PROPERTY TEAM NEWSLETTER

Article: Making break clauses work – some tips for tenants

Q: When does 12th January mean 13th January?
A: When it is specified as the date for operation of a tenant's break clause to determine a lease in a notice read by a 'reasonable recipient'.

This was the conclusion of the majority of the House or Lords in *Mannai v Eagle Star* [1997] AC 749 in which they were asked to decide whether a notice served by a tenant expressing the intention to terminate a lease on 12th January 1995 under a clause permitting the tenant to break the lease by serving notice to expire on the third anniversary of the term commencement date was effective when, in fact, the third anniversary of the term commencement date was 13th January 1995.

As this recession bites it has once again become important to consider the principles that apply when tenants' attempts to operate break clauses are challenged by landlords.The decision in *Mannai* was concerned with the construction of notices. Lord Steyn explained that:

"The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene." (767G-768B)

This sensible answer is consistent with the contemporary approach to construing contractual documents. But it does of course lead to further litigation as parties try to find out where the 'bright line' is and what errors tenants can (and cannot) get away with. The answer appears to be that whereas notices specifying the wrong date will be effective when they can be understood by the reasonable recipient, particularly if they can be read in conjunction with the terms of the lease or a covering letter (see *Keith Bayley Rogers & Co v Cubes* (1975) 31 P&CR 312) in order to resolve any ambiguity, notices specifying the wrong party as the server or recipient of the notice may be held to be ineffective. This is because the question of whether a notice has been served by the correct party is a question of fact and not a matter of construction – see *Lemmerbell v Britannia LAS Direct* [1998] 3 EGLR 67 but contrast *HIH v Lionsgate Investment* [2000] L&TR 297.

Of course practitioners considering the point in advance are unlikely to make the same mistake that Mannai's agents made. However the decision does not help tenants who miss the time limits and serve a notice a day too late – all well-drafted leases will lay down time limits for service of a notice and those time limits are the essence of the contract and must be strictly observed – *United Scientific Holdings v Burnley Corporation* [1978] AC 904.
When acting for tenants it is also important to remember that serving a properly drafted notice to operate the break clause on the landlord and on time is only the start of the process of terminating a lease. Most break clauses will specify that exercise of the right to break is conditional upon other matters, typically yielding up vacant possession and complying with covenants in the lease.

It is surprisingly often the case that tenants who have chosen to operate the break nevertheless find it difficult to vacate on time. In *John Laing Construction v Amber Pass* [2004] 2 EGLR 128 the break clause provided that the term would determine upon the tenant yielding up the entirety of the premises at the expiry of the notice. The tenant vacated but left security guards and barriers in place because of a concern about vandalism; it also retained keys. The Court considered that its task (cf. *Mannai*) was to look objectively at what had occurred and concluded (1) the party seeking to terminate the lease had manifested a clear intention to do so; and (2) the landlord could occupy the premises without difficulty if it wished to, retention of the keys did not prevent this. The tenant succeeded.

Complying with the repairing and decorating covenants in the lease can pose a much greater problem to the tenant, particularly if the force of the covenant is not mitigated by reference to 'material' or 'reasonable' compliance. A covenant requiring absolute compliance with the covenants in the lease means what it says and,

for example, failure to comply with a covenant to decorate in the last year of the term will amount to a breach of the condition precedent for termination of the lease – see *Bairstow Eves v Ripley* [1992] 2 EGLR 47 (in fact a case about an option to renew, but the same principles apply).

A clause requiring 'material compliance' with the covenants in a lease was considered by the Court of Appeal in *Fitzroy House Epworth Street (No 1) Ltd v Financial Times Ltd* [2006] EWCA Civ 329; [2006] 1 WLR 2207 where the tenant had vacated premises let for £595,000 p.a. leaving about £20,000 worth of disrepair. The Court of Appeal dismissed the landlord's appeal from the judge's refusal to grant the landlord a declaration that by reason of the tenant's breach of covenant at the relevant date the lease continued to exist. In doing so it made the following relevant points: (1) the word "material" had been inserted into the break clause in order to mitigate the requirement for absolute compliance with all covenants at the relevant time; (2) "material" did not mean that only breaches which were trivial were permitted; (3) the materiality of any breach was to be assessed objectively by the ability of the landlord to relet or sell the property without delay or additional expenditure. The fact that the landlord had deliberately refused to co-operate with the tenant's attempt to agree a remedial programme was no doubt an influential factor in this case.

To sum up – if acting for a tenant who wishes to break their lease:
(1) Re-read the lease and remind yourself of the precise terms of the break clause
(2) Draft a notice in the form required by the clause specifying the correct date for termination of the lease
(3) Make sure that the notice is served on the correct (current) landlord, in time
(4) Send the landlord a covering letter explaining what the intention of the notice is
(5) Then advise the tenant what they must do to comply with the conditions for exercise of the break
(6) In the case of repairing and decorating covenants try to agree a programme of works with the landlord in advance
(7) Finally, make sure the tenant vacates in time

John de Waal

Did you see.......? Recent cases you may have missed.

Residential Landlord and Tenant
Rent Act 1977. Possession Order. Reasonableness.
Whitehouse v Loi Lee [2009] EWCA Civ 375
The tenant appealed against the making of a possession order, which had been granted on the basis that it was reasonable so to do as there was suitable alternative accommodation available.

Held: The CA allowed the appeal and set aside the PO on the basis that the judge had arrived at his decision on a mistaken basis. In considering all the circumstances, the judge should have compared the effect on the respective parties of making the order and not making the order.

Residential Letting Contracts
Office of Fair Trading v Foxtons Ltd [2009] EWCA Civ 288; [2009] WLR (D) 128
The scope of the relief that the court can grant in proceedings brought by the OFT under the Unfair Terms in Consumers Contracts Regulations 1999 and the implemented Directive 93/13/EEC on Unfair Terms in Consumer Contracts.

Held: 1. In a situation where on a general challenge a court had found a term or terms in a set of standard conditions in use in current contracts unfair, it is a proper exercise of its power to grant an injunction to prevent enforcement of that term or terms in existing contracts; 2. Declarations can be granted by the court even though parties before the court were not the parties to the contracts in which the terms appeared; that was the whole aim of the Directive in its pursuit of protection for consumers.

Payments In
Case management powers
Marstons PLC v Charman & Others [2009] All ER 231 (D)
In a claim for dilapidations and arrears of rent of licensed public houses, the landlord had made alternative applications to strike out the defendant tenant's defence and counterclaim for failing to comply with court orders under CPR 3.4(2)(c) or for an unless order that the T file a response to a Scott schedule. The judge dismissed the application but granted the unless order and, in order to progress proceedings which had been ongoing for two years, imposed a condition of the Court's own initiative that the T make a payment in of £93,000 within one week.

Held: The Court of Appeal held that the payment in was disproportionate in the circumstances. It had not advanced the conduct of the litigation, instead it the effect of putting unnecessary pressure on the T to abandon its defence and counterclaim.

Other News

The jurisdiction of the Lands Tribunal was transferred to the Lands Chamber of the Upper Tribunal from the 1 June 2009

The DCLG is currently consulting on whether to repeal ss.121-123 of the CLRA 2002 (requirement for a RTE company).

Case Summaries by Laura Tweedy and Andy Creer

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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Stephen Lennard	1976	Kerry Bretherton	1992	Alastair Redpath-Stevens	1998
Robert Leonard	1976	John de Waal	1992	Andrew Lane	1999
Wendy Parker	1978	Alexander Goold	1994	Sarah McCann	2001
Karl King	1985	Andrew Skelly	1994	Dean Underwood	2002
Michelle Stevens-Hoare	1986	Alexander Bastin	1995	Michael Wheater	2003
Steven Woolf	1989	Edward Rowntree	1996	Phillipa Harris	2005
Sara Benbow	1990	David Pliener	1996	Andy Creer	2005
Daniel Gatty	1990	Brendan Mullee	1996	Philip Fellows	2007
Rupert Higgins	1991	Nicola Muir	1998	Laura Tweedy	2007
Arthur Moore	1992	Alison Meacher	1998		