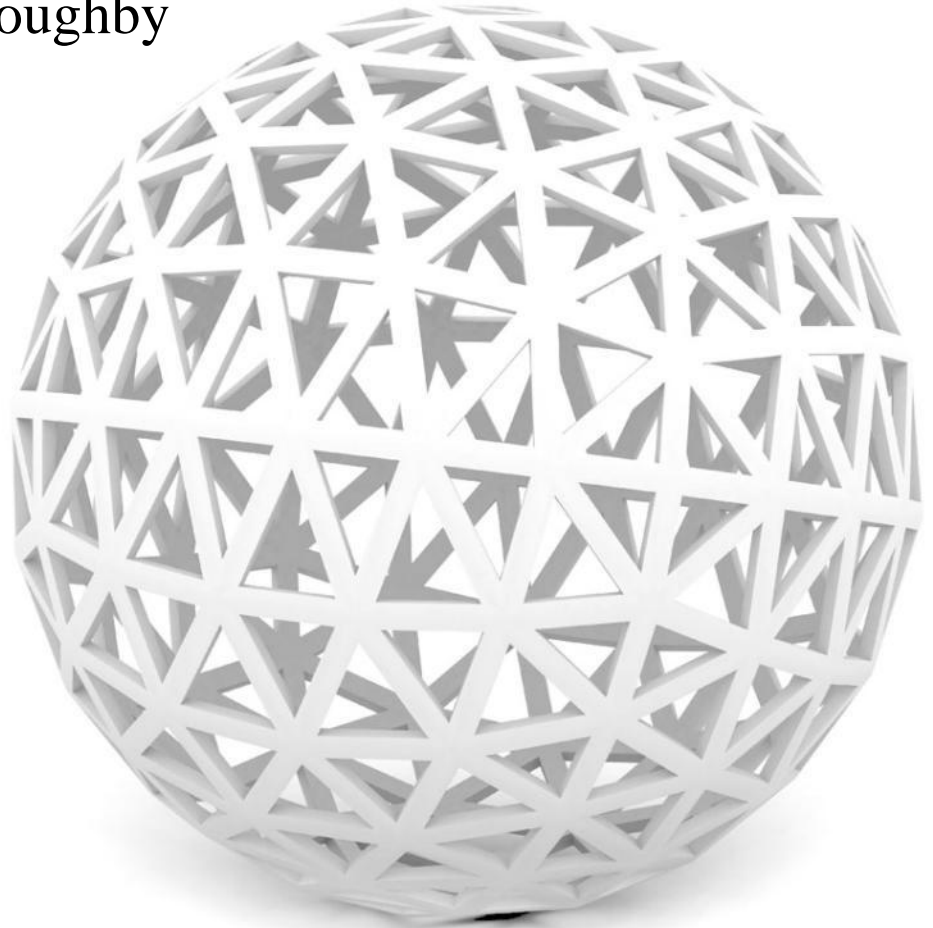


# ALLEN & OVERY

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*“Breaking up is  
hard to do” - A  
Practical Guide  
to Breaking your  
Lease*



# Roadmap

## 1. Break rights – impact

## 2. Some potential pitfalls

- Serving the break notice
- Vacant possession
- Payment of “rent”

(N.B. check lease for other pre-conditions in any given case; exact wording of lease will affect interpretation)

## 3. Tips when negotiating a new lease

## Failing to break – impact

- 10 year lease, £1 million p.a. rental
- Tenant fails to exercise the break at 5<sup>th</sup> year (not rolling break)
- 5 years rental liability (and other costs)
- Tenant has to negotiate a surrender premium or sub-let
- Exposure: mismatch between rent on sub-letting and lease, difficulty in re-letting (voids), rent-free period

# Some Potential Pitfalls

- Serving the Notice
- Vacant Possession
- Paying “Rent”

## Serving the Notice – Some Pitfalls

- To whom – read the notice provisions (*Hotgroup PLC v RBS* [2010])
- By whom (Tenant? Group company in occupation? Solicitors on tenant's behalf?)
- Where (Premises? Registered Office? Abroad?)
- When (Get dates right e.g. “not less than 6 months”)
- How (Mandatory? Permissive? Registered post? Fax? Email?)
- Other conditions (pink paper / blue paper?)
  
- **Action points:** instruct solicitors who can check the lease, any deeds of variation, diarise break dates and notice dates, and check notice has been served. Don't get distracted even if negotiating a surrender.

# Vacant Possession (“VP”)

**What is it? Depends on wording of lease but in essence: no people, no belongings so that landlord can enjoy the property undisturbed. Sound simple? It’s not and case law not always clear.**

- Are there people in possession - ensure there are no other sub-tenancies, licences or trespassers in place (*Beard v Porter* [1948])
- Don’t leave anything that would constitute an obstacle to the Landlord’s ability to use the Premises (e.g. rubbish, partitions, under floor cabling) – (*Cumberland Consolidated Holdings v Ireland* [1946])
- Don’t leave security guards or workmen in place beyond break date (*NYK Logistics (UK) v Ibrend Estates BV* [2011] cf. *John Laing v Amber Pass* [2005])
- If you stay in beyond break date, get landlord’s express consent – silence not enough (*NYK Logistics*)
- Return the keys (and key codes if appropriate)

# Vacant Possession

## Action Points:

- Confirm the hand back condition under the lease and associated documents (e.g. licences for alterations) with your solicitors (and landlord if possible)
- Request landlord's dilapidations schedule early
- Instruct contractors to price the works and allow sufficient time to do them if necessary
- Negotiate payment of equivalent cost of reinstatement works with the landlord plus a risk premium
- Complete negotiations for surrender
- If surrender not possible, ensure you start and complete the reinstatement well before the break date so VP can be delivered
- Key point: Allow a generous timeline as each stage will have a lead-in and may be subject to delays (e.g. inviting tenders, reviewing tender responses, getting contractors on site, snagging issues etc)

## Payment of “rent”

- Depends on the specific drafting of the lease
- Is it the “basic” quarterly rent? Or all the sums reserved as “rent”?
  - The scenarios that follow are based on these assumptions:
  - Break clause is conditional on payment of rent in full
  - “Rent” is defined as basic rent and other sums payable to the landlord during the course of the tenancy
  - “Rent” is payable on the usual quarter days in advance (not arrears) and whether it is demanded or not
  - A valid break notice has been served



# Payment of “rent”

## Caselaw - examples of potential pitfalls:

- Tenant serves break notice and vacates but pays rent up to the break date but not beyond (*PCE Investors v Cancer Research* [2012]; *Canonical v TST Millbank* [2013])
- Tenant served break notice with default interest of GBP130.00 outstanding (*Avocet v Merol* [2011])
- Trivial arrears sufficient to defeat break (*Quirkco Investments v Aspray Transport Ltd* [2011] – insurance rent)

# Payment of “rent”

## Key action points:

- Check what sums are payable (definition of “rent”?)
- Pay in cleared funds (not a cheque) before the deadline
- Be pro-active – don’t wait for an invoice
- Don’t apportion rent – unless lease (and your solicitors) say you can
- Watch out for demands just prior to break date – be ready to pay at short notice
- Calculate and pay interest on any historic late payments

# When entering into new leases

- Ideally, unconditional subject only to service of a valid break notice
- Avoid a break clause conditional on “material” or “substantial” compliance with lease covenants - unclear
- The Code for Leasing Business Premises in England and Wales 2007 (best practice not mandatory) suggests that break clauses should only require:
  - Tenant to pay **principal rent** up to expiry (i.e. not additional sums or interest and apportionable)
  - Tenant to give up **occupation** (i.e. vacate)
  - Tenant to leave **no subleases** (or other derivative interests)

## Conclusion - Existing Leases

- **Seek advice** - ensure you instruct professionals
- **Prepare** – diarise your break dates and get prepared well in advance allowing for delays
- **Vacant possession** – identify any vacant possession conditions and resolve them (preferably by surrender)
- **Rent** – identify what rent has to be paid and pay it all in advance
- **Rent review** – good opportunity to renegotiate terms of existing break clause

# Questions?



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