

Break clauses in a time of uncertainty

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What we are talking about today

- “*the right key which alone is capable of turning the lock*”: service, time and contractual interpretation
- Conditional break clauses: snares for the unwary?
- How vacant is vacant possession?
- Break clauses and the Landlord and Tenant Act 1954
- Mind the (registration) gap: the interaction between break clauses and land registration

“the right key which alone is capable of turning the lock”



“The simple fact is that the tenant has failed to use the right key which alone is capable of turning the lock.” *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 754, per Lord Goff

What is a break clause?

- Gives a party the right to end the tenancy before it is otherwise due to expire
- Specie of option
- Consequently, strict compliance with its terms are required
- Notices terminating a tenancy are technical documents because they are effective without the consent of the receiver

Contractual interpretation

- What does strictly mean?
- *Hankey v. Clavering* [1942] 2 KB 326
 - Lord Greene MR:
 - *“Notices of this kind are documents of a technical nature, technical because they are not consensual documents, but, if they are in proper form, they have of their own force without any assent by the recipient the effect of bringing the demise to an end.”*

Contractual interpretation

- *Reed Personnel Services plc v American Express Ltd* [1997] 1 EGLR 229
 - “where a lease contains an option which may be exercised only upon fulfilment of a condition, it is essential that that condition (a so-called pre-condition) be fulfilled before any purported exercise of the option can be valid” (Jacob J)

Contractual interpretation

- *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749
 - *Hankey v Clavering* was doubted
 - The construction of the notices had to be approached objectively, and the question was how a reasonable recipient would have understood them
 - The notice should be construed against the background of the terms of the lease

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd



“If someone has gone to great pains, well in advance, to secure tickets for himself and a friend for a Beethoven concert at the Royal Festival Hall by a famous visiting orchestra on 13 January and says to the friend a week earlier "I'll see you at the Festival Hall concert on 12 January" it will be obvious that he is referring to the concert on 13 January. According to the old rules of construction, the law will agree if there is no concert at the Festival Hall on 12 January. In that case there is a latent ambiguity. But if there is a concert on that date (Stockhausen, say, played by a different orchestra) he will be taken to have referred to that concert.”

(Lord Hoffmann)

Mannai – the clause

- Two leases – 10 years from 13 January 1992

"The tenant may by serving not less than six months' notice in writing on the landlord or its solicitors such notice to expire on the third anniversary of the term commencement date determine this lease and upon expiry of such notice this lease shall cease and determine and have no further effect. ... "

The notice served - the mistake

- “Pursuant to clause 7(13) of the lease we as tenant hereby give notice to you to determine the lease on 12 January 1995...”
- Unfortunately, however, the tenant made a mistake. The third anniversary of the term commencement date was not 12 January 1995 but 13 January 1995

Cf notice to quit

- “...the plaintiff has only himself to blame for the difficulties he is in in this case. Had he added the words which are very ordinarily inserted in a notice to quit, 'or at the expiration of the year of your tenancy, which shall expire next after the end of " one half-year from the service of this notice,' and which are inserted to avoid such a point as that now taken, all would have been in order; but the words are not there.”
- *Sidebotham v. Holland* [1895] 1 Q.B. 378, 389

Safety net – avoid the trap

- “Furthermore it is also well settled that, if the person giving the notice specifies the actual date but out of caution also specifies, in the alternative, the end of the period at which the notice is required under the clause to take effect, the alternative so given will be effective to save the notice if the actual date so given should prove to have been mistaken.” Per Lord Goff of Chieveley (dissenting)

Scintilla temporis, strict compliance or reasonable recipient?

- First instance: notices good – took effect at the moment of time which was both the last moment of 12 January and the first of 13 January, so that determined on 13 January.
- CA: a notice stated to take effect on 12 January could not operate to determine the lease on 13 January - notices ineffective.
- HL: a reasonable recipient with knowledge of the terms of the leases and of the third anniversary date would have been left in no doubt that the tenant wished to determine the leases on 13 January 1995 but had wrongly described it as 12 January;

The old rule... If the words of the document were capable of referring unambiguously to a person or thing, no extrinsic evidence was admissible to show that the author was using them to refer to something or someone else

In re Fish; Ingham v. Rayner [1894] 2 Ch. 83 in which the testator left his residuary estate to his "niece Eliza." He had no niece called Eliza but his wife had an illegitimate grandniece called Eliza, to whom the evidence of their relationship showed that he must have intended to refer, and also, as it happened, a legitimate grandniece called Eliza. The Court of Appeal said that the estate went to the legitimate grandniece and that evidence of the relationship between the testator and the illegitimate grandniece was inadmissible. Lindley L.J. said, at p. 85: "where the person most nearly answering the description is the legitimate grandniece of the testator's wife . . . no evidence can be admitted to prove that her illegitimate grandniece was intended.

On the other hand, if there was no one to whom the description accurately applied, there was said to be a "latent ambiguity" and evidence of background facts which showed what the testator must have meant, notwithstanding that he had used the wrong words, was admitted.

The principle from Mannai

- “The reasonable recipient would not have been perplexed in any way by the minor error in the notices. The notices would have achieved their intended purpose.”
- Per Lord Steyn.

Conditional break clauses: snares for the unwary?

- *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 revisited

Implied term in lease for repayment of rent?

- Rent was payable quarterly in advance on the usual quarter days.
- T's notice - only effective if there were no arrears of rent and a break premium of one year's rent was paid.
- T paid rent in full for the quarter starting on 25 December 2011 and ending on 24 March 2012, and break premium.
- T demanded repayment of the rent for the period from 25 January to 24 March 2012.
- LL refused to make repayment.
- T sought recovery of rent, car parking fee, insurance charge and service charge for the post-termination period.
- First instance - a term should be implied into the lease to the effect that M was entitled to those sums. The Court of Appeal and Supreme Court disagreed.

- Implied terms generally - necessity for business efficacy and obviousness
- [*Attorney General of Belize v Belize Telecom Ltd* \[2009\] UKPC 10, \[2009\] 1 W.L.R. 1988, \[2009\] 3 WLUK 455](#) Belize did not relax the traditional and highly restrictive approach to the implication of terms, Belize explained
- Factors in favour of implied term
- Factors against implied term
- Outcome - Save in a very clear case, no implied term. T made no recovery
- Service charge - The position in relation to the service charge was different as the lease enabled the service charge to be apportioned.

How vacant is vacant possession?



Vacant possession

- *Legal and General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch), [2006] L&TR 22
- *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264
- *Ibrend Estates BC v NYK Logistics (UK) Ltd* [2011] EWCA Civ 683, [2011] 4 All ER 539

Riverside Park Ltd v NHS Property Services Ltd
[2016] EWHC 1313 (Ch)

- Right to terminate on six months' notice by tenant and vacant possession
- Tenant had installed partitioning
 - standard demountable partitions
 - Purpose was to benefit the tenant by creating smaller offices
- Failed to remove upon moving out
- Held by the High Court that the partitions were chattels, not tenant's fixtures

Goldman Sachs v Procession House Trustee Ltd
[2018] EWHC 1523 (Ch), [2018] EGLR 33

- Break “subject to the Tenant being able to yield up the Premises with vacant possession as provided in Clause 23.2”.
- “On expiration of such notice, the Term shall cease and determine (and the Tenant shall yield up the Premises in accordance with clause 11 and with full vacant possession)”.
- Clause 11 was the reinstatement obligation

Goldman Sachs v Procession House Trustee Ltd
[2018] EWHC 1523 (Ch), [2018] EGLR 33

- Break clause was conditional on the tenant yielding up the premises with vacant possession on the break date
- BUT – did it also require full compliance with the reinstatement obligation as well?

Goldman Sachs v Procession House Trustee Ltd
[2018] EWHC 1523 (Ch), [2018] EGLR 33

- Held: Although both parties' interpretations of the clause were possible, the “natural and ordinary meaning” of the break clause was to impose a single condition to yield up with vacant possession
- Incumbent on a landlord to make the extent of any such conditions very clear

Break clauses and the Landlord and Tenant Act 1954: triggering them and inserting them



Effect of break notices

- A break notice determines the contractual term
- A tenancy protected by Part II of the Landlord and Tenant Act 1954 can only be ended by a way specified in that Act
- To end the tenancy, the party serving the notice also has to end the protection given by Part II of the Landlord and Tenant Act 1954

Tenants' break notices

- Tenant's notice to quit: sections 24(2) and 69(1) Landlord and Tenant Act 1954

Landlords' break notices

- Also need to engage section 25 of the Landlord and Tenant Act 1954
- 'Double duty': *Scholl Manufacturing Co Ltd v Clifton (Slim-Line) Ltd* [1967] Ch 41
- *Aberdeen Steak Houses Group plc v The Crown Estate Commissioners* [1997] 2 EGLR 107

Landlords' break notices – issues

- Is the landlord entitled to serve notice under the lease the competent landlord for s.25?
- Break notice can allow for termination of part of property, but s.25 can only be served for the whole of the property
- Time provisions for s.25 and notice may differ
- Often better to serve two notices

Including a break clause – renewal issues

- Section 35 Landlord and Tenant Act 1954
- Is redevelopment ‘on the cards’?
- *Adams v Green* [1978] 2 EGLR 46 – not the policy of the Act to prevent redevelopment
- *Davy's of London (Wine Merchants) Ltd v City of London Corporation* [2004] EWHC 2224 (Ch), [2004] 3 EGLR 39



Mind the (registration) gap: the interaction between break clauses and land registration

Sackville UK Property Select II (GP) No 1 Ltd v Robertson Taylor Insurance Brokers Ltd [2018] EWHC 122 (Ch), [2018] EGLR 13.

The facts

- Cs demised to D1 office premises in EC3 for a term of 10 years
- D2 acquired the business and shares of D1 and then D1 was wholly owned subsidiary within the same group
- With the written consent of C (required under the lease) D1 assigned the Lease to D2 by deed
- D1 and D2 with same solicitor who proceeded on the incorrect basis that the lease was not an interest required to be registered at Land Registry and a Deed of Assignment appropriate for an unregistered lease was used, whereas a Form TR1 ought to have been used
- Ds' solicitor serves notice to break - in the name of D2
- D2 was not registered as proprietor of the Lease until after service

The result

- Cs argued notice not effective –D2 could not serve when it was not at the time registered proprietor
- Ds' argument - Cs knew that this was a mistake and that Ds' solicitor had authority to serve the notice in respect of whichever party was suitable. Ds argued that the notice was in all the circumstances valid and effective to determine the Lease. Ds also contended that a reasonable recipient in the position of Cs could have been in no doubt that the notice was served on behalf of the person who was the tenant.
- Cs' argument: D2 only equitable assignee; s.27(1) LRA 2002, a disposition of a registered estate does not operate at law until the disposition is completed by registration.

- Registration gap: Cannot serve a break notice while registration is pending and not yet a legal owner.
- Solution: Additional clauses in sale contract to appoint the buyer of the lease as the seller's agent during the registration gap. This allows the buyer, during the registration gap, to serve notices etc.

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