

Property Dispute Resolution Newsletter

Break clauses

In these times of financial turmoil, more and more businesses are looking at ways to reduce their outgoings which in some cases may include bringing to an end commercial leases. It is increasingly common for leases to include break clauses to introduce a degree of flexibility.



A break clause is a term in a lease that allows a party to the lease – usually, but not always, the tenant – to bring the lease to an end before the expiry of the fixed term. In those instances where a lease term may be 12 years from the commencement date, a break clause which enables a tenant to bring to an end the lease after 3 years could offer a lifeline to a tenant in financial difficulty. However, simply because a lease contains a break clause, it does not follow that the break clause can be exercised. Consideration needs to be given as whether the clause is conditional or unconditional.

For the party looking to rely upon the break clause, an unconditional clause is preferable as provided the notice is served during the appropriate period, using an acceptable method and upon the right person, the notice is likely be valid. Matters are not so straightforward with conditional break clauses, however. At one extreme these all state that the break clause can be relied upon provided that **all** terms and conditions of the lease have been complied with. In almost all cases it will be possible for a landlord to show that some condition of the lease, however minor, has not been met, thus rendering the break clause ineffective.

A tenant exercising a break clause would wish to ensure that the conditions to exercise the break are conditions that can be fulfilled, for instance that the rent has been paid up to date.

It will also be important to ensure that service requirements are strictly carefully adhered to including when, upon whom and where notice is served. A party who has meticulously complied with strict conditions applied to a break clause can still fail to validly exercise the break by, for example, sending the notice to the other party's solicitor by first class post rather than to their registered office by recorded delivery as required by the lease.

Break clauses can be a very useful tool but remember to check the break clause provision within the lease carefully and in good time, paying particular attention to:-

- who can rely upon the break clause?
- what is the earliest and latest date the break clause can be exercised?
- are there any conditions attached to the break clause?
- does notice of intention to rely upon the break clause need to be served in a specific manner?

Failing to adhere to the requirements of a break clause will mean that the break clause cannot be relied upon. For that reason, it is better to take advice sooner rather than later, if a break of notice is contemplated.

Chris Drinkall

In this issue

- Break clauses
- Trespassers
- Gas: it's no laughing matter!
- The Tenancy Deposit Scheme – the judicial approach (almost) 2 years on
- Property dispute resolution expertise
- Eviction did not discriminate against disabled tenant

Trespassers

Whether it is a sign of the recession or pure coincidence, if the tabloids are to be believed, squatters or trespassers over land are making a comeback. Contrary to common belief, in the vast majority of cases, trespassers can be removed from a property quickly and without vast expense.

Rollits' Property Dispute Resolution Team has a wealth of experience in dealing with trespassers. Using tried and tested procedures, we are able to provide a dedicated trespassers repossession service that can achieve the prompt recovery of possession.

To start the repossession procedure, we will need full details of the ownership of the land/property and evidence of your legal interest in the property, when the trespassers arrived and how many trespassers are on the land. We can then issue possession proceedings usually within a matter of hours, arrange for the trespassers to be served with notice of proceedings the same day and attend the possession hearing on your behalf shortly after. In many cases, the trespassers will leave before a possession order is even made but if not, we can instruct an appropriate enforcement officer to enforce the order, remove the trespassers and secure possession of the property.

In short, we can offer a dedicated trespasser service that offers

- Fast, reactive advice and assistance from experts in property repossession
- The commencement of repossession proceedings on the same day as instructions are received
- Possession orders obtained within 3 working days in the majority of cases
- Enforcement procedures that ensure the expeditious recovery of land following the provision of a possession order
- Fixed fees available
- Practical advice to prevent a reoccurrence in future

One final reminder: you should not take the law into your own hands and try and forcibly remove the trespassers. Even though the trespassers may have no legal right to be on the land, or in the property, an attempt to remove the trespassers without a court order could result in a claim for illegal eviction being made which gives rise to a civil claim for damages and also criminal prosecution.

Chris Drinkall

Gas: it's no laughing matter!

In the recent case of *CDS Housing -v- Bellis*, the Court of Appeal confirmed that a Landlord was justified in seeking an immediate possession order against a Tenant whose conduct put both himself and others at risk.

In that case, the Tenant, had on more than one occasion caused damage to the electric and gas installations to the property, putting not only his own safety in jeopardy but also that of his neighbours. Possession proceedings were commenced by the Landlord on the basis of the substantial risk to health being caused by the Tenant and an immediate possession order was made.

Dismissing the Tenant's appeal against the immediate possession order, the Court of Appeal stated that the primary consideration for the judge hearing the possession claim was whether he was satisfied that the Tenant would not repeat his actions. On the facts of the case, the Judge could not be satisfied that the Tenant would not in future cause further damage to the installations. As such, there remained a very real danger to both the Tenant and neighbouring residents and consequently the making of an immediate possession order was justified.

Whilst the mantra that "each case will be decided on its facts" still applies the Court of Appeal's decision shows the level of importance attached to gas and electricity safety by the Court. Where a Landlord suspects that the tenant is interfering with the gas and/or electricity supplies to their property, immediate steps must be taken to investigate matters further. "The Tenant wouldn't let me in" will not provide a Landlord with much protection should someone be seriously injured or worse arising from a Tenant's interference with utility supplies. If necessary, applications for injunctions to allow access or the wave of possession proceedings must be considered as one of urgency.

Chris Drinkall



The Tenancy Deposit Scheme – the judicial approach (almost) 2 years on

The Housing Act 2004 made it a legal requirement that from 6 April 2007 all deposits taken by residential landlords had to be protected by the landlord effectively placing the money or arranging an insurance policy with one of a handful of approved bodies established to manage this “Tenancy Deposit Scheme.”

The legislation requires landlords to protect tenants’ deposits in this way and to inform tenants of the details of the particular protection scheme into which their deposit had been placed within 14 days of taking the deposit. The legislation also provides that if the landlord fails to do so there can be potentially serious penalties, such as the inability of the landlord to issue and rely upon mandatory possession notices and possible compensation payments to the tenant of up to three times the value of the deposit.

The scheme also established dispute resolution procedures to deal with disputes that arise surrounding the return (or otherwise) of the deposit.

Almost two years since the TDS took effect, it has become clear that whilst there appear to be some very demanding timescales set out in the legislation, and whilst of course good practice suggests that landlords should comply with these wherever possible, in reality the Courts have been willing to



grant a degree of leeway to landlords who at least make a reasonable (if belated) attempt to comply.

In the 2008 case of *Harvey -v- Bamforth* which was heard in Sheffield County Court, the landlord had failed to serve the required information on the tenant within the required 14 days. In fact the information was only served on the tenant some 7 months late, and only after possession proceedings had begun, but importantly before the tenant made their own application to court to prevent the landlord from obtaining possession on this basis and to seek compensation. At an initial hearing before a District Judge, an order was made in the tenant’s favour and the landlord was ordered to pay compensation of 3 times the value of the deposit.

On appeal to the Circuit Judge, however, he overturned the order against the landlord. The Judge did

not clarify, though, whether he considered the “long-stop” cut-off date for late service of this information to be the date of the tenant’s own application to court, or the date of the court hearing itself.

The Residential Landlords’ Association have noted that the same principle may apply not only to late service of the required information on the tenant, but also to the late placing of deposits under the scheme. They are keen to stress, however, that as a matter of best practice, landlords should seek to register their deposits AND provide the required information to the tenant within the prescribed 14 day period.

This is sensible advice, for whilst the *Harvey -v- Bamforth* decision might be an early indicator that the courts are reluctant to impose draconian sanctions on Landlords for non-compliance, it is still very early days in the development of case law in this area. The legislation was drafted chiefly to protect tenants, and included the time limits (presumably) with good reason. Therefore whilst a landlord who had accidentally omitted to serve the required information on the tenant might hope to rely on the case to protect him if he complied before the tenant’s own application to court, it would be a brave (or possibly foolhardy) landlord who took the case as *carte blanche* to take a relaxed approach to paying into the Tenancy Deposit Schemes and providing the statutorily required information.

Andrew Digwood

Property dispute resolution expertise

Rollits Property Dispute Resolution team of Ralph Gilbert, Andrew Digwood and Chris Drinkall have a wealth of experience between them in advising landowners, developers RSLs, commercial landlords and tenants and property professionals. They advise on the full spectrum of property related disputes including the issues raised in this newsletter.

Their expertise is recognised in two leading law directories The Legal 500 and Chambers and Partners. In particular, for several years Ralph has been recommended by Chambers as a ‘Leader in the Field’ of commercial dispute resolution.



Chris, Ralph and Andrew

Eviction did not discriminate against disabled tenant

Residential landlords, and in particular local authorities and RSLs, received a stark warning from the Court of Appeal following its 2007 decision in *Lewisham London Borough Council -v- Malcolm* that a disabled tenant might be able to claim that he or she had been discriminated against where they claimed that the breach of the terms of their lease which led to the eviction was a result of their disability.



In the particular case, Mr Malcolm was a schizophrenic and in breach of the terms of his lease had sub-let his flat and moved elsewhere. The Council took the view from a housing management point of view that they had to take action on such a breach since they could be criticised for allowing their stock of housing to be used in this way. Because of the breach of the lease terms, the Council served a Notice to Quit upon him.

Mr Malcolm claimed that he was being discriminated against because of his disability (his schizophrenia) and because (he asserted) it was at least partly due to his disability that he had acted in breach of the terms of the lease. The Court of Appeal found in his favour in 2007 but the Council appealed to the House of Lords who in their 2008 decision overturned the earlier ruling.

Lord Bingham noted that the treatment

to which the tenant had been subject was his Landlord seeking possession of the flat, on the basis that his sub-letting constituted a breach of the terms of the lease.

The Court accepted that the Landlord, as an RSL, had duties to manage its stock of housing in a responsible way and that it could have come in for severe criticism if it allowed such sub-lettings to effectively "jump the queue" of the waiting list system. Lord Bingham concluded that the Landlord had made its decision on a sound housing-management basis and that the decision had nothing to do with the tenant's disability. He compared the treatment of Mr Malcolm with how a tenant without a mental disability might be treated by the Council if they sub-let their flat and moved elsewhere, and concluded that Mr Malcolm had been treated no less favourably. Furthermore, the Council had not been aware of Mr Malcolm's disability

at the time when it began to take action to claim possession of the flat.

The House of Lords ruled that the tenant had not therefore been the subject of unlawful discrimination because the reason behind the landlord's actions did not relate to the tenant's disability and the tenant was treated no less favourably than someone without that disability.

Whilst this ruling may well be followed in the majority of cases when a landlord seeks possession from a tenant in circumstances of a serious breach of the tenancy agreement. Nevertheless, RSLs, in particular, must continue to take full account of a tenant's disability in ensuring that in commencing proceedings the RSL is not discriminating against the tenant on the grounds of disability.

Andrew Digwood

Information

If you have any queries on any issues raised in this Newsletter, or any property dispute matters in general please contact: Ralph Gilbert on 01482 337352 or email ralph.gilbert@rollits.com

This Newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull HU1 1YJ.

The law is stated as at 16 Feb 2009.

Hull Office
Wilberforce Court, High Street,
Hull HU1 1YJ
Tel +44 (0)1482 323239

York Office
Rowntree Wharf, Navigation Road,
York YO1 9WE
Tel +44 (0)1904 625790

www.rollits.com