

Break options - A case of ‘Breaking Bad’ or simply ‘Buyer Beware’?

- Potential for tenants having to pay rent on vacated premises.
- All intended outcomes from activating a break option should be clearly set out within a lease.
- Tenants should consider incorporating break dates close to a quarter day.

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A break option entitles either the landlord or the tenant, or both, to end the lease before the term would otherwise expire. Where a break option is activated, the general rule is that the tenant must still pay a full quarter’s rent, as usual, on the rent payment day immediately before the break date, even though the break date may fall midway through a quarter. Obviously, failure to comply with any conditions within a break clause, such as payment of rent, could result in the parties’ ability to terminate the lease being frustrated.

There is therefore the potential issue of a break being activated correctly but with the tenant then having effectively paid rent on premises they have vacated. Whilst each case is decided on its own facts, it appears that the courts apply the same test adopted in forfeiture claims where rent is not viewed as being capable of being apportioned on a time basis. Therefore any ‘overpayment’ will not be refunded, unless the lease contains a clear and unambiguous clause stating both parties’ agreement to reimbursement in the break option provisions.

There are recent cases where parties have sought to rely upon implied terms not explicitly stated in a lease, arguing that a tenant should only pay for what they actually receive and that any overpayment of rent should therefore be repaid. Following the decision of the Supreme Court in *Marks & Spencer Plc v BNP Paribas Security Services Trust Co Jersey Ltd* [2015], it appears the courts are unlikely to accept an implied term for a refund of ‘overpaid’ rent in the absence of an express provision in the lease.

The lessons to be learned are:

- Parties need to expressly state the consequence of any anticipated/particular event within a lease, as the lack of express provisions can be costly.
- Tenants should consider setting break dates towards the end of a rent quarter period.
- Conveyancers acting for tenants should attempt to include express provisions or clauses for the repayment of any overpaid rent upon exercise of a break option.
- It is not sensible to assume that lease terms can be implied in general.
- Rent paid in advance cannot be apportioned on a time basis except in limited circumstances.