

When is a tenant's break to be included in the hypothetical lease at review?

- The presumption of reality
- Understanding the impact of specified dates
- Be wary of personal rights to break

A typical rent review clause will usually stipulate that the hypothetical lease to be assumed will be on the same terms as the actual lease. The question is whether it is also to be assumed that the hypothetical lease contains any break clauses which are contained in the actual lease?

It is widely acknowledged that the court is keen to follow the presumption in favour of reality and is not prepared to re-write rent review provisions unless it is necessary to do so, in order to prevent the object of the lease being frustrated. So if the lease in question:

- Contains a break clause operable by reference to anniversaries of the actual lease term, then the hypothetical lease will also contain such break clauses.
- Contains a break clause operable on a specified date, then if the assumed lease term accommodates that date, the hypothetical lease will contain the assumption of a break clause on that date.
- Contains a break clause operable on a specified date, then if that date has passed, the hypothetical lease is less likely to contain the assumption of a break clause.
- Gave the actual tenant a personal right to break the lease, that right cannot also apply to the hypothetical tenant and would not therefore be contained in the hypothetical lease.

Again, we have a scenario where the rent should be assessed on the basis of the landlord and tenant relationship which actually exists as at the relevant review date.

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