

# Break Clauses

Second Edition

Mark Warwick QC

Barrister, Selborne Chambers, London

Nicholas Trompeter

Barrister, Selborne Chambers, London

Published by Jordan Publishing, owned by LexisNexis

Jordan Publishing  
Regus  
Terrace Floor  
Castlemead  
Lower Castle Street  
Bristol BS1 3AG

© Jordan Publishing 2016

Whilst the publishers and the author have taken every care in preparing the material included in this work, any statements made as to the legal or other implications of any transaction, any particular method of litigation or any kind of compensation claim are made in good faith purely for general guidance and cannot be regarded as a substitute for professional advice. Consequently, no liability can be accepted for loss or expense incurred as a result of relying in particular circumstances on statements made in this work.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any way or by any means, including photocopying or recording, without the written permission of the copyright holder, application for which should be addressed to the publisher.

Crown Copyright material is reproduced with kind permission of the Controller of Her Majesty's Stationery Office.

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978 1 78473 034 5

Typeset by Letterpart Limited, Caterham on the Hill, Surrey CR3 5XL

Printed in Great Britain by CPI Group (UK) Ltd, Croydon, CR0 4YY

# CONTENTS

Foreword to the Second Edition	v
Foreword to the First Edition	vii
Authors' Preface to the Second Edition	ix
Table of Cases	xix
Table of Statutes	xxxi
Table of Statutory Instruments	xxxv
 <b>Chapter 1</b>	
<b>The Nature of a Break Clause</b>	<b>1</b>
A definition	1
A break notice is not a notice to quit	1
The right to terminate is unilateral	2
Forfeiture / acceptance of repudiatory breach distinguished	2
A break clause is a type of option	3
Break clauses can appear in all types of tenancies and in many different forms	5
 <b>Chapter 2</b>	
<b>Formalities and Registration</b>	<b>7</b>
Formalities	7
Registration	8
 <b>Chapter 3</b>	
<b>Assignment</b>	<b>9</b>
The historical position	9
Section 63 of the Law of Property Act 1925	10
Restrictions on assignability	12
(a) Purely personal break clauses	12
(b) 'Hybrid' break clauses	13
(c) Interrelationship with rent review	15
Old and new tenancies	16
Other tenancies	17
(a) Where the landlord assigns the reversion	17
(b) Where the tenant assigns the term	18
'New' tenancies	19
Severance of the reversion	20
Assignment of part of the demise	22
Equitable assignees	23

The position where the break clause is not contained in a lease	24
Best practice	25
<b>Chapter 4</b>	
<b>Who May Exercise the Break Clause</b>	<b>27</b>
Introduction	27
Where the lease is silent or unclear	27
Joint lessees	28
Joint lessors	29
The survivor(s) of joint lessors/lessees	29
Where the landlord is also one of the tenants	30
Concurrent Lessees	31
Trustees in bankruptcy	31
Administrators	32
Liquidators	32
Receivers and managers	33
Personal representatives	33
Upon reassignment of a lease containing a personal break clause	35
Former or non-landlords / tenants	40
Agents	41
<b>Chapter 5</b>	
<b>The Form and Content of the Break Notice</b>	<b>45</b>
Introduction	45
Compliance with indispensable conditions	45
Mistakes in the break notice: the general approach	47
The objective approach to the construction of notices	52
The 'relevant objective contextual scene'	56
(a) General observations	56
(b) Covering letters	57
Mistakes as to the break date	59
(a) Where a mistake as to the date has invalidated the notice	59
(b) Where a mistake as to the date has not invalidated the notice	60
Mistakes as to the identity of the serving party	64
(a) Where a mistake as to the identity of the serving party has invalidated the notice	64
(b) Where a mistake as to the identity of the serving party has not invalidated the notice	67
Mistakes as to the identity of the intended recipient	69
(a) Where a mistake as to the identity of the intended recipient has invalidated the notice	69
(b) Where a mistake as to the identity of the intended recipient has not invalidated the notice	70
Mistakes as to the identity of the demised premises	72
Break notices marked 'without prejudice'	72
(a) 'Without prejudice' to the validity of an earlier break notice	72
(b) 'Without prejudice' with no further words of qualification	73
Break notices marked 'subject to contract'	74

**Chapter 6****The Time for Exercise of the Break Clause and Service of the Break Notice**

Introduction	77
References to the 'commencement of the term'	78
The time for exercise of the break clause	80
(a) 'Within' a specified period	80
(b) A specified period 'from' or 'after' a specified date	82
(c) A specified period 'commencing on' or 'beginning with' a specified date	84
The specified period of notice	85
(a) Where the lease is silent	85
(b) 'Not less than' a specified period of notice	85
(c) 'At least' a specified period of notice	87
(d) A specified period of notice 'before' a specified date	88
The 'corresponding date' rule	89
Other fractions of time	92
(a) 'Year'	92
(b) 'Quarter'	92
(c) 'Month'	93
(d) 'Day'	94
The effect of late service	94
Acceptance of short service of a break notice	96

**Chapter 7****The Method of Service of a Break Notice**

Introduction	97
Compliance with the prescribed contractual method for service	97
Particular contractual methods for service	103
(a) Personal service	103
(b) Service by post / facsimile / email	105
(c) Service at the recipient's last known address	105
'Indirect' service	106
Section 196 of the Law of Property Act 1925	108
(a) The applicability of s 196 to break notices	108
(b) The effect of s 196	109
(c) 'Leaving' the notice pursuant to section 196(3)	110
(d) 'Sending' the notice pursuant to section 196(4)	115
Service at common law	116

**Chapter 8****On Whom the Break Notice Should be Served**

Introduction	119
Joint lessees / lessors	119
Concurrent lessees	119
Multiple parties	120
Bankrupts / trustees in bankruptcy	121
Companies in administration	121

Companies in liquidation	121
Receivers and managers	122
Where the intended recipient has deceased	122
Personal representatives	122
Agents	123

## **Chapter 9**

<b>Conditions in a Break Clause: General Principles</b>	<b>125</b>
The principle of strict compliance	125
De minimis failures to comply with conditions	129
The time for compliance	129
Spent breaches	135
Words of qualification	137
(a) 'Reasonable'	138
(b) 'Material'	140
(c) 'Substantial'	142
Settlements / side agreements	143
Identifying the precondition	148

## **Chapter 10**

<b>Particular Conditions in a Tenant's Break Clause</b>	<b>151</b>
Introduction	151
Vacant possession	151
(a) General principles	151
(b) Examples involving break clauses	155
Payment of rent and other sums	161
(a) The meaning of 'payment'	161
(b) The amount of rent required to be paid	163
(c) The payment of other sums	173
Repairing obligations	175
Reinstatement obligations	177

## **Chapter 11**

<b>The Recovery of 'Overpaid' Rent and Other Sums</b>	<b>179</b>
Introduction	179
Implication of a term in the lease	179
Implied agreement	186
Restitution for unjust enrichment	188
(a) Introduction	188
(b) Payment under duress	189
(c) Payment under mistake	190
(d) Total failure of consideration	191

## **Chapter 12**

<b>Redevelopment Break Clauses</b>	<b>195</b>
Conditions in a landlord's break clause	195
Intention, desire and other linguistic formulations	195
(a) 'Intends'	195

(b) 'Desires' or 'wishes'	197
(c) 'Proposes'	197
(d) 'Requires'	197
The scope of the break clause	198
Redevelopment break clauses under the 1954 Act	200
Redevelopment break clauses under the 1993 Act	201
(a) The statutory framework	201
(b) Conditions governing the exercise of the break clause	202
The Electronic Communications Code	204

## Chapter 13

<b>Invalid Break Notices: Waiver, Estoppel and Withdrawal</b>	<b>207</b>
Introduction	207
Waiver and estoppel: general principles	207
(a) Waiver	207
(b) Estoppel	209
The operation of waiver and estoppel in the break clause context	211
(a) Loss of the right to exercise the break	211
(b) Loss of the right to insist on a break notice being given at all	215
(c) Loss of the right to insist on a break notice being given by the correct party	215
(d) Loss of the right to insist on a break notice being given to the correct party	217
(e) Loss of the right to insist on a break notice being given within the prescribed time limit	219
(f) Loss of the right to insist on compliance with conditions	221
(g) Loss of the right to exercise a landlord's break clause following acceptance of rent	222
Unilateral waiver in respect of performance of conditions	223
The server of a notice cannot rely upon his own wrong	224
Silence	225
Withdrawal of a break notice	228
Countermanding a break notice	230
Sequential break notices	231

## Chapter 14

<b>The Effect of Exercising a Break Clause</b>	<b>235</b>
As between landlord and tenant	235
(a) The extent to which the parties are relieved of the need to perform their covenants	235
(b) Liability for existing breaches of covenant	236
(c) The landlord's entitlement to claim double rent or double value	236
As regards an underlessee	238
(a) Where the head tenant exercises the break clause	238
(a) Where the head landlord exercises the break clause	238
The inter-relationship with rent review provisions	239
(a) Introduction	239

(b) Where the inter-relationship between a break clause and the rent review machinery has made time of the essence of the review	240
(c) Where the inter-relationship between a break clause and the rent review machinery has not made time of the essence of the review	246
<b>Chapter 15</b>	
<b>Professional Liability</b>	<b>249</b>
Introduction	249
Failure to advise during a transaction	250
Failure to remind of an approaching break date	252
Failure to draw attention to preconditions	254
Failure to give proper notice	256
Contributory negligence	256
<b>Chapter 16</b>	
<b>Business Tenancies</b>	<b>259</b>
Introduction	259
Termination of business tenancies by the landlord	259
Termination of business tenancies by the tenant	261
The position of sub-tenants	261
The extent of the 'broken' demise	262
The insertion of break clauses into new leases under the 1954 Act	263
(a) The jurisdiction	263
(b) Insertion of landlord's break clauses	264
(c) Insertion of tenant's break clauses	272
<b>Chapter 17</b>	
<b>Residential Tenancies</b>	<b>275</b>
Introduction	275
Termination of Rent Act tenancies	275
Termination of assured tenancies	277
Termination of assured shorthold tenancies	279
(a) The general position	279
(b) Tenancy deposits	282
(c) Prevention of retaliatory evictions	285
(d) Other restrictions	287
Termination of contractual tenancies without any security of tenure	288
<b>Chapter 18</b>	
<b>Agricultural Tenancies</b>	<b>291</b>
Introduction	291
Termination of tenancies of agricultural holdings	291
(a) Part III of the 1986 Act: 'notices to quit'	292
(b) Restrictions on length of a 'notice to quit'	292
(c) Method of service of a 'notice to quit'	295
(d) Restrictions on operation of a 'notice to quit'	296
(e) Compensation following a 'notice to quit'	298



Termination of farm business tenancies	299
(a) Farm business tenancies for a term of more than two years	299
(b) Periodic farm business tenancies	300
(c) Method of service of a 'notice to quit'	301
(d) Compensation following a 'notice to quit'	302
<b>Chapter 19</b>	
<b>Drafting Break Clauses</b>	<b>303</b>
General remarks	303
Matters to be addressed when drafting a break clause	304
<b>Chapter 20</b>	
<b>Practical Advice When Exercising a Break Clause</b>	<b>307</b>
Advice for the party seeking to exercise the break clause	307
(a) Three warnings	307
(b) Preconditions	308
(c) Drafting the break notice	308
(d) Service of the break notice	309
Advice for the recipient of a break notice	309
(a) Compliance with preconditions	309
(b) The break notice	309
Litigation tactics for the tenant	310
Litigation tactics for the landlord	310
<b>Appendix 1</b>	
<b>Break Clause for the Landlord – On One or More Specified Dates</b>	<b>313</b>
<b>Appendix 2</b>	
<b>Break Clause for the Landlord – Incorporating a Rolling Break</b>	<b>315</b>
<b>Appendix 3</b>	
<b>Break Clause for the Tenant – On One or More Specified Dates</b>	<b>317</b>
<b>Appendix 4</b>	
<b>Break Clause for the Tenant – Incorporating a Rolling Break</b>	<b>319</b>
<b>Appendix 5</b>	
<b>Particulars of Claim – Landlord's Claim for Declaration Etc</b>	<b>321</b>
<b>Appendix 6</b>	
<b>Defence and Counterclaim – In Response to Landlord's Claim for Declaration Etc</b>	<b>325</b>
<b>Index</b>	<b>329</b>