



Break notices: tenant's invalid notice keeps it on hook for rent of £1 million per year

Summary and implications

A break notice served by one of two joint tenants was held¹ to be invalid. In consequence, the tenants remained bound by the lease for a further five years at a rent of just under £1 million per year (subject to review).

In a difficult letting market, if the tenant gets its break notice wrong, the landlord can reap substantial rewards, with dire consequences for the tenant.

Landlords should:

- check validity of a tenant's break notice promptly after receipt; and
- ensure any challenge is made promptly:
 - A landlord's subsequent conduct may give rise to arguments of estoppel/waiver; and
 - Delay in challenging the notice may also go to the question of whether, objectively, the reasonable recipient² would have been misled by the error in the notice if the evidence shows the landlord was not.

Break pre-conditions: requirement for notice

Any break option will require the party seeking to exercise the option to serve notice on the other party. The form, timing and service of that notice will be set out in the lease.

If the notice does not comply with any part of the pre-condition, for example as to the period of notice to be given, it will be invalid. Such an error or defect cannot be cured.

If the notice contains a mistake, such as the termination date specified³ or the name of the landlord⁴ then it will depend on the facts whether the notice is valid, applying the "reasonable recipient" test².

Ask a question

If you have any questions please contact Julie Gattegno, Partner
T +44 (0)20 7524 6302
j.gattegno@nabarro.com

¹ The Prudential Assurance Company Limited v Exel UK Limited, Tubbett Britten Consumer Group Limited [2009]

² See text on next page

³ Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997]

⁴ Lay v Ackerman [2005]

The tenants' notice

The tenants were Exel UK Limited ("Exel") and Tibbett & Britten Consumer Group Limited ("Consumer"). Exel and Consumer were in the same group of companies. Consumer was a dormant company, it shared one director with Exel and the same company secretary.

Exel's solicitors served the break notice as solicitors and agents for Exel alone.

The Court found that the tenants' solicitors were authorised to serve the notice on behalf of both companies. However, applying the relevant principles (see table below), the notice was held to be invalid because:

- it would not have been unambiguously understood to be an effective notice by a reasonable recipient; and
- the terms of the notice would create real doubt as to whether it was served on behalf of Consumer; in fact the notice was silent as to whether it was being served on Consumer's behalf.

Defences: estoppel/waiver

The tenants tried to argue estoppel on grounds of previous correspondence between the parties' solicitors in which the tenants' solicitors incorrectly stated Exel was the tenant. The court rejected this argument. It was clear that the mistake in the notice was entirely down to the tenants' solicitors. No assurance had been given by the landlord that a notice served by Exel alone would be valid.

A tenant may raise estoppel/waiver arguments based on a landlord's conduct following service of a defective notice. In this case, the actual understanding of the recipient landlord may be relevant.

The "reasonable recipient" test

Where a notice contains a mistake the test is:

- how, in light of the mistake, a reasonable person in the position of the recipient would have understood the notice having the benefit of the relevant factual background; and
- whether, as a result, the notice would have been understood as conveying the information required by the lease.

Principles regarding validity of notices

- The notice must clearly and unambiguously communicate that the person entitled to exercise the option is determining the lease on the permitted date.
- If someone other than the tenant gives the notice without stating that he acts as agent the notice will be valid provided that the giver was authorised to give the notice and the landlord can rely on the notice being binding on the tenant.
- The test is objective: how a reasonable person in light of the background which can reasonably be expected was available to the parties would have understood the notice.
- A mistake in the notice, even as to identity of the person giving it, will not necessarily invalidate it, provided that its meaning is clear, the mistake is obvious and the recipient can safely rely on it.

London

Lacon House,
84 Theobald's Road,
London WC1X 8RW
T +44 (0)20 7524 6000
F +44 (0)20 7524 6524

Sheffield

1 South Quay,
Victoria Quays,
Sheffield S2 5SY
T +44 (0)114 279 4000
F +44 (0)114 278 6123

Brussels

209A Avenue Louise,
1050 Brussels, Belgium
T +32 2 626 0740
F +32 2 626 0749

Alliance firms

France

August & Debouzy
Gilles August
T +33 (0)1 45 61 51 80
www.august-debouzy.com

Germany

GSK Stockmann + Kollegen
Rainer Stockmann
T +49 (30) 20 39 07 - 0
www.gsk.de

Italy

Nunziante Magrone
Gianmatteo Nunziante
T +39 06 695181
www.nunziantemagrone.it

Nabarro LLP

Registered office: Lacon House, 84 Theobald's Road, London, WC1X 8RW.

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