



# Investing in UK Real Estate?

What does the lease not say?

June 2010

---

## What does the lease not say

Not all is as it seems when you look at a lease. Below are some examples of where what the lease doesn't say is as important as what it does say.

### Qualified covenants

In most leases, a tenant's dealings with the property for example by assignment or subletting are restricted, either: (a) absolutely; (b) without first obtaining landlord's consent (a "qualified covenant"); or (c) without first obtaining consent, such consent not to be unreasonably withheld (a "fully qualified covenant").

What is not obvious from a lease is that where restrictions are qualified, English law implies that where landlord's consent is sought it is not to be unreasonably withheld. A qualified covenant therefore turns into a fully qualified covenant.

In addition, the law implies into a qualified and fully qualified covenant a duty on the landlord in receipt of an application for consent, to give consent within a reasonable time, unless it is reasonable not to do so and to provide the tenant with written notice of his decision. If unconditional consent is withheld the landlord must give his reasons.

If a landlord fails to comply with its obligations by failing to respond within a reasonable time or by unreasonably refusing consent the tenant can sue the landlord for compensation. Also if a tenant believes a landlord has refused consent unreasonably it may deal with the property without consent.

### Break clauses

A break clause allowing either the landlord or the tenant to terminate the lease early will usually specify when the break can operate and any conditions which must be satisfied before the break clause will be effective. The more common conditions are that the tenant must comply with all its covenants in the lease or that the tenant must have paid all payments due under the lease.

Any conditions specified in the break clause must be strictly complied with by the break date for the break to be effective.

If rent is paid in advance and the break date is in the middle of a rental period, the whole amount of rent

due should be paid by the tenant on the payment date. There is no right to apportion the rent to cover only the period up to the break date unless the lease expressly provides for this.

If the tenant has an obligation to repair the premises, all repairs must be completed prior to the break date or a settlement agreed to compensate the landlord for the tenant's breach of its repairing covenant. The terms of the settlement must be performed. If there is no settlement and repairs are not completed prior to the break date the break will not be effective.

### Repairing covenants

Virtually all leases contain comprehensive covenants for the tenant to repair the premises.

The landlord may bring an action for damages against the tenant for its failure to repair either during the term or after its expiry. The law limits the maximum amount recoverable to the amount by which the value of the reversion has been diminished by the breach. Cost of repairs in excess of this will not be recoverable unless the lease makes express provision for the cost of works to be recovered as a debt.

The law also provides that if at the end of the term the premises are to be pulled down or alterations undertaken which would render any tenant repairs valueless the landlord cannot recover damages for the breach.

If a lease was granted for seven years or more and still has three years left to run the law restricts how a landlord can exercise its right to recover damages for a tenant's breach of its repairing covenant. Where this applies a right to damages is not enforceable unless the landlord has served notice on the tenant not less than one month before the commencement of the action.

The tenant then has 28 days to serve a counter notice which prevents the landlord from proceeding with a claim for breach of covenant without the permission of the court. The court must not give permission unless the landlord proves one or more of five grounds for example that the value of the reversion has been substantially diminished or for

---

the protection of the interests of occupiers other than the tenant.

The court may, in granting or refusing permission, impose such terms and conditions on the landlord or the tenant as it thinks fit.

The law also gives tenants the right to compensation for improvements which they have carried out. An improvement must fulfil certain criteria, including increasing the rental value of the premises. Improvements which the tenant agreed to carry out under the terms of the lease are excluded.

### **Forfeiture**

A well written lease will almost always contain a provision for the landlord to re-enter the premises and forfeit the lease if there is a non-payment of rent, breach of other covenants or an event of default by the tenant.

A landlord is prevented from forfeiting a lease if he waives the right to forfeit the lease. An act of waiver is any act by the landlord which indicates that it considers the tenant to still be the tenant and that the lease continues. Prior to forfeiture of the lease best practice is not to contact the tenant at all, so as not to risk waiving the right to forfeit.

For breaches other than non-payment of rent, the law requires a landlord to give a tenant notice of its breach which details what action is required to remedy the breach and giving the tenant a reasonable amount of time to remedy the breach. If the tenant does not remedy the breach the landlord can then take steps to forfeit the lease.

Forfeiture can be effected by the landlord peaceably re-entering the premises and changing the locks (usually done out of working hours) or by application to the court.

Following forfeiture the tenant, its mortgagee and sub-tenant have a right to apply to court for relief from forfeiture. The court has a discretion (except in non-payment of rent cases) whether to grant relief or not. If relief is granted it will mean that the tenant will continue to hold under the existing lease.

### **Business rates**

Occupiers of commercial property and owners of unoccupied commercial property are liable to pay a tax known as business rates.

Business rates are assessed initially by reference to a rental value.

Owners of property occupied by another party should not have any liability.

A developer or occupier should seek professional advice as to the impact of business rates on its project.

**Note: The above applies to the UK only (which does not include Scotland). Each lease is different. The above are examples only.**

### **Next steps**

For more information on what the lease doesn't say or how we can help you navigate the issues, please contact:

Wendy Miller, Real Estate Litigation & Dispute Resolution Partner

T +44 (0) 20 3400 4655

E [wendy.miller@blplaw.com](mailto:wendy.miller@blplaw.com)