

Break Free? Not So Fast — Strict Compliance and the Hidden Traps in Commercial Lease Breaks

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Break clauses are among the most heavily negotiated — and often litigated — provisions in commercial leases. This advisory sets out the key principles, leading case law and practical steps for exercising or responding to a break right. The core message for tenants is that break clauses must be exercised strictly in accordance with the lease, as even minor failures can be fatal, and that including an express term in the early drafting stage is essential for recovering apportioned rent. For landlords, clear and unqualified conditions remain the strongest protection for rental income and asset value.

Strict Compliance: The Courts Mean What the Lease Says

The courts in England and Wales take a strict approach to break clauses: a break is effective only where every condition is met exactly as drafted. Even minor errors in notice, timing or compliance can invalidate what was intended to be a valuable exit right.

The common law position rests on well-established principles:

- A break clause must be exercised in strict accordance with its terms.
- Time is of the essence — a break notice served even one day late will be ineffective.
- Conditions precedent must be exactly performed — substantial or near-complete compliance is not sufficient.
- The courts will not relieve a tenant from noncompliance, however minor and however little prejudice the landlord suffers.

These principles place a heavy burden on tenants and make break clauses among the most unforgiving mechanisms in commercial lease law.

Case authorities illustrate these principles in practice. In *Avocet v. Merol*[1] (2011), a modest shortfall in rent by the break date was fatal to the break. *Siemens v. Friends Life*[2] (2014) confirmed that the court has no discretion to excuse even minor noncompliance with conditions precedent to a break. *Marks*

and Spencer v. BNP Paribas[3] (2011) established that there is no implied right to recover rent paid beyond the break date — apportionment must be addressed expressly at the drafting stage. In *Fitzroy House v. Financial Times*[4] (2006), the Court of Appeal distinguished "material compliance" from strict compliance, holding that softer wording permits minor breaches. The choice of language will determine the standard the tenant must meet and, in turn, whether the break right is exercisable in practice.

Typical Conditions

Break conditions typically fall into three categories:

1. **Service of notice**: strict requirements as to timing, form and method of service
2. **Payment obligations**: rent, service charge, insurance rent or other sums due up to the break date
3. **Condition of the premises**: including delivery of vacant possession and, occasionally, reinstatement or removal of fixtures. In *NYK Logistics v. Ibrend Estates* [5] (2011), the Court of Appeal held that leaving behind old racking defeated vacant possession, even though the items had no practical value to either party. Tenants must plan carefully to ensure the premises are fully cleared well before the break date.

From a landlord's perspective, these conditions protect income streams, safeguard asset value and support timely re-letting or redevelopment. From a tenant's perspective, overly broad conditions risk rendering a break right unusable. It converts a right to a privilege.

"No breach" conditions — requiring compliance with all lease obligations at the break date — are particularly risky, since most leases carry minor, historic or even unknown breaches (such as a small area of disrepair or an alteration carried out without formal consent). Therefore, a landlord wishing to resist a break need only identify any subsisting breach, however trivial, to defeat the tenant's attempt to exit.

Exercising a Break: Practical Steps

Tenants should begin preparing well in advance. A compliance checklist should cover every condition in the lease, including notice requirements, payment obligations and the physical state of the premises. Where payment of all sums due is required, a without-prejudice payment of any disputed amounts is prudent rather than risking the break failing on a technicality. Notice should be served in strict accordance with the lease

Legal counsel should be taken early, particularly where the lease contains unusual or ambiguous conditions.

The Commercial Lease Code[6]

The Code for Leasing Business Premises 2020 (Code), published by the Royal Institution of Chartered Surveyors (RICS), recommends that break conditions should be limited to matters within the tenant's direct control: essentially, payment of principal rent and giving up occupation.

While the Code is neither statutory nor binding on all landlords, it is mandatory for RICS members and widely adopted in practice. For non-RICS members, it remains a useful benchmark. The difficulties encountered in Avocet and Siemens arose because the break conditions were broadly drafted, and the *Financial Times* decision illustrates the practical difference that softer wording can make — reinforcing the Code's preference for proportionate, clearly defined conditions. For landlords and tenants, key takeaways from the decision include:

- Break clauses must be exercised in strict accordance with the lease.
- Use clear, unqualified language in break conditions to protect rental income and asset value.
- Conditions should cover notice, payment obligations and the physical state of the premises.
- "No breach" conditions provide the widest protection but may face market resistance.
- Absent an express term, tenants cannot recover apportioned rent – address this early at the drafting stage.
- The Commercial Lease Code influences market expectations but does not override contractual freedom.

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1 *Avocet Industrial Estates LLP v Merol Ltd* [2011] EWHC 3422 (Ch).

2 *Siemens Hearing Instruments Ltd v Friends Life Ltd* [2014] EWCA Civ 382.

3 *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72.

4 *Fitzroy House Epworth Street (No 1) Ltd v The Financial Times Ltd* [2006] EWCA Civ 329.

5 *NYK Logistics (UK) Ltd v Ibrend Estates BV* [2011] EWCA Civ 683.

6 Code for Leasing Business Premises in England andales (2020), published by RICS.

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