

## FAQ Property Questions

### Telecoms

A telecoms operator wants to place a mobile telecoms mast on your client's land, he asks what rights the operator will have.

If the operator is licensed and the agreement relates to electronic communications equipment, it will have various rights and powers under the Telecommunications Code contained in Schedule 2 of the Communications Act 2002. In particular, an owner cannot insist that the operator removes or relocates the equipment without a court order which is discretionary. This can restrict or delay an owner's ability to regain possession or develop the land or property. It is not possible simply to remove the Code rights, and an owner should therefore ensure that the agreement contains extensive indemnities from the operator to cover any losses that the owner may suffer if the operator invokes the Code rights.

Rights under the Code arise as soon as any agreement is reached, so owners should not confirm agreement in any way until the final terms have been agreed. Owners should also be wary of signing early access agreements with operators while detailed terms are being negotiated.

If a landowner refuses to allow an operator to install equipment or insists on unacceptable terms, the operator has a statutory right to apply for a court order forcing the landowner. Operators generally use this only as a last resort, but an owner should bear it in mind when negotiating terms.

The agreement may constitute a lease if the arrangement in practice has the characteristics of a tenancy, irrespective of what the agreement says. The result is that the operator may have security of tenure under the Landlord and Tenant Act 1954, in addition to its rights under the Code. Most operators appear to be aware of this when negotiating with owners at the end of the agreement. If the arrangement is likely to constitute a lease, owners should insist that the agreement with the operator is drafted as a lease expressly granted without security of tenure.

### Withdrawing break notice

A tenant has served notice breaking its lease but now wants to withdraw it. Can it do so?

Without the landlord's agreement a tenant cannot unilaterally withdraw a break notice once it has been served.

If the break is conditional on the tenant doing something, for example clearing any rent arrears or handing back the premises in repair, it may try to defeat the break by deliberately not complying with the conditions. However, it is open to the landlord to waive the conditions.

Assuming that the landlord agrees, the notice can be withdrawn with mutual consent. However, this may not be the end of the matter as the withdrawal of a break notice creates an automatic surrender and re-grant of the lease which may have a number of implications (including potential tax consequences) which are outside the scope of this brief article. The lease can be left in this state, but best practice would be for the "new" lease to be documented, for example in order to ensure that any previous alterations that the tenant has carried out to the premises can be properly dealt with when the new lease ends. The new lease can be drafted quite simply by reference to the original lease.

### **Subletting premises – joint assignment**

You are a tenant who wants to dispose of your premises but your landlord has refused consent to an assignment or sublease based on reasonable concerns about the financial strength of the incoming assignee/subtenant. An offer of additional security has not been acceptable to the landlord. Is there another way of disposing of the premises?

Apart from offering the landlord a premium, the tenant could consider assigning the lease jointly to itself and the assignee, coupled with the additional security previously offered. The landlord would find it hard to refuse on the grounds of covenant strength as it will have increased.

The tenant and the assignee would need to enter into a separate agreement to confirm who funds the rent and other lease payments, and in what proportion if the sublease rent would have been less than the passing rent. It would also cover other arrangements such as rights of occupation, restrictions on alterations and any other points that would have applied if the sublease had been granted.

It would also need to provide that the lease is re-assigned to the tenant at the end of the sublease term had it been granted, and that the assignee's rights as joint tenant would come to an end in the same circumstances as if the sublease were forfeited.

The arrangement is not guaranteed to work as the landlord may have an argument that the arrangement still constitutes a subletting, but in a difficult market and without any other options it would be worth trying.

### **Subletting premises – group company indemnity**

Your tenant client wants to sublet its premises, but the terms agreed with the subtenant do not comply with the conditions for subletting in the lease. What can the tenant do if the landlord insists that the sublease must comply?

The usual areas where a sublease will differ from the head lease will be the level of rent, frequency or dates of rent review, and extent of repairing obligations. In the past parties would often enter into a sublease containing the terms required by the landlord, with a separate agreement containing the necessary payment, indemnity or rebate to reflect the true terms of the deal.

The well-known 2001 case of *Allied Dunbar v Homebase* reminded the industry that attempts by a tenant and subtenant to do this will usually fail, on the basis that the documents will be read together when considering whether the head lease conditions have been complied with.

In cases where the agreed sublease rent is lower than the level required by the head lease, the tenant may agree to pay the subtenant a reverse premium equal to the difference in rent across the term. In many cases this will still fall foul of the head lease if it prohibits subletting at a premium.

But what if the separate agreement with the subtenant containing the relevant payment, indemnity or rebate is given by a third party rather than the tenant? A comment by one of the judges in the 2004 case of *Crestfort v Tesco Stores* indicates that this may not fall foul of the head lease, on the basis that the relationship between tenant and subtenant remains intact and indeed is emphasised because the separate agreement is with a third party. The judge also mentioned that it would not matter whether the third party was associated with the tenant. The comment was made obiter and the issue has not yet been properly tested before the courts, but it still provides a good indication of the way that the courts may consider such arrangements if challenged in the future.

In practice, this arrangement may only be available where the tenant is part of a group, and a parent or other group company can be the third party. The subtenant would need to be satisfied with the covenant strength of the third party.

The arrangement would have to be disclosed to the landlord as part of the application for consent, and failure to do so would most probably invalidate consent if given.

## **Break Option – conditional on rent**

Q Your client tenant intends to exercise a break option in its lease. The break date falls on a quarter day and is conditional on the tenant having paid all lease rents that are due. What points must your client be aware of with that condition?

Establish which payments under the lease are covered. Expressions such as “lease rents” will often include service charges, insurance premiums, VAT and even interest on late payments. Also establish whether the condition for payment only applies at the break date or whether it also applies at the date that the break notice is served

Ask the landlord to provide a statement confirming exactly what payments are required in order to satisfy the condition - this is important as there may be some historical arrears that have been forgotten. However, unless the lease specifies the landlord does not have to do so, in which case the tenant will need to check its financial and management records carefully.

The landlord may issue a demand, for example a reconciled service charge payment, just before the break date, and the tenant may struggle to arrange payment in time. If the demand is valid and the payment is due, non-payment would mean that the condition has not been satisfied.

Most lease payments are in advance and the final payments before the break date will probably include a period beyond. Particular care needs to be taken as the break date is on a quarter day. This means that the lease would expire at the end of the quarter day, not the day before. If rent and on-account service charges are payable quarterly, instalments may technically fall due on the break date. If payments have only been made for the quarter before the break date, the payment condition will not have been satisfied even if just one day’s payment has been missed.

Unless the lease states that only a proportion of the final payments have to be made, or unless the landlord specifically agrees, the tenant will have to pay for the full period in order to ensure that the payment condition is satisfied. The landlord may not have to refund any part of the payments beyond the break date as the Apportionment Act 1870 does not apply where the lease ends early.

Potential problems with the payment condition can be avoided when the lease is drafted by:-

- Limiting the condition to principal rent only
- Providing that only a proportion of the final payment up to the break date has to be paid.
- The landlord must provide a statement at least two months before the break date of all amounts due, and only those payments will be required to satisfy the condition.
- If the break date is likely to fall around a quarter or other payment day, change it to a day or 2 before the payment date

## **Contact**

For more information, contact:

Julian Busfield  
Senior Solicitor  
Tel 01895 207811  
Email [julian.busfield@ibblaw.co.uk](mailto:julian.busfield@ibblaw.co.uk)