

Disrepairs invalidate break attempt

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The Scottish Court of Session, Outer House has recently held that where a tenant was required under a lease not to be in breach on serving a break notice “and/or” on the break date, the tenant’s substantial repair works between those two dates were of no avail.

In *Arlington Business Parks GP v Scottish & Newcastle* (2014) a lease of office space in Edinburgh contained a break clause that required the tenant to give 12 months’ notice and not be “*in breach of any of their obligations ... at the date of service of such notice and/or the termination date.*”

The tenant served notice to break within time but, at the date of service of the notice, the property was in disrepair. Between the service of notice and the break date, the tenant spent over £1.3m repairing the property so that, at the break date, there were no disrepairs. The tenant then vacated the property and sought to treat the lease as being at an end. It accepted that there had been disrepairs when the break notice was served but said that those disrepairs were remediable and did not amount to a “breach” within the meaning of the break clause which it said meant material, non-remediable breaches. The tenant further argued that the reference to “and/or” meant that the tenant lost its right to break only if there were breaches both on the date of the notice and on the break date or at the break date. As there was no breach at the break date, the notice took effect.

The court disagreed. It was of the view that “and/or” meant that there had to be no breach on either or both dates. The notice would not take effect if the tenant was in breach: (1) at the date of service the notice (as was the case); or (2) at the break date; or (3) on both dates.

As for the word “breach”, the court found that there was no distinction to be drawn in the lease between “breach” and “non-performance” or “non-observance”, contrary to the tenant’s suggestions; they all described the same thing. The court considered the commercial purpose of the break clause and said that its purpose was to give the landlord reassurance that, come the break date, the property would be in a proper condition thereby allowing it to be marketed during the 12 months notice period. In view of these findings, the court was of the view that there had been a breach at the date of service of the notice and so the lease had continued beyond the break date and remained in force.





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