

TELECOMMUNICATIONS EQUIPMENT COULD INVALIDATE A LEASE BREAK



The Digital Economy Act 2017 has caused considerable alarm to occupiers looking to issue break notices, as the ability to break may now be jeopardised.

The Digital Economy Act 2017 includes the new electronic communications Code (“Code”) which came into force on 28 December 2017.

The Code applies in full to all telecoms agreements completed after 28 December 2017 and in a modified form to telecoms agreements already existing on that date.

The aim of the new Code is to promote network connectivity, expand coverage and take into account legitimate interests of all parties in a world where access to communication networks is an essential part of everyday life. It is designed to support the roll-out of a robust and sustainable telecommunications network throughout the UK. The Code doesn't just apply to rooftop and mobile telecoms installations; Agreements to supply network cabling and services to occupiers (often for fixed line telecoms/internet connections), and the termination of those agreements, are captured within the Code.

The Code gives additional rights to operators for extended termination notice periods, as well as limiting the grounds for termination. This means operating a break clause could be invalidated unless the following is taken into consideration when terminating agreements:

TIME PERIOD



1

An occupier must give 18 months' notice to terminate a Code agreement. Operators will then have three months to serve a counter-notice if they oppose termination of the agreement, and they can apply for a Court Order for that agreement to continue.

2

Termination is separate to removal. Once an agreement has been brought to an end, if the operator hasn't removed their equipment, an occupier must serve a further notice giving the operator a reasonable period of time to remove the apparatus. The occupier can apply to Court for an Order enforcing or granting removal rights.

3

At a minimum, the time period will be 18 months, plus the time taken to remove the equipment. Our advice is to start the process at least 2 years ahead of any break date. Any surveys to identify which operators and equipment are present should be carried out ahead of this time period.

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In the case of giving up the premises with vacant possession, in order to comply with a break clause, the presence of a telecoms agreement still in place may invalidate the break for two reasons:

1

The break clause may be deemed invalid where a third party agreement with the occupier still exists and gives rights to that third party to enter the premises or continue to supply services to the demised spaces. The property must be empty of people including employees, security and facilities management personnel as well as third party rights to enter the premises. The landlord or purchaser must be able to assume and enjoy immediate and exclusive possession, occupation and control of the premises.

2

Vacant possession – In a case where vacant possession is required after the break clause, the property must be empty of chattels where these substantially prevent or interfere with the enjoyment of the right of possession over a substantial part of the property. In a recent case *Riverside Park Ltd v NHS Property Services Ltd* 2016, EWHC 1313 (CH) the Court ruled that an occupier installed internal non-structural partitions which were deemed to be chattels. The reason given was that they could be removed without damaging the premises and have been installed by the occupier for his own benefit rather than adding value or improving the premises. The judge then went on to rule that not only were they a chattel, but they also represented the physical impediment as the landlord should be entitled to market the property in an open plan rather than in a cellularised layout. Far from providing clarity, this case leaves more questions than it answers. In the case of data cabling and telecoms equipment, there has been no legal clarification and our advice is to err on the side of caution. All telecoms equipment should be removed from the premises by the break date, unless (in the case of the fixed line connections) the landlord expressly agrees to it being retained, perhaps for the benefit of an incoming tenant.

In summary, the new Electronic Communications Code included within the Digital Economy Act 2017 now places a huge emphasis on giving an extended period of notice to telecoms operators to terminate their agreements, now 18 months. However, termination of the notice is only one part of this and once the agreement has been brought to an end an occupier must serve a further notice giving the operator a reasonable period of time to remove the equipment.

In order to comply with break clause requirements, a well advised tenant seeking to exercise a break which is conditional on giving vacant possession will;

- establish what telecoms agreements and/or equipment are in place,
- establish who the operators are
- establish whether there is a ground for termination.
- ensure sufficient time is allowed for terminating any telecoms rights (which is at least 18 months) plus further time for removal of equipment.



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