1. This paper has really only one conclusion: As Lewison LJ said in Siemens Hearing Instruments v Friends Life Ltd [2014] EWCA Civ 382 at [66]:

“66. For these reasons I would allow the appeal. The clear moral is: if you want to avoid expensive litigation, and the possible loss of a valuable right to break, you must pay close attention to all the requirements of the clause, including the formal requirements, and follow them precisely.”

2. The term “commercial lease” is not a term of art. A commercial lease is a lease, just like any other. The factor that distinguishes it from other types of lease (i.e. residential) is simply that the parties to it (or at the very least the tenant) are commercial entities.

3. Notwithstanding the fact that a commercial lease is just a lease, the special characteristics of the tenant (if not the landlord) means that different factors often dictate the behaviour of the parties and the nature of the terms that they might want to see in a lease agreement to which they intend to become a party. Further, the legislation that governs commercial leases is, as is well known, entirely different to that which governs the residential letting market.

BREAK CLAUSES

4. Break clauses are a case in point. It is rare to see a break clause in a residential lease. Most residential leasehold properties are let either on long leases where the tenant regards the demised property much as one would freehold property (i.e. a long term home) or are let on short tenancies which may or may not be renewed regularly or might simply become periodic tenancies where tenants hold over at the end of the term.
5. In contrast, in the commercial lease sector break clauses are frequently used. They are often a commercial necessity that provides one or both of the parties with the opportunity to bring a lease to an early end on pre-negotiated terms.

6. The recession has generated many cases in which landlords have attempted, on technical grounds, to frustrate attempts by tenants to determine leases by exercising powers conferred by break clauses. The matters on which the cases frequently turn are whether or not the break notice has been validly served and whether the requisite break notice conditions have been complied with.

7. The Court of Appeal case of Siemens Hearing Instruments v Friends Life Ltd [2014] EWCA Civ 382 emphasised the need for compliance with the terms of the break clause. Applying the case of United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 WLR 74, in which Diplock LJ said that the key question is whether the trigger event that gives rise to the exercise of the promisor’s obligations has occurred: yes or no. There is no almost. The court cannot ascribe different consequences for non-compliance if the parties have not done so.

**Service of a valid break notice**

8. At least under any conventionally worded break clause a break notice must be served by the current tenant (i.e. the person or persons in whom the legal estate of the lease is vested). That break notice must usually be served on the person or persons in whom the legal estate\(^1\) of the landlord’s reversionary interest is currently\(^2\) vested. If there are joint tenants or landlords a break notice must be served by or on all of

\(^1\) Strait v Fenner [1912] 2 Ch 504; Dun & Bradstreet v Provident Mutual Life Assurance [1998] 2 EGLR 175.

\(^2\) This will not be the original landlord if the reversion has been assigned, Standard Life Investments Property Holding Limited v W & J Linney Limited [2011] L & TR 9.
the joint tenants or landlords\(^3\). If either the landlord’s or the tenant’s estate is in the process of being sold then during the ‘registration gap’ it is the transferor that is the proper server or recipient\(^4\).

9. If a break clause prescribes time limits for service of a break notice any failure to comply with such time limits will be fatal to the validity of the same, *Quartermaine v Selby* (1889) 5 TLR 223.

10. The method of service of a break notice must also comply with any provision in the lease dictating how such a notice must be served\(^5\). In the absence of anything in the lease about permissible methods of service a break notice can be served in any manner permitted by (i) the common law, or (ii) section 196 of the Law of Property Act 1925.

**Content of break notice**

11. The break clause will need to be interpreted to ascertain what the contents of a break notice must state in order for the notice to be valid. However, generally speaking, a break clause will be interpreted as requiring simply that a break notice must, unambiguously, communicate particular meaning, namely that the tenant wants to exercise his entitlement so conferred by the break clause to determine the lease, *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited* [1997] AC 749.

12. A break notice is capable of succeeding in communicating its central message even if that break notice fails to refer to the specific break clause\(^6\) or the break date\(^7\) or does not name either the landlord or

\(^3\) A break notice served on only one of two or more joint tenants will be invalid, *Woods v MacKenzie* [1975] 1 WLR 613; *Hounslow LBC v Pilling* [1993] 2 EGLR 59.

\(^4\) *Brown & Root Technology Limited v Sun Alliance* [2001] Ch 763.

\(^5\) It will be a question of contractual interpretation, see, for example, *Von Essen Hotels 5 Limited v Vaughan* [2007] EWCA Civ 1349 and *Truegold International Limited v Questrock Limited* [2010] EWHC 966 (Ch).

\(^6\) *Giddens v Dodd* (1856) 3 Drew 485.
tenant. It will be a question of fact whether an inaccuracy or error in the contents of a break notice has, as a result of obscuring the notice’s central message, invalidated the notice.

13. Break notices have been held to be valid notwithstanding that they have misidentified the break date, see, for example, *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited* [1997] AC 749 (stating 12 January as opposed to 13 January) and *Peer Freeholds Limited v Clean Wash International Limited* [2005] EWHC 179 (Ch) (22 August instead of 7 November).

14. Several cases have found a tenant’s break notice to have been invalidated as a result of the misidentification of the tenant or tenants, see, for example, *Prudential Assurance Co Limited v Exel UK Limited* [2009 EWHC 1350 (Ch) (notice served on behalf of only one of two tenants), *Lemmerbell Limited v Britannia LAS Direct Limited* [1998] 3 EGLR 67 and *Proctor & Gamble Technical Centres Limited v Brixton Plc* [2003] 2 EGLR 24 (notices said that service had been not by the tenants but by companies in the same group as the tenant company).

15. In contrast in *Townsend Carriers Limited v Pfizer Limited* (1977) 33 P & CR 361 and *Havant International v Lionsgate (H) Investment* [2000] 2 L & TR 297, in which break notices were stated to have been served by a company in the same group as the tenant company, the break notices were held to be valid.

16. Whether the misidentification of the landlord in a tenant’s break notice will invalidate the notice will, again, depend upon whether the mistake prevents the break notice conveying its central message. Recent decisions include *MW Trustees Limited v Telular* [2011] EWCA 104 (Ch) (misidentification of the landlord would not have invalidated the notice) and *Standard Life Investments Property Holding Limited v W &

7 *Allum & Co Limited v Europa Poster Services Limited* [1968] 1 All ER 826.
J Linney Limited [2011] L & TR 9 (where misidentification of the landlord invalidated the notice).

Break subject to other conditions

17. Many break clauses make the exercise of the break conditional upon the tenant complying with some or all of the tenants’ covenants in the lease. These clauses can and do raise various issues. To the extent that such clauses seek to make compliance with covenants other than payment of rent and yielding up a pre-condition they are contrary to the Business Lease Code. However, many older leases in particular provide for the break only to take effect if the tenant has complied with its obligations under the lease. On occasion the conditions are so onerous that the lease is, to all intents and purposes, unbreakable.

18. Where the clause is absolute even minor or trivial breaches will deprive the tenant of the ability to break the term, Finch v Underwood [1876] 2 Ch 310. In Bairstow Eves (Securities) Limited v Ripley [1992] 2 EGLR 47 the Court of Appeal rejected the submission that where a condition precedent was written in absolute terms it should be regarded as satisfied unless at the relevant date there were breaches of covenant for which substantial damages would be recoverable.

19. In Bass Holdings Limited v Morton Music Limited [1988] 1 Ch 493 it was held that the standard form of wording requiring absolute compliance only requires compliance as at the date of notice or termination (as required) and does not require compliance throughout the term of the lease.

20. Disputes can and do arise regarding the required time for compliance. Is it the time of giving notice or the time of termination, or both? Ultimately, it is a matter of construction of the relevant clause, see Finch v Underwood [1876] 2 Ch 310 (date of notice), Simons v Associated Furnishers [1931] 1 Ch 379 (determination of term),
Robinson v Thames Mead Park Estates [1947] (date of notice) and West Country Cleaners (Falmouth) v Saly [1966] 1 WLR 1485 (expiry of lease) by way of examples.

21. Given the decision in Bairstow Eves (Securities) Limited v Ripley [1992] 2 EGLR 47 it is not surprising that some break clauses are drafted in such a way as to protect the tenant against the possibility of being thwarted by some minor or insubstantial breach. Words of limitation often used include those that require only "substantial", "reasonable" or "material" compliance with the tenant’s covenants.

22. In Fitzroy House Epworth Street (No 1) Limited & Another v The Financial Times Limited [2006] EWCA Civ 329 the Court of Appeal considered the meaning of the word “material”. Therein it was held that the issue of material compliance “must be determined on an objective basis”. Further, “the word ‘material’ is susceptible to a number of nuances but what is fair and reasonable between landlord and tenant is not one of them”.

23. The Court of Appeal rejected the landlord’s contention that there would not be material compliance unless the only breaches in existence on the break date were trivial and of the kind that would occur if a screw was missing or loose in a particular location (para 84). In that case, addressing the question as one of fact, the Court of Appeal held that there had been material compliance.

24. Fitzroy House Epworth Street (No 1) Limited & Another v The Financial Times Limited [2006] EWCA Civ 329 was applied in Mourant Property Trust Limited v Fusion Electric (UK) Limited [2009] EWHC 3659 (Ch) in which the law was summarised. “reasonable” imports a different concept from “material”. This will impact upon the type of evidence that can be adduced. Whilst it was not possible in the Fitzroy House case to look at the parties’ respective conduct to assess material compliance, if the break clause is made conditional upon “reasonable compliance”
with or performance of the tenant’s covenants the court will look at the tenant’s conduct in carrying out repairs, including whether it followed expert advice, in its assessment.

25. It is common for break clauses to be drafted so as to be conditional upon vacant possession being given on the termination date. Failure to provide vacant possession will invalidate a purported break, see NYK Logistics (UK) Limited v Ibrend Estates BV [2011] EWCA Civ 683, for example. The question as to whether or not vacant possession has been given will be answered by applying the usual principles.

26. Break provisions often make the exercise of a break conditional on payment of all rent due on or before the termination date even if there is no need to comply with other covenants. It is not uncommon to find a break exercisable on or immediately after a rent payment day, even if rent is payable quarterly in advance. In the recent decision in Avocet Industrial Estates LLP v (1) Merol Limited & (2) Tudor Rose International Limited [2011] EWHC 3422 (Ch) even the payment of late rent at the time the break clause was purported to be exercised the non payment of default interest was still fatal to the validity of the purported break.

27. A question can arise as to whether the tenant is entitled to pay only an apportioned rent that relates to the period of its occupation before termination. Unless the tenant can point to a specific provision permitting apportioned payment the safest course is to pay the full rent and seek to argue about the right to apportionment later. Tenant’s hopes were raised in Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another [2013] EWHC 1279 (Ch) where Morgan J held that a term allowing the tenant a refund of the overpaid rent should be implied into the lease. Unfortunately the Court of Appeal unanimously reversed this decision. To imply the term he has not correctly applied the test in Belize v Belize Telecom Ltd [2009] UKPC 10: the question was whether he was
satisfied the parties to the lease would have implied the term. Furthermore it was not a term necessary to give business efficacy. This case means that it may be necessary to break as close to rent day as possible, or expressly include an apportionment clause.

**CONCLUDING REMARKS**

28. Break clauses historically have, and continue to take up a considerable amount of court time. The success or otherwise of determining a lease before the term has expired may be crucial to the financial well-being or the realisation of strategic plans of the tenant. Conversely, it may be equally important to a landlord who might wish to recover property for the purposes of redevelopment.

29. The recent instability in the economy has unsurprisingly given rise to an increasing amount of litigation on the issues explored in the foregoing. The wealth of case law illustrates the necessity to both draft and interpret break clauses very carefully. The consequences of getting it wrong can be very expensive!

Richard Adkinson
No5 Chambers
+ 44 (0) 845 210 5555
ra@no5.com