

Alison Fielden & Co.

Solicitors & Notary Public

FACTSHEET

Points to bear in mind when negotiating Business Leases

Help us to help you

Solicitors are well aware that for business clients time is money, that business leases are usually dealt with under pressure of time, and an urgent priority for the tenant client will be to take occupation as soon as possible and for the landlord client to secure rent payments as soon as possible. However it helps us to help you if you instruct us at an early stage to allow sufficient time for the matters listed below to be dealt with. The parties will have to live with the consequences for the entire term of the lease and the agreements will survive changes in landlord or tenant.

Heads of terms

Where agents are used they will normally draw heads of terms in a similar way to particulars of sale drawn up by estate agents on residential properties. The heads of terms are not intended to be legally binding but to include the main points agreed between the parties including rent, length of term, rent reviews, repair, alteration and alienation.

Even though the heads of terms are not intended to be legally binding it is prudent to ensure they are reasonably accurate since a party wishing to depart from them may find itself in a weak negotiating position.

Lease Code 2007

The Leasing Business Premises: Landlord Code contains recommendations covering lease negotiations, rent deposits, rent review, length of term and renewal rights, service charges, repairs, alterations and changes of use, assignment and subletting, insurance and management generally.

The Lease Code 2007 recommends that landlords should be aware of the RICS 2006 Code of Practice on service charges and the Commercial Properties Service Charge Code which was published in June 2006 and became effective on 1 April 2007.

Tenants should be aware of these provisions and ask that the landlords comply with them. They do not have legally binding force but are recommendations only.

Plan

It is essential in most cases for there to be a plan of the property to indicate the area of the unit, its relationship to other parts of the premises, parking spaces, access etc.

Landlord's Title

Your solicitor will wish to check that the landlord is able to grant the lease which may entail checking his title to the property and whether the landlord itself is a leaseholder or a freeholder. Any superior landlord may have to give consent to the letting.

If the landlord is a company your solicitor will want to see that it has the power to grant the tenancy intended.

Searches, enquiries and surveys

Your solicitor will advise on suitable searches. At the minimum a local search will be needed; water searches and environmental searches are also recommended. Index map searches may be appropriate if there is a question on whether part or all of the land is unregistered. Your solicitor will advise on other searches relevant to particular areas such as mining searches, flood searches, chancel repair etc.

Tenants should be aware that they may be liable for service charges which relate to the whole of the building and not just their unit. It may be advisable to prepare a schedule of condition so that both parties agree the state of the property at the commencement of the lease.

Planning matters

At an early stage your solicitor will wish to check whether the use intended for the business premises is consistent with planning legislation and permissions granted by the local authority.

Even if the use is continuing from a previous use this may not necessarily be a permitted use. Breaches of planning control can be enforced for four years in the case of building, engineering, mining or other operations and for ten years in the case of a change of use.

Environmental matters

Parties should be aware that occupiers of any land are liable for contamination on it and when taking on a business lease as when purchasing a property an environmental search may be a useful precaution. Ask your solicitor for details.

The Control of Asbestos Regulation came into force on 13 November 2006 and imposes an obligation on the duty holder to determine whether asbestos is present in the building, or is likely to be present, and manage any risk. The duty holder must carry out a suitable and sufficient assessment. It is prudent to find out what assessments have been carried out in any previous occupations of the property that a tenant plans to occupy.

Radon gas is present in small quantities throughout the country, some areas having pockets of more dense incidence of radon than others. The local search will reveal whether the property is in an affected area.

Other statutory obligations

The Regulatory Reform (Fire Safety) Order 2005 now applies to most non-domestic premises.

Fire certificates are no longer used. The order focuses instead on risk assessment. The responsible person must ensure compliance with the order. Sanctions for failure to comply include fines and imprisonment.

Disability Discrimination Act 1995 and employers' liability as well as occupiers' liability should also be borne in mind.

Lease term

Bear in mind that the lease term will determine whether the lease has to be registered at HM Land Registry and will also affect stamp duty land tax (see below).

The term can be brought to an end early if a "break clause" is included in the lease. The term can be extended if an option to renew is included in the lease. Note that there is an automatic right to renew in the Landlord and Tenant Act 1954 unless this is excluded in the terms of the lease.

Repairing obligations by landlord and tenant

Generally the shorter the term, the less onerous the tenant's responsibilities are. Very often the landlord will be responsible for roof, foundations, exterior and services, and the tenant will be responsible for internal repairs and decoration and very often plate glass. Note the particular terms of the lease for details and also for a precise description of the demised premises and thus the extent of the tenant's repairing obligations e.g. the demise may include floor coverings but not floor screed etc.

Common parts

If the lease relates to a unit in a parade of shops or a series of warehouses in an industrial estate there may well be service charges for common parts e.g. common driveways, staircases, grounds, services. Generally the landlord will pay these and will take contributions from the tenant. As to how this is calculated and whether the landlord or the tenants subsidise any empty units the lease will provide. The Lease Code mentioned above makes recommendations. It is important to check at an early stage whether the user clause in the lease is consistent with the planning legislation and also sufficient for the tenant's proposed use. See further under planning above.

Rights by landlord and tenant

Sufficient rights should be contained in the lease for the tenant to park (if parking spaces are not included within the demise), access to the property, use the common parts, take services, use bins, use toilets and kitchens where relevant etc. The landlord may also reserve rights for other units.

Insurance

Generally the landlord will be responsible for insuring the whole building where there are several units and the tenant will pay a contribution within the service charge.

The insurance clauses should be checked in the lease for example to ensure adequate provision for what happens if the property is destroyed, how the insurance monies are used, whether the rent is suspended and if insurance covers this, and whether there is an obligation to reinstate and who obtains the insurance proceeds on total frustration i.e. where the property cannot be reinstated.

Stamp duty land tax

Stamp duty land tax is payable on lease transactions as well as other land transactions. In the case of leases the tax is calculated on two elements: any capital purchase price, and any rent liability. Where there is a rent review clause in the lease the total rent liability cannot be fully known in advance and an estimate of the stamp duty land tax has to be used for the initial payment. Bear in mind that stamp duty land tax is an ongoing liability and will fall to be reconsidered at each rent review and each change in occupation. As for any other tax the revenue can challenge calculations for six years at least if underpayments are suspected.

Land registration

Leases for more than seven years will need to be registered at the land registry and in this case a set of prescribed clauses required by the land registry must be included at the beginning of the lease.

Going into occupation before the Lease is agreed

Generally this is not to be recommended since there is a risk that if terms cannot be agreed there may be a dispute between the parties as to when (or whether) the tenant should leave and who owes what to whom.

There is a possible solution however: if the parties sign a licence to occupy pending agreement on the lease terms this creates a flexible but legally binding agreement which is suitable for a short term arrangement. Your solicitor can advise, but the sooner your solicitor is aware of the proposed occupation date the better.

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