

CUMMINGS COMMERCIAL PROPERTY BRIEFING JUNE 2006

TAKING A LEASE

Signing a lease is one of the most significant financial commitments your business will make. It is important, therefore to seek professional advice at an early stage. There is a guide to help landlords and tenants to negotiate fairer leases entitled *A code of commercial practice for commercial leases in England & Wales*. Leases are complex documents and few people outside the property world understand all the detail and the implications. This is why it is essential to call on the professionals – your chartered surveyor and solicitor – at an early stage.

What Is A Lease?

A lease is a binding contract in law, which sets out the terms and conditions of the tenancy agreement between the landlord and the tenant. It thus defines the rights and obligations of both parties. It is, therefore, enforceable – you cannot simply walk away from a lease.

However, certain aspects of the relationship between landlords and tenants are also defined by law. A first draft of the lease will usually be drawn up by the landlord's solicitor as a basis for discussion between the parties.

New Lease Or Existing Lease?

The pattern of property tenure may be complex and is not always a simple matter of a tenant taking a lease direct from the property owner (the freeholder). If you, as a prospective tenant, are taking a lease on a building you might be negotiating a new lease with the freeholder.

On the other hand you might be entering the chain lower down and taking an assignment of an existing lease, or perhaps a sub-lease. With the new lease you should be able to negotiate terms to match your requirements. With an existing lease, you will be bound by the terms and conditions that it already contains and you have to decide before signing whether you can live with these or not.

These complexities emphasise the need for professional advice, and no two situations are identical. What follows is geared to a tenant negotiating a new lease, but most of the same considerations apply when assessing the suitability of an existing lease that you are thinking of acquiring.

Is There Such A Thing As A Standard Lease?

No. Subject to over-riding legal requirements, it is up to the landlord and tenant to agree the terms. However, there are certain matters that will crop up in almost all leases and the Law Society produces model leases for various types of tenancy.

The landlord and his or her advisors will have a pretty clear idea of the form of lease they would like and the main conditions. You, as a prospective tenant, may want to negotiate for changes on specific points. Your bargaining position relative to the landlord will depend on a number of factors, including the state of the property market. This is where your chartered surveyor's expertise will be invaluable.



How Long Should A Lease Run?

This is up to the parties to negotiate. In the case of longer leases there will often be provisions for the rent to be adjusted at intervals of, say, three to five years. The wording of the rent review clause in the lease is very important (see below).

However, the length of the lease does not necessarily limit how long you may occupy the property. Most business tenants have security of tenure under the Landlord and Tenant Act 1954, which gives them the right to acquire a new lease when the existing lease expires, subject to certain exceptions.

Do I Always Have Security Of Tenure?

No. Some leases will specifically state that the tenant does not have the protection of the Landlord and Tenant Act 1954, which normally provides for security of tenure. However, to be valid this exclusion requires the approval of the county court at the time the lease is prepared. As a general rule, you should be wary of giving up the security of tenure that the law provides.

Even if your lease is protected, you are not certain of obtaining a new lease when the current one expires. The landlord might legitimately oppose your application on certain limited specific grounds: that he or she needs to occupy the building or wishes to redevelop it, for example, in which case compensation is payable to the tenant.

For more information on security of tenure and lease renewal procedures see *Renewing a lease*.

What Are The Redecoration And Repair Obligations?

The clauses in the lease relating to redecoration and repair are very important, particularly when you are leasing an older building. Usually, you as a tenant will be responsible for internal decoration and repairs and you may be responsible for external ones as well. The requirement to repair a property probably includes an obligation to undertake any repairs necessary at the time you sign the lease.

So, be very wary if you are planning to lease a building that is already in disrepair. This is where it is vital to have the premises surveyed by your chartered surveyor at the outset. We can co-ordinate with our consultant building surveyor to advise on the scale of liability that might be involved.

Note also that towards the end of the lease the landlord may serve notice on you – known as a schedule of dilapidations – to carry out specific repairs. Since there is frequently argument over this point, it is again important to have a record of the state of the premises (a schedule of condition) at the outset and professional advice is paramount.

May I Carry Out Alterations To The Building?

The lease will probably prohibit you from undertaking structural alterations or building extensions but may allow you to make internal alterations – such as partitioning – with landlord's consent. You may, however, be required to remove any changes you may have made internally and return the premises to their original state (reinstate them) at the end of the lease.



Who Insures The Premises?

Broadly, there are two different considerations involved: who arranges the insurance and who pays the premiums. Normally, the tenant will pay the premiums in one form or another, even if the insurance is arranged by the landlord. Most tenants will also want to insure against disruption and loss of profits should the building become unusable following fire or other accident.

Am I Restricted In My Use Of The Building?

You will inevitably be subject to some restrictions under planning legislation. The lease will also impose further restrictions on use – to maintain the balance of tenant mix. A lease with strict use conditions may be difficult to assign.

How Is The Rent Established At The Outset?

It is up to the landlord and tenant and their advisors to agree a starting rent before the lease is signed. However, this rent may be subsequently reviewed at intervals. The expertise and market knowledge of your chartered surveyor is vital in agreeing a rent because he or she will know the level of rents that have been achieved for similar lettings in the area and can advise you on what figure is reasonable. And sometimes it may be possible to negotiate a rent-free period at the beginning of the lease.

However, the rent cannot be viewed in isolation without considering the other terms of the lease. You should, for example, expect to pay more if the landlord takes responsibility for repairs than you would if you were responsible for them.

The lease will probably state that the rent is payable quarterly in advance, and there will be penalties for late payment.

Will The Landlord Require A Guarantee For The Rent?

The landlord may require some kind of guarantee for the rent and other obligations of the lease. If you are asked to provide a personal guarantee – don't! If your company goes bust, the landlord could have a claim on your home and other personal assets. You also need to be clear whether any guarantees would cease to apply if the lease was subsequently assigned.

Ensure, if you can, that any guarantee lapses on assignment. Rent bonds and/or insurance back guarantees are other mechanisms to provide security.

What Are Service Charges?

In addition to the rent, there are certain other regular payments that you as a tenant may need to make to the landlord. Particularly where you occupy only part of a larger building, the landlord may charge you a portion of the cost for services that he or she supplies for the building as a whole: maintenance to the common parts, decoration and maintenance of the exterior of the building and the like. This will generally be described as a service charge.

It is important to ensure before signing the lease that you understand the basis on which service charges will be calculated and the sums likely to be involved. Try for a 'cap' if possible.



Who Is Responsible For Paying Business Rates?

Businesses are liable to pay the uniform business rate (UBR), and it is usually the tenant who will be responsible. Occasionally, however, the landlord will pay the uniform business rate and pass on the cost to the tenant, perhaps in the service charge. The lease should make clear where the responsibility lies.

Can I Escape From A Lease If My Property Requirements Change?

There are two main possibilities if you want to vacate the premises before your lease expires. You may assign the lease to another tenant who takes over responsibility for paying the rent to the landlord. Or you may continue to pay the rent, but sub-let the space to another tenant, from whom you in turn collect rent. However, your lease will probably limit or impose conditions on your ability to follow either course, and you need to understand these limitations fully before you sign the lease at the outset.

Some leases will contain a break clause, which gives the landlord or tenant (or both) the right to walk away from the lease at a specific point. There may be a penalty payable if you exercised your right.

The clauses in your lease relating to assignment and sub-letting can have a very important effect on your future flexibility. You should make certain that your chartered surveyor or solicitor explains exactly what you are being asked to agree, and its possible implications. Be very careful of 'old' leases predating 1st January 1996 which are subject to the old rules of privity of contract.

Put your best foot forward.

A feature of the leasing process is that agreements are made 'subject to contract' and they are not binding until the lease is signed. The potentially serious consequence is that your prospective landlord can accept a higher and better bid and leave you with abortive legal costs and a disrupted programme for moving or even worse, result in business failure.

The benefits of employing a competent agent are substantial. Besides giving you improved access to the market you can take comfort that terms have been negotiated from a position of strength based on good knowledge of the market and it will also safeguard you from being gazumped.

If favoured with your instruction, we will agree a detailed brief which will be circulated to all 530 Central London office agents through the Estates Clearing House.

We will conduct a comprehensive search via our day-to-day contact with the local agency network and extensive in-house databases. We have access to off-market availability, which will ensure you are made aware of all the space available and your requirement will be fully exposed to the market.

We are on line to the Land Registry database and can identify the owner of any building in your search area as well as comprehensive details of lease renewal/break option dates affecting occupiers in those buildings, so that we can make approaches prior to the event date.

As part of our service, we will organise and accompany you on inspections and provide you with on-site advice. Once your preferred options have been identified we



will then negotiate aggressively utilising our expert market knowledge, in order to agree the most advantageous deal/flexible terms possible. For example, a tenant break option coinciding with a rent review for maximum flexibility. In this respect, it is important that break options are negotiated in an unconditional way as conditional breaks are strictly construed by the courts and can be inoperative.

Upon terms being agreed, we will undertake a full measured inspection in accordance with the Royal Institution of Chartered Surveyors Code of Measuring Practice in order to verify the landlords' quoted floor areas. In many cases, we can achieve a reduction resulting in considerable savings for your company.

We can co-ordinate space planning, fit out and cabling, obtaining landlords' consent to improvements/alterations and any other elements required.

We will liaise closely with your appointed Solicitor in order to ensure the form of lease/contract accurately reflects those terms agreed and no unnecessary burden is placed upon your company.

What Next?

Cummings Commercial would be happy to attend an initial meeting without any initial cost or obligation to our company to discuss your property requirements in more detail.

We work on a performance related fee structure geared to actual savings secured for your company.

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