



A Client's Guide to Commercial Leases

Leasing Commercial Premises

These notes are Samble Burton & Worth's guidance in taking (or transferring) leases of commercial premises. It is aimed at someone who is going to be a tenant though someone who is an occasional landlord might find it useful as well. The guidance is general and you should not exclusively rely on it. You should take specific advice on any issues that concern you.

New Leases

Leases are always drawn up by the landlord's solicitors. They are therefore usually biased in favour of the landlord. They are long and complicated documents and they need careful and expert review. When the landlord sends us the draft lease we will go through it to check that the terms are as agreed and let you know any amendments we think should be made to it. There may then be a process of negotiation during which the terms of the lease will be settled. When the lease is agreed the landlord's solicitors will provide two copies of it; one to be signed by the landlord and the other to be signed by the tenant. When the deal is concluded the two copies will be swapped so that each side will hold the signed copy of the other. This process is known as exchange of leases or sometimes as completion.

Before then you need to make sure all of your arrangements are in place because you will be committed at exchange to the deal. You will therefore need to make sure of the following:

1. that your finances are in order;
2. that your stock and equipment and IT are all in place;
3. that your staff are recruited;
4. that you registered for VAT if you need to do so, and
5. that insurance is in place.

As part of the process that we do before exchange we will ask various fairly searching questions of the landlord's solicitors about the premises and about the property and we will supply you with answers. If you consider that there are any particular points you need to be attended to please do not hesitate to let us know.

Searches

Unless you tell us that you do not wish to do so we will also make various conveyancing searches. There will be a local search and check with the Town Hall of the local



authority's records including for example the planning history, the status of the road and whether there are any road works to be done in the area and whether there are any other issues such as breach of building regulations or lack of planning consent. Other searches that we may make might include an environmental search to make sure there is no pollution which you might be responsible for after you take the lease.

Stamp Duty Land Tax

In preparing budgets you need to check whether there is any liability to a tax known as stamp duty land tax. This is calculated on a formula based on the length of the lease, the amount of the rent and whether you are paying a lump sum to the landlord, which is known as a premium. If you give us the figures we can calculate whether there is likely to be any liability. If there is liability a stamp duty land tax return will need to be filed within 14 days of the completion of the lease. If you do not comply with that timetable, Revenue and Customs will be entitled to charge you a penalty. We will help you with the return provided of course you provide the essential information. Sometimes additional stamp duty land tax is payable during the length of the lease. If the rent is increased in the first five years then there has to be a recalculation based on the new rent and if necessary any additional taxes are payable again within 30 days', this time from the earlier of the end of the fifth year of the lease and the date on which the rent for the first five years becomes definite.

Stamp duty land tax can also become payable if the rent is increased during the term. If you remain in the premises after the lease expires (known as holding over) then again you may have a liability for stamp duty land tax.

Whilst we will help you on each of these occasions to calculate any tax you will appreciate that we will have long ago closed our file and we will not be in a position to initiate these returns. It will be something that you will have to remember and either deal with yourself or ask us to help with.

Matters that you need to consider when negotiating

Break clauses

Commercial leases are usually granted for a specific period known as the term. It's not unknown for it to be agreed between the landlord and the tenant that the tenant can have the right to terminate the lease earlier than it otherwise might be ended. Sometimes a break clause coincides with any rent review, but otherwise it might just be a specific period, such as the 3rd year of the term.. It's quite normal for the break clause to indicate that the tenant must give a certain period of notice to give the landlord time to look for a re-letting.



You should be careful what restrictions the landlord might put on exercising the break. It's probably not unreasonable that you should have paid all the rent up to date, though even there, if you're trying to break the lease because your business is doing badly that might not be a very good idea from your point of view. You should resist any suggestion that you cannot break if you have not honoured all the terms of the lease.

If the matter gets as far as a court the courts have tended to be very strict and even a very minor breach of the lease such as perhaps having painted with 2 coats of paint rather than the 3 coats that the lease might provide for might be enough to stop you cancelling the lease.

If there is a time limit on exercising the break or if the lease lays out the procedure for doing it it's important that you strictly comply. If the lease indicates that you must leave the premises empty then that does mean completely empty. There was a case when a tenant had kept some keys after the lease was supposed to have ended because his workmen were finishing repairs and the decorating. The court decided that that wasn't exercising the break clause in the terms of the lease and the break hadn't happened.

Sitting tenant rights

Traditionally business leases in England and Wales had the protection of the Landlord and Tenant Act 1954. The effect of that is that if the Act applies your lease does not actually stop on the date when the lease says it will. Under the Act the lease will continue to run until either the landlord or the tenant take the initiative to say that they would like it to be renewed or ended. The renewal is on current market rates and terms. Furthermore, the landlord can only object to a renewal on certain grounds of which the obvious ones are that the tenant has been a bad one or less obvious that the landlord wants to use the premises himself or wishes to redevelop. All of this is a major advantage to you as a tenant.

Unfortunately, many landlords seek to remove the protection of the Act and it is relatively easy to do so though you have to agree.. Tenants often agree not realising that they are giving up significant protection. It's a position of relative negotiating strength. If you have the opportunity to do so you should object to any suggestion to remove the protection of the Act. Even if the landlord is likely to renew your lease, having the protection of the Act shifts the balance of power and strengthens your negotiating position.

Landlord's legal fees on new leases

it used to be very common for landlords to ask that their legal bill for granting a new lease be paid by the incoming tenant. The government has attempted to discourage this but it is still not unknown. Again it comes down to relative negotiating strengths but you should consider trying to agree that you do not pay the bill. Failing that you might suggest a compromise such as paying a contribution or a fixed amount. You could also



suggest that if the landlord can claim the VAT back you might pay all or part of the bill but that the landlord pays the VAT element and claims the VAT back from the government.

You should note that if you as a tenant pay you cannot in any case yourself recover VAT on the landlords solicitors bill though you can recover VAT (if you're registered) on your own solicitors bill and your own solicitors bill is tax deductible against income or corporation tax.

Landlord's legal fees on renewing a lease under the Landlord and Tenant Act 1954

if you do have a sitting tenant rights to insist on a new lease being granted to you you do not normally have to pay the landlords conveyancing bill for acting for the landlord on the grant of the new lease. If there is a disagreement between you and the landlord that might be resolved by a County Court ruling on the matter. The County court can award costs to one or other of the parties as part of the trial procedure.

Landlord's legal fees on existing leases

If you're having an existing lease transferred to you or you're transferring your existing lease to a new tenant the lease will set out the position about payment of landlords expenses and it will usually provide that they should be paid by the tenant. It can't really provide that the incoming tenant pays because he is not a party to the lease but it's common for the outgoing tenant to ask for the incoming tenant to pay or contribute.

When an existing lease is being transferred to a new tenant the landlord will want to check on the good standing of the new tenant to make sure that there is not likely to be a default. The lease will almost certainly say that the landlord is entitled to do that and to ask for references which may be personal, bank, trade or any combination of those. The lease will often give examples of the sorts of tenants that the landlord can turn down. It's also quite common for the lease to provide that an incoming tenant must deposit some money as security.

Rent reviews

Leases of over about 3 years will often have a clause for the rent to be reviewed. Reviews are almost always upwards although if the property is unattractive in your negotiating position as a tenant is strong, you could push for downward reviews.

Reviews are usually either to a market value current at the date of the review settled in some manner by a surveyor or indexed, usually to inflation. Just occasionally, a landlord



will ask for the best of either. You should strongly resist this. From your point of view, it's normally better to go to market rents because if there is a recession and lots of empty

properties nearby that will be reflected in the review. If it's purely indexed inflation may be raging in the midst of the depression and your rent might go up whilst everything else is going down.

We can advise on the legalities of the rent review, but we cannot advise on what the rent should be, you should consult a valuer about that.

There are various other matters contained in the rent review clause that you might need to discuss with us. Rent review clause will normally direct that the valuer is to ignore certain things such as the fact that you're occupying the business. He would also be required as part of the valuation exercise to assume that everybody's done what there are supposed to have done under the terms of the lease and that this the lease has been damaged or destroyed it has been repaired. That last assumption could obviously be very unfair to you.

Another matter is the valuer is directed to consider that he is reviewing a rent in the lease which is as long as the original lease. There are varying arguments about how the length of assumed term will affect the review. This is really a matter that you need a surveyor's advice on before you take over the lease. Ints you need to consider if an existing lease is being transferred

The lease often directs that any improvements made by you which the lease requires you to make are not ignored when seeking to put the rent up. Since the lease will often require you to comply with statutes and laws that mean that quite expensive work will not be disregarded and you will be charged extra rent for work that you've done. In connection with that see the section on statutory obligations below .

Rent suspensions.

The lease will often say that the rent is to be suspended if the premises are damaged so that they can't be used, as long as the damage is insured for and nothing that the tenant has done has made it so that the insurance will not pay out. That's a good enough as far as it goes but if the premises are unusable ideally you would like the rent to be suspended. Landlords often resist this change but we would recommend that we try and get it. Sometimes the lease also provides that the lease can be cancelled. If either the landlord can't rebuild or in some cases doesn't want to. Usually, the landlord, under the terms of the lease, can keep any insurance money.



You should consider with your insurance broker whether you should have separate insurance for business disruption. If the lease only allows the landlord to cancel the lease if it's the case that the building is unusable because of disrepair we would suggest

that we ask for it to be amended so that you can to. You don't want to find a situation where the premises are damaged you find somewhere else and then the lease is revised and you're in effect renting to places when you only need one..

Transferring an Existing Lease or Assignment

The points below will also you apply to you in the future. If you are currently taking a brand-new lease but at some time in the future you might want to consider transferring it to a new tenant

Assigning (Transferring) A Lease

If rather than taking a brand-new lease you are taking over the lease from someone else, many of the factors that are talked about above will need to be considered. Because the lease already exists it will probably be extremely difficult to get it changed but you need to consider its wording to make sure you are happy with and can live with what it says.

The process of transferring a lease is referred to as assigning. In order for it to go through the landlord will want to assess the incoming tenant to make sure that they are good for the rent and a respectable tenant. They will ask for personal trade and professional references, they may ask to see trading accounts and might wish someone to stand as a guarantor. They may sometimes ask for a rent deposit as security. They will ask for their professional fees to be paid upfront or for a solicitor to give an undertaking that they will be paid. The undertaking is a promise by the solicitor personally to pay expenses therefore no solicitor will give such an undertaking without the money being deposited first and it being clearly understood the client is giving instructions give and honour the undertaking and that the client cannot withdraw the instructions or the deposit.

If you are transferring your lease to someone else you will wish to be as fussy as any landlord. The lease will almost certainly say that if the new tenant defaults after they take over then you as the outgoing tenant will in effect guarantee them and will pay the rent for them. Since by then you will not be trading and will have no income from the business to meet those expenses that might be a very serious blow. You should therefore never assign the existing lease to an irresponsible tenant. If you are transferring or assigning your lease to a new incoming tenant when you're leaving the business you too should insist on having a guarantor especially if the new tenant is a company.



Authorised guarantee agreement

If you're transferring your lease to a new tenant it's also in your interests to make sure that the incoming tenant will be a good one. Most commercial leases provide that if the incoming tenant defaults then the outgoing tenant acts as a guarantor for the incoming tenant. For that reason you should be as fussy as the landlord. If you look at your lease you will see that towards the back of it, it may well have a sample document that has to be entered into by the outgoing tenant, the landlord and the new incoming tenant. This is known as an authorised guarantee agreement and in effect, it means that if you're transferring your existing lease as part of that you will be agreeing to guarantee the performance of the new tenant.

If a new incoming tenant defaults you could find that you are paying the rent and other payments on the lease whilst no longer having a trade or business to produce any income to pay.

There will be legal expenses occasioned by transferring the lease which will need to be paid to the landlord's solicitors to do the vetting referred to above and to produce the documentation needed to give the landlords permission for the transfer. Your lease will probably also say that your landlord's surveyor's fees for approving and vetting the new tenant will need to be paid and on the face of it they will be payable by you because you're a party to the existing lease. You can of course agree with your incoming tenant that they pay all or part of this and again it something you might consider negotiating.

Repairs and renovations

In most cases the tenants are in effect responsible for the expense of any repairs to the building. The word repair is ambiguous in leases it can mean improving. If you are renting a stand-alone building the obligation will be put directly on you to repair. If you are leasing part of the building such as an office, rooms, part floor or downstairs premises with other tenants above then it may be that the landlord will do the repairs but will charge you a proportion of the expense. Part of our preliminary enquiries mentioned above is to ask what the budgets and expenses of previous years have been. You should have the property surveyed or looked at by a builder to see whether there are any upcoming substantial expenses.



Inspection and survey

We do not inspect properties that clients are thinking of leasing. We must rely on you to do that and to draw our attention to any issues

We recommend that you do have a survey by a qualified surveyor to see if there are any issues relating to the property, which might cause you difficulties. If you are having

a mortgage you should not rely on your lender survey. The lenders surveyor will only be interested to make sure that the property gives adequate security to the lender. They will not be concerned about issues that might concern you.

You should also inspect the property yourself and if for any reason you're not having a survey that becomes even more important. Bear in mind normally we will not inspect the property on your behalf and even if we did we don't have any surveyors qualifications which allow us to advise on building issues. We would merely be inspecting as solicitors.

You need to look at the property to make sure that it is in reasonable repair and condition bearing in mind that you might have to put the property back into good condition, which might be better than it is when you took it over. See the comments below.

You should also check to ensure that there is adequate access to the property, We need to know whether the property connects directly to any public road., and, that if there are car parking spaces that you have the car parking spaces that you're expecting and you should check the plan if any to make sure that those car parking spaces are accurately marked.

You need to look at the property to see if anyone is exercising any rights over it, such as walking over it parking on part of the land that you're expecting to lease or encroaching on it in anyway. You also need to see whether there are any pipes channels wires or service media or anything like footpath which you don't expect to be there and might interfere with your future use.

Repairs and renovations of older buildings

If the property is an old one already in bad condition you might wish to try and limit your liability to keeping the property in no better condition than it is at the moment. A repairing obligation can actually mean that you have a liability to improve the property above this current standard.



Dilapidations

if you are the tenant of the lease which does come to an end and if there are repairing obligations on the tenant in it you will have to do make sure that when you hand the property over that it is in good repair and clean and tidy and that you have removed everything from it so that it is empty ready for a new tenant. If you don't the landlord can make a claim against you which is enforceable, even though the lease is ended and these claims can be substantial. If therefore your lease is coming towards its end, and you wish to vacate you should start getting things sorted and tidy in advance

Statutory Obligations

Most leases impose a duty on the tenant to comply with any obligations imposed by laws (statutes) and this can be a very significant liability. Examples are:

a) Disability Discrimination

If a physical feature of the property makes it impossible or reasonably difficult for a disabled person to make use of the service provided then the service provider, which would normally be the tenant, must take such steps as are reasonable in all the circumstances of the case for them to take to rectify this. This could be to remove a feature, altering or provide a way of avoiding an obstruction such as a high step or providing an alternative access. That could mean things like widening doors for wheelchair access, the provision of accessible tables, desks, toilets and other facilities.

b) Control of Asbestos

All employers have a duty to protect staff from exposure to asbestos and there is also an obligation to manage asbestos risk in nondomestic premises. There is an obligation to assess whether asbestos is present, assess the risk from any asbestos and put in place a written action plan and systems to manage the risk which might but does not necessarily mean that the asbestos would have to be removed. Anyone who might come into contact with asbestos such as contractors and workmen need to be told about the risk. In addition to the liability under the lease which means that you would be having to do this as tenant, it can be a criminal offence to break these regulations.

c) Smoking Control

It is necessary to display no smoking signs and take reasonable steps to ensure that staff, customers, members and visitors are aware smoking is not permitted and to ensure that no-one smokes in smoke-free premises or vehicles.



d)Fire Safety

Occupiers of commercial premises have an obligation to prepare a fire risk assessment. In some cases this could lead to substantial expense if for instance you had to supply fire escapes. It is important therefore that you check the risk of fire, the premises, the existence of fire escapes, the existence of fire doors, whether you need to do PAT testing, the installation of emergency lighting and fire alarms and checking the electrics.

Energy Performance Certificates

If a new lease is being granted it is for the landlord to provide an energy performance certificate. He can use an old one which is up to 10 years old if there has not been any physical change. If you make alterations and then come to sell your lease you might have to get an updated certificate. The Government has indicated from April 2018 that it will be unlawful to let properties with a rating of a F or G which is the lowest rating. If you wanted therefore to transfer your lease to somebody else not only might you need to get a new certificate you might have to do considerable work to upgrade if that regulation comes in.

Utilities

if you're taking over premises that have been leased before you need to make sure that there are no existing debts. Whilst you're not theoretically responsible for any debts the utility suppliers may well seek to charge you if the current tenant disappears. We would not normally make enquiries concerning this nor would we ask the outgoing tenant for meter readings and you need to raise that with the outgoing tenant or with the managing agents. You also need to arrange your own supply of utilities, which again we will not deal with.

Companies

Limited liability companies are treated in law as they are an individual distinct and separate from their owners and managers. If a company enters into a lease or contract it is as responsible for performing it as you would be if you had entered it into as an individual. The difficulty is that the company may have no assets of its own. If the owners closed down a company which had no assets, the landlord wouldn't be able to recover any money for rent or repairs. For that reason, landlords are very reluctant to have a small private company as a tenant unless a director or shareholder of the company stands guarantor for the company. You'll find that nearly all landlords will insist on a guarantor.



If you are transferring or assigning your lease to a new incoming tenant when you're leaving the business you too should insist on having a guarantor if the new tenant is a company.