

Taking leasehold premises – some practical points

As a new or young business, taking a lease of premises for the first time can be a minefield, and it is not always apparent what to look out for or what questions should be asked of the seller or landlord and the agent. Firstly there are some General Points to consider which are:

1. Get a survey done of the premises.

It cannot be emphasised enough how important this is, regardless of whether the lease is only going to be for a short term otherwise you can find yourself becoming liable for the costs of works you had not expected. Virtually all commercial leases now are Full Repairing and Insuring which means that the tenant is required to cover all costs relating to the part of the premises that is their responsibility. On a lease of whole, this will include the structure and exterior and on a lease of part there will be a service charge to pick up a proportion of the costs expended by the landlord for these and for common parts, so one way or another you will be charged for this.

2. What uses are the premises authorised for?

There are two issues to think about here, one is whether it has the correct planning consent for the use in question, which can be established via the Council's planning department but also whether the title to the property allows it to be used for that purpose. It is therefore possible that a property can have the necessary planning consent but there is a restrictive covenant on the title to the property prohibiting the use in question.

3. EPC, fire, asbestos

Most commercial properties will now need an *Energy Performance Certificate* which should be provided by the landlord or the seller when a lease is granted or assigned. You will want to be sure that one is in place so that the cost for having it done does not fall on you. The only exceptions to a certificate being required are buildings that have no heating, mechanical ventilation or air conditioning systems and the following:

- Temporary buildings with a planned time of use of two years or less.
- Industrial sites and workshops with low energy demand.
- Non-residential agricultural buildings with low energy demand.
- Stand-alone buildings with a total useful floor area of less than 50 square metres, which are not dwellings.

The premises must have a current *fire assessment* in place. The old fire certificate system based on number of employees in a premises is no longer in place. As tenant you will have a responsibility to make sure that there is always a current assessment in place and to update it as necessary, along with implementing changes that it requires. That duty starts the moment you take up occupation of the premises. Get as much information as possible in advance regarding fire safety risks and where acquiring or letting part, do not ignore other parts of the building. Remember that a service charge provision can enable the Landlord to recharge Tenant for fire safety works to common parts.

There are criminal penalties for failing to comply with fire regulation requirements.

Regarding *asbestos*, if the premises has been built pre 2000 a full assessment is required. Post 2000, the list of materials required by the Construction (Design and Management) Regulations should address this. Once again as tenant it is your responsibility to ensure that there is an ongoing appropriate assessment in place and that any measures identified to deal with asbestos on the premises are followed through and monitored. As before, there are criminal penalties for not doing so.

4. Do you need to make any alterations, change the signage or the use?

From the outset you should think about exactly what you will need to do to the premises in order to get up and running from it. It is likely that a license will be required from the landlord in order to deal with alterations, signage and use so it should be flagged up straight away in order not to hold up the transaction further down the line. You will most likely be required to produce plans and specifications for any works you intend to carry out so it is again best to get this prepared as soon as possible.

5. Is the lease renewable?

Commercial leases can benefit from statutory protection under the Landlord and Tenant Act 1954 and will continue on once the term ends unless the lease has been specifically contracted out of the Act. If it comes within the act, the landlord must renew the lease, which would have to be on similar terms to the previous lease. There are certain grounds however on which they can avoid doing this. It is as well to investigate whether Landlord has future plans to use the premises themselves or to substantially redevelop them.

6. Unfavourable terms

Remember that if you either take assignment of a lease that contains harsh terms which are unfavourable to the tenant, or take a new lease containing such terms, not only can it affect you during your occupation of the premises but it can make that lease difficult for you sell on or sublet as the case may be, should you subsequently wish to do so.

Taking an existing lease

1. Lease is not negotiable

You will be stuck with the terms of the lease in place at the time so it is important to establish at an early stage whether it contains provisions that are onerous. It is possible for variations to leases to be agreed if necessary but this requires the agreement of the landlord, which would obviously delay the transaction and increase costs.

2. Dilapidations

Especially where you are taking on the tail end of a lease, be aware that you could end up becoming liable for the cost of dilapidations. It is very important to therefore be aware of the condition of the premises, check whether any schedule of dilapidations has been served by the landlord and if need be make a retention from the purchase price in respect of dilapidations costs or agree an indemnity from the outgoing tenant. Another reason that getting a survey done is so important. The tail end of a lease of a premises in bad condition however is generally to be avoided for this reason.

3. When is the next rent review due?

If a rent review is be imminent, depending on the terms of the rent review clause and also on the market, this could result in a substantial rent increase. Is also important to find out whether any review that should have taken place is not outstanding, for the same reasons.

4. Service charge, any big expenditure coming up?

Be clear about what proportion of any service charge you will be responsible for and what it includes. It is advisable to check whether the existing tenant has had difficulties with the landlord in relation to service charges and to see a copy of the service charge accounts as soon as possible. Check if there is any major expenditure about to arise, for example an office block with an old malfunctioning lift which is about to be replaced, you could find yourself paying for the costs resulting from the years of use by other tenants.

5. Landlord's costs

More often than not landlord's consent is required to assign a lease and generally the landlord will want to offload this cost onto the existing tenant who in turn is quite likely to offload this onto the incoming tenant. Be aware of this potential expense and establish from the outset where the responsibility for these fees will lie.

Taking a new lease

1. Schedule of condition

It is a very good idea to get a schedule of condition prepared, with photographic evidence of the condition of the property at the time of entering into the lease which leaves little room for argument if the Landlord serves a dilapidations notice or alleges that a repairing covenant has not been complied with.

2. Seek, professional advice from early stage

The biggest advantage of taking a new lease is the ability to negotiate the terms as you want them to be. You should speak with a solicitor at the earliest opportunity to talk about what you are looking for so that they can suggest to you what the heads of terms should contain. The more that is agreed up front, the less long winded legal wrangling later on which means less costs.

3. Key clauses to think about

What do you need to be able to do in terms of *assigning and or subletting*? Often assignment and sublets of part can be prohibited.

What level of *alterations* will you need to make to the premises? On shorter commercial leases you would expect to be able to erect internal demountable partitions without any consent but other internal non structural alterations with consent, external and structural alterations prohibited.

What level of *repair* are you going to be expected to keep the premises in? You probably do not want to be required to put the premises in any better a state of repair than it is in at the date of the lease. What exactly are you going to be responsible for repairing and what repair costs will you be liable for? This needs to be absolutely clear. If you are on the ground floor of a building you do not want to be contributing towards the costs of repairing and maintaining a lift.

How frequently is the *rent going to be reviewed*? On shorter renewable leases there is often a rent review inserted right at the end of the contractual term so that during any interim period whilst a new lease is negotiated, the landlord can increase the rent. What is the rent review based on? It is not always open market rent, sometimes it can be connected to other factors such as the RPI or turnover. Remember that if your first rent review is before 5 years from the commencement of the lease, you could be liable for paying Stamp Duty Land Tax on the increased rent.

4. Authorised Guarantee Agreements

Virtually all leases now require you to give an Authorised Guarantee Agreement, which means you guarantee the performance of any new tenant that you assign the lease to. This is often required in addition to that tenant having to offer a guarantor. The effect of this is that the landlord can go back to you in the event that the assignee fails to pay rent or breaches a lease covenant so be aware of this.

5. Break clauses

Do you want an option to terminate the lease sooner than the end of the agreed term? If you are unsure as to how your business is going to fair over the coming years this may be a good idea. You then have the option of a having longer lease should you require but with a get out clause in the event that you need it. Sometimes the Landlord will want a break option as well however, how damaging could this potentially be to you if exercised by the Landlord?

6. Length of term and Stamp Duty Land Tax

It is worth checking out based on any premium payable, the rent and the length of the lease term whether you will have to pay SDLT. The calculation on a new lease is not straightforward, however on the HMRC website (www.hmrc.gov.uk) there is a calculator in which you can enter the premium, the rent and length of lease to work this out, so that any tax due does not come as a surprise. Remember that a longer lease term can lead to an increased liability to pay SDLT.

7. Is the Landlord going to be carrying out development nearby?

When taking a lease of a unit on a new site, consider how much further development the landlord is looking to carry out. Are you going to find yourself on a site where a considerable amount of works are taking place for long periods of time, causing inconvenience in relation to noise levels, access, workmen having to enter the premises etc? If you have clients that need to visit your premises is it going to cause a bad impression because it looks like you are based on a building site?

In summary then, there are a number of considerations and it is helpful to be armed with as much understanding as possible so that potential problems can be rooted out early in the process.



Tomasz Dukanovich
01752 764848
tomasz.dukanovich@brightllp.co.uk