

# Commercial Leases

Many businesses, when deciding to take on leasehold premises, will engage a property agent to represent and advise them in any negotiations with a potential landlord. It is just as likely, especially in a smaller transaction, that a business will negotiate the general terms of the transaction (known as the Heads (or Memorandum) of Terms) direct with the potential landlord or its agent. It is upon these Heads of Terms that the landlord's solicitors will base the draft Lease and it is therefore extremely important when negotiating these Heads of Terms that you do not agree to something which will become a cause for regret later:

## Term of the Lease

The first thing to agree is how long the Lease will last for, commonly known as the "term" of the Lease. The longer the term, the more obligations the Landlord will require you to take on and the more you may be willing to accept. Leases over 7 years now have to be registered at the Land Registry at the cost of the tenant. See also Stamp Duty Land Tax implications below.

## Security of Tenure

Business tenants generally will have a right at the end of a Lease to require the landlord to grant them a new lease on similar terms to the old lease and the landlord will only be able to refuse to grant a new lease in very limited circumstances. However increasingly landlords want to exclude that right in leases to new tenants. To do that there is a fairly simple notice procedure to be followed involving a formal declaration.

## Rent and Rent Review

It is common for the landlord to require payment of rent by banker's standing order. Rent will usually be paid quarterly in advance (although in a very short lease it may be paid monthly in advance). In a longer lease, it is also usual for there to be provision for a review of the rent which still tends to be "upwards only" notwithstanding the Government seeking to change this practice. That means that the rent will either go up to the market rate at the time of review or at least stay the same. Rent reviews occur generally every five years although this is a matter for negotiation. Be wary of agreeing anything shorter because it can have adverse tax implications.

## Service Charges

If a lease is for only part of a building, the tenant will usually only be responsible for the maintenance and repair of the internal parts of the property. The landlord will generally be responsible for the maintenance and repair of the exterior, the structure and internal and external common parts together (if appropriate) with the provision of any other services such as landscaping and security. The cost of

those items will be recharged to the tenant through a service charge. One way around any uncertainty as to how much may be payable each year is to agree either a fixed contribution to service costs or alternatively a capped figure (with the capped figure perhaps increasing annually in line with the retail prices index).

## **Insurance**

The landlord will in nearly all cases be responsible for arranging buildings insurance and also for arranging insurance for loss of rent cover in the event that the property is damaged (where the rent under the lease will cease whilst the property is unusable). The landlord will seek to recover the insurance premiums (or a proportion of them in respect of a lease of part of a building) from the tenant.

## **User**

Ensure that the landlord knows what you wish to use the property for and ask the landlord whether or not that is a permitted planning use for the property.

## **Alterations**

The Lease will limit your ability to make alterations to the property and may forbid altogether structural alterations. Non-structural alterations may be allowed depending on the term of the lease but landlord's consent will generally be needed, including your proposed fitting out works for which plans and specifications will be needed at an early stage.

## **Repair**

Generally, a tenant will be responsible for ensuring the property is kept in good repair and condition. In the case of a lease of a whole building, this will generally include the structure as well as the decoration and thus could turn out to be an extremely expensive commitment, especially in the case of a short term lease. It is always important to obtain a surveyor's report on the condition of the property to ensure that there are no problems which may only become apparent when you take occupation of the property. One way of limiting the liability of a tenant is to have a Schedule of Condition prepared prior to completion and for the lease to state that the tenant does not have to keep the property in any better a state than shown in that Schedule of Condition.

## **Disposal**

The lease will limit your ability to dispose of the property before the end of the lease term. Most landlords will allow a subletting of the whole premises or in some cases a defined area of the property or the transfer of the lease to a third party but the landlord's consent will always be required and you will have to meet the landlord's costs in dealing with that formality.

## **Break Clause**

Either the landlord or the tenant or both may require the ability to end the lease early either upon a set date or alternatively at any time after a certain number of months notice. You will want to make sure that the Heads of Terms state that the break clause is to be unconditional so that the tenant's ability to bring the lease to an end is not dependent upon the tenant having observed every single covenant in the lease.

## **Stamp Duty Land Tax (SDLT)**

Some leases will attract SDLT. It is calculated on a complex formula involving a multiplier with the length of the lease and the amount of the rent. A tax return is necessary for leases over 7 years and may be required for shorter leases at higher rental values. Make sure you know what the potential tax liability may be before committing yourself.

## **Guarantees and Rent Deposits**

If the landlord is uncertain as to the financial strength of the tenant he may require individuals or parent companies to guarantee the obligations of the tenant in the lease. In the case of an individual, such a guarantee would mean that the landlord could attack all of the individual's assets if the tenant defaults under the lease. An alternative, or even an additional safeguard, is that of a Rent Deposit Deed where the tenant deposits a number of month's rent with the landlord which the landlord can draw upon in the event that the tenant breaches the lease.

## **Landlord's Costs**

It is common, especially in smaller transactions, for landlords to require their legal costs to be paid by the incoming tenant. This is by no means obligatory although may be unavoidable. Before committing to paying these costs, ensure that you obtain an estimate or even agree a fixed contribution (bearing in mind that VAT will usually be added).

Once the Heads of Terms are agreed the matter will then be referred to the landlord's solicitors for them to prepare the lease documentation. You will also then be asked to inform the landlord which firm of solicitors you intend to instruct to act on your behalf to actually negotiate the lease.

Barlow Robbins LLP is a leading legal practice providing a full range of legal services to business and individuals. With offices at Guildford, Godalming and Woking, our partners and staff are committed to providing a first rate service combining professional and technical skills with extensive practical experience. Our offices below deal with commercial property work including sales and purchases, leases, tenancy agreements and rent reviews. You can find out more details about the practice and the work which it undertakes on our website at [www.barlowrobbins.com](http://www.barlowrobbins.com).