

9. Taking a lease

Commercial and
General (Page 1)

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What you need to know

When a company proposes to take a lease it should be aware of all its business requirements in order to give full instructions to its professional advisers. The following article looks at some the matters contained in a typical lease which the parties, particularly the tenant company, would find useful to consider before consulting its lawyers.

Description of the Property

This must be as accurate as possible to avoid dispute as to the extent of the property included in the lease and the respective parties' obligations to repair (this is dealt with in more detail below). Usually the solicitor will not have had the opportunity to inspect the property and therefore members must satisfy themselves that the description in the lease correctly shows the extent of its boundaries. Where a boundary is not defined this should be settled between the parties prior to signing the lease. Ideally, the parties should agree a professionally prepared plan on an adequate scale.

The Tenant's Rights

The lease should include all associated rights for the proper use of the property and it should not be assumed that these will be implied as a matter of course. The four most important rights are:

1. The right of access from the nearest public highway and, where a lease of part of a building is being taken, the right to use passages, staircases, lifts, etc., leading to the property.
2. The right to use all services, i.e. gas, electricity, water, drains, telephone services etc.
3. A right of support from other adjoining premises such that the landlord or adjoining tenant is not entitled to allow the adjoining premises to fall into disrepair.

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4. A right of access onto adjoining premises for the purpose of repair of the property.

Depending on the circumstances, other rights may be required, e.g. car-parking, unloading facilities, and perhaps the right to use any toilets where these are not within the property itself.

The Landlord's Rights

The landlord will usually seek to reserve similar rights to those mentioned above, either for his own benefit or for the benefit of tenants of adjoining premises. It should be ensured that the exercise of these rights by the landlord is practicable and will not unduly affect the tenant's business.

The Length of the Term

Usually it is true to say that the longer the term the better (from the point of view of security of tenure). Nevertheless, this can be a double-edged sword, for the obligations of the company extend for some considerable time in the future. It is not always fully appreciated that the tenant could remain liable even if he has disposed of his interest in the lease.

The Tenant's Covenants

Under the lease, the tenant will agree to perform certain obligations. The most important of these are considered below:

To Pay Rent

Advice should be taken as to the rent currently being paid in the area for similar premises. Although the landlord will generally have fixed ideas as to rent values, negotiation will usually pay dividends if only to induce the landlord to agree to certain fringe benefits, e.g. relaxation of certain terms of the lease. Depending on the circumstances, the tenant should enquire about an initial rent-free period, particularly where the property is to be "fitted out" prior to occupation.

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To Pay other Outgoings

These will include insurance rent, (i.e. where the landlord has arranged the insurance, the tenant will be responsible for a proportion of the premiums paid), rates, heating, electricity charges. etc.

If the landlord undertakes to do repairs himself, the cost will usually be passed on to the tenant by way of service charges. In budgeting for the future it is worthwhile enquiring about estimated service charges for future years and particularly the amount of any charges made by managing agents which will be payable by the tenant. Inflated managing charges are becoming more common.

To Repair

Repairing covenants in leases have caused more problems than any other area with the possible exception of rent reviews. One of the main reasons for this is the high cost of structural repairs and the problem of determining whether proposed works amount to repair or improvements.

Where the company is taking part of a building the tenant should agree to carry out internal repairs only, leaving the landlord responsible for the main structure, services etc.

In the case of a lease of a whole of a building, the landlord will usually require a 'full' repairing covenant, i.e. the tenant will be responsible for both the interior and exterior, including the main structure. The tenant will usually have difficulty in negotiating an internal repairing covenant in these circumstances but can still limit his potential liability.

The tenant should always instruct a surveyor who will usually undertake a full structural survey. If possible, the tenant should seek through his surveyor to arrange for an agreed list of defects ('schedule of condition'). The tenant should then aim to ensure that any major items will be made good by the landlord or that the landlord will not require the tenant to repair these at the end of the lease, as would otherwise be the case.

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There may also be inherent defects in the design or construction of the property which are not obvious at the time the lease is taken. These may only manifest themselves at a much later date and may prove extremely expensive to remedy. The tenant should always seek to include in the lease, a specific exclusion of his liability for such matters.

Insurance

In practice this will usually be arranged by the landlord but the tenant will reimburse the landlord for any premiums paid either through the service charge made or through insurance rent. Whoever insures, the most important criteria is that the property is kept adequately covered. The tenant must ensure that he is entitled to see copies of the insurance policy and premium receipts. The tenant should also be certain that the landlord is obliged to rebuild the premises if at all possible and that (after fire or other damage) the rent will not be payable until the property is rebuilt.

If the tenant arranges insurance he will be obliged to rebuild the property and, if the insurance proceeds are not adequate, any shortfall must be made out of his own resources.

Alienation, Improvements and User

These all involve questions of how much control the landlord can exercise and how much freedom of action the tenant will have to pursue his activities. It cannot be emphasised enough that the tenant must ensure allowances are made in the lease for changes in circumstances or requirements of the company in the future. If provision is not made at this stage, it may be expensive or impossible to remedy afterwards. The general rule is that where the landlord purports to restrict the tenant's freedom of action, the tenant should seek to qualify the restriction such that the consent of the landlord to the proposed change cannot be unreasonably withheld or delayed. The following specific points arise:

Alienation - this is the right for the tenant to assign the remainder of the term of the lease or otherwise dispose of the interest, e.g. by underletting or subletting surplus space.

If the tenant is part of a group of companies, then it is wise to include a provision whereby consent is not required for it to share occupation of the property with its parent or associated companies. Landlords sometimes ask for a provision whereby a tenant wishing to dispose of its interest under the lease, must first offer to surrender the lease to the landlord. As considerable value may attach to the lease at a later date (even though no premium is paid at the outset) this should always be resisted.

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Improvements - the tenant should see that he has fully considered any alterations to the property which will be required by reason of the operation of his business.

Modern leases vary between those that prohibit even the most minor alterations to the appearance of the property to those that only prohibit structural alterations. In any event it is better to agree any proposed alterations before the grant of the lease as otherwise, even if the landlord is prepared to grant consent, the tenant will be liable for paying the landlord's cost of granting it at a later date.

User - the proposed use of the property should be permitted both by the lease and by planning laws. The distinction between certain classes of user under planning laws may depend on the actual circumstances as there may be an overlap. Most factories will be used for a mixture of light industrial and warehouse use. As these are distinct classes of use under planning laws (and consent will be required for any change from one to the other) enquiries should be made with the local authority to ascertain which is the appropriate use for the company's proposed activities.

Obviously the use permitted by the lease and the use permitted under the planning laws must coincide.

Any attempt to restrict the user permitted under the lease to a particular use should be resisted as this can have adverse consequences in agreeing consent for change of use by the company or in any future attempt to sell the property.