



## Notes for Clients Granting a Commercial Lease

These notes are for general information only. They should not be relied upon in the absence of advice about a particular situation and no liability is accepted in the absence of our receiving formal instructions and providing formal advice.

---

### 1. Consents

You may need permission from:-

Your lender.

The planning authority.

Your superior Landlord if any (rare in this area).

The provider of any grant which might be conditional upon your continued use of the premises yourselves.

### 2. VAT and Tax

There can be tax and VAT implications. Consult your accountant before concluding negotiations.

For example, it may be to your advantage to charge VAT on the rent so that you can recover other VAT. On the other hand, this may restrict the number of persons willing to consider taking a lease of the premises. In any event you should discuss all the financial implications with your accountant as we do not advise on particular tax or VAT matters.

If the rent is to be additional income for you then it may change the rate at which you pay Income Tax. There may also be implications for Inheritance Tax. It may well be advantageous to have a meeting with us and your accountants to discuss any long term implications and how best we can make arrangements to reduce your overall tax liability. It may be possible, for example, to transfer an interest in a property to your spouse, with a saving for the family.

### 3. Regulations generally

There is an increasing number and range of regulations comprised in acts of Parliament, Statutory Instruments, European law or otherwise.

It is important that you keep up to date with these.

Breaches can result in:-

Prosecution

Breach of the terms of your arrangements with your lender

Breach of the terms for the arrangement with your tenant.

Increased risk of successful claims by staff or visitors to the premises.

Breach of the terms of various insurance policies.

Examples of the most onerous obligations are

- a. The Control of Asbestos Work Regulations 2002 section 4 (3). An audit must have been carried out involving a proper assessment of the asbestos risk in the premises, and any recommendations dealt with properly.
- b. Regulatory Reform (Fire Safety) Order 2005 (fire risk assessments)
- c. Requirements to provide Energy Performance Certificates (being introduced on various dates for different sorts of property the last being 1/10/08)
- d. Disabled access.
- e. No smoking regulations.

While you may be able to negotiate terms such that the tenants becomes responsible for some of these, this is not possible in all cases and bear in mind that you may have a retained part of the property e.g. a shared entrance, for which you remain responsible.

### 4. Insurance

The usual arrangement is for the Landlord to insure the premises but the tenants to reimburse the cost of that insurance. You will need to maintain a policy in a sufficient sum and against all usual risks as defined in the lease (as well as complying with any requirements of your lender and/or superior landlord).

You should provide a copy from time to time to the Tenant. You need to be confident that the tenant complies with its terms, or at least has no excuse for non-compliance.

The Insurer might repudiate a claim if it could show breach of regulations.

The policy is likely to require that all statutory and similar regulations are complied with in full. Therefore you need to be very careful that you comply yourself if it is your responsibility, and that you ensure compliance by Tenants where it is theirs.

NB. The Landlord only has to insure against the risks which are described in the Lease.

NB. The Insurer will only cover risks as described in the policy.

Consider carefully whether there may be other risks which should be covered.

Consider the matter of inherent defects. These may be defects which occurred during the design or construction of the building. They may not be apparent on any survey of the building. They were not necessarily considered defects at the time eg mundic waste and high alumina cement were considered adequate building materials when used but subsequently have been shown to be inadequate.

The Tenant should keep the premises safe for visitors.

However the Landlord should ensure that the Tenant keeps the premises safe for visitors (as well as looking after any parts which are not let to the Tenant eg shared entrances or car parks).

## 5. Condition of the property and repairing obligations

The way in which these are shared between the Landlord and the Tenant often depends upon the length of the lease.

The longer the lease the more likely the Tenant is to be wholly responsible for repairs or the full cost of the Landlord of carrying out those repairs.

It is usual for a Tenant to be obliged to maintain a property, or some part of it e.g. the interior, in good repair, even if it is poor repair when he takes over. Other arrangements are possible.

The way in which the repairing obligation is assessed in case of dispute relates in part to the age and nature of the property, as well as to the precise wording of the lease. After a long term, it is clearly difficult for the Landlord or the Tenant to be sure, or to be able to prove, what the condition of the property was at the beginning. For this reason it is always worth considering arranging a formal report (Schedule of Conditions) by a professional surveyor at the outset.

An obligation to keep something in repair, strictly speaking, is breached if you allow it to fall into disrepair and then repair it, however quickly.

#### **6. Tenant Works and Waiver of Rent**

Sometimes special terms are agreed e.g. the Tenants will have a rent free period as an inducement; or there may be a requirement for the Tenant, or the Landlord to carry out certain improvements, or payment of a premium to the Tenant (a reverse premium). Anything like this should be checked with your accountant first.

#### **7. Planning**

If the Tenant asks your consent to amend the planning conditions affecting the property, you should consider whether this has any implications for the rest of the property or its value, or on rent reviews.

#### **8. Length of Term**

A long lease with a good Tenant gives you the opportunity to sell the property to an Investor.

A short lease (especially if the Tenant's statutory right to renewal is excluded) keeps your options open.

#### 9. **Information**

The Tenant's Solicitors will ask us for various information and documents. It is helpful to have it available to us at the outset e.g. copy planning documents, deeds, insurance policy, any notices received about the building, asbestos and other important condition reports.

#### 10. **Break Clauses**

It is possible to give the Landlord or the Tenant, or both, the right to bring the Lease to an end before the original term expires. Whether this would be advantageous to you depends entirely on your circumstances and the market now, and at that time.

#### 11. **Security of Tenure**

It is usual for a Tenant occupying a building for his business to have the right to ask the Court to renew the lease at the end of term.

There are circumstances in which the Landlord can object to a renewal of the Lease.

This right can be excluded before the start of the lease.

If neither party serves a Notice to Quit at the end of the term, the Tenant can stay on anyway.

#### 12. **Security for the rent**

If the Tenant is inexperienced in commercial matters, or has a poor record of business dealings, or is a small limited company, you may want additional security. This could take the form of an individual giving a Guarantee, or the payment of a Rent Deposit.

#### 13. **References and Searches**

We do not, as a general rule, make anything other than very basic searches against the Tenant.

If you wish us to make any more detailed searches then please let us know and we will try to warn you of the costs involved.

References are sometimes very valuable and sometimes worth little more than the paper on which they are written. Personal judgement must play a large part in your decision whether to take on a tenant, or not.

#### 14. Commencement of the term

The date on which the formal lease terms starts will be described in the lease document. In some cases the Tenant's occupation commences on a different date and in some cases that different date is critical to legal time limits.

You should therefore note very carefully any date of occupation which is different from that set out in the lease, with full details of the circumstances.

Do not let a Tenant in before the lease starts without seeking advice.

#### 15. Costs

We will estimate our costs and disbursements from time to time. They would be increased e.g. if there were long drawn-out negotiations with the Tenant or e.g. if there were additional requirements such as Guarantor or Rent Deposit.

In some cases one of the original terms negotiated with the Tenant is that the Tenant should be responsible for the Landlord's costs. This is more common with smaller and shorter leases where the costs might be disproportionate to the benefit to the Landlord of granting the lease.

#### 16. Description of the property and plans

These need to be precise and accurate.

You need to consider carefully what, if any, rights you need to reserve over the property for the benefit of other property.

17. **Your Adjoining Property**

If you own adjoining property then please give us clear instructions should there be anything which you want us to incorporate in the Lease for the protection of those adjoining properties.

18. **Rates**

NB the change in the rules for rating of unoccupied properties.

19. **Energy Performance Certificates**

**Best Endeavours. Reasonable Endeavours.**

You will frequently find this phrase in a Lease or other legal document. To quote a Judge the phrase “means what the words say; they do not mean second best endeavours”.

“Take all those steps in their power which are capable of producing the desired results ... ..” being steps which a prudent, determined and a reasonable (person) acting in his own interests and desiring to achieve that result, would take”.

“Reasonable Endeavours are less stringent. The person is obliged to balance “the weight of their contractual obligation” against “all relevant commercial considerations”. “The chances of achieving the desired result would also be of prime importance”.

“All reasonable endeavours” lies somewhere between the above two definitions.

20. **Accountants**

If your accountant wishes us to seek any particular information before you are committed to the transaction then please ask him to write to us with the requirements.

Capital allowances are complicated. There are four different categories.

Although VAT is usually not payable on a purchase, it is a complex subject and should be fully investigated.