



Notes for Clients Taking a Commercial Lease (new or existing)

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. VAT and Tax

There can be tax and VAT implications.

2. Asbestos

Under Section 4(3) of the Asbestos Regulations, to put it simply, the person responsible for a structure must ensure that an audit has been made enabling a proper assessment of the asbestos risk to be completed.

3. Insurance

The usual arrangement is for the landlord to insure the premises but the tenant to reimburse the cost of that insurance. You will need the lease to require the landlord to maintain a policy in a sufficient sum and against all usual risks. You should ask to inspect it from time to time during the lease in case the landlord changes the policy.

You will also need your own insurance for risks such as occupiers liability, employer liability and of course insurance for any equipment and stock.

NB. The policy is likely to require that all statutory and similar regulations are complied with in full. Therefore you must be very careful that you comply with all regulations. As they are being created all the time it would be wise to subscribe to some sort of relevant trade paper which would warn you of changes.

The insurance policy could be put at risk by the failure of others eg the Landlord or another tenant, to comply with the requirements in full.

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).

4. **Condition of the Property & Repairing Obligations**

It is usual for the tenant to be obliged to maintain the property in good repair even if it is in poor repair when he takes over. Other arrangements are possible.

The obligation does relate to the age and nature of the property. After a long term it is clearly difficult for either the Landlord or the tenant to be sure what the condition of the property was at the beginning. For this reason, it is always worth considering having a formal report made by a professional surveyor of the condition of the premises at the outset.

If you are obliged to keep something in repair remember that this can sometimes be very strictly interpreted. In other words, waiting until someone tells you that it is in disrepair and then repairing it may mean that you have breached the terms of the Lease.

You may be responsible to others if the building is affected by asbestos or radon, in particular, you may have a liability to employees.

5. **Tenant Works and Waiver of Rent**

If it is agreed that the tenant will have a rent free period, or that the tenant may or must carry out certain works of improvement, or that the Landlord will carry out certain works of improvement before the Lease commences or pay the tenant to take the lease, or anything of this general nature then you should check with your accountant any tax and VAT implications.

6. **Ownership of the Lease**

There may be advantages in arranging for the ownership of the lease to be different from the ownership of the business which you propose to operate from the premises. This can have inheritance tax, capital gains tax, income tax and risk implications. However there can be disadvantages in that the usual right to renew a lease may be lost and so professional advice is needed.

7. **Planning**

We advise that you check that the current planning permission covers the use to which you propose to put the building. The usual searches we make may provide sufficient information. If you need planning permission for change of use then this should be discussed with the landlord and local authority first. If you or the landlord have mortgagees, their consent may be required.

8. **Length of Term**

A long Lease may give you the opportunity to sell it with or without your business and help you plan long term. A short lease means that you will be relieved of your responsibilities earlier but that you will have less time in which to recoup the cost of taking the lease, moving the business etc.

9 **Information**

We will make various searches and enquiries for you. If you are given information by others which is of any value to you, you should ask us to obtain written confirmation of it.

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 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 a Court to renew the Lease at the end of the original term. If the Landlord does not serve a Notice to Quit, the tenant can stay anyway. There are circumstances in which the Landlord can object. Usually the Landlord is happy for the situation to continue provided that the rent is increased to current levels.

It is usual for a Landlord to serve notices before the end of the tenancy, it may be in the tenant's interest to serve a notice on the landlord.

12. **Guarantees**

Landlords often want another individual to give a guarantee where the Tenant is someone with little commercial experience, or a poor record of business dealings, or where the Tenant is a small limited company which could easily be put into liquidation owing rent. The guarantor must be advised fully and independently.

13. **Commencement of Term**

The date on which the formal Lease starts will be described in the Lease document. In some cases the Tenant's occupation commences on a different date and the date on which he actually took up occupation is critical to some legal time limits. You should therefore note very carefully any date of occupation which is different from that in the Lease with full details of the circumstances.

14. **Costs**

We will estimate our costs and disbursements but they may be exceeded e.g. if we have long drawn out negotiations because the landlord proposes unreasonable terms or is very slow.

In some cases the buyer of an existing lease is expected to pay for any consents required e.g. from a landlord or mortgagee.

In some cases the landlord expects his costs to be paid by the tenant when a new lease is being created.

These issues are negotiable but have often been settled at an early stage.

15. **Description of the Property and Plans**

Please check these and the reference to any rights of way etc that you will need very carefully when we show you a copy of the lease.

16. **Stamp Duty Land Tax**

This is a new tax and very complicated in the case of leases.

- (a) It is payable when the tenant takes up occupation if this is before completion of the lease document.
- (b) Additional tax may be payable if the rent is reviewed within the first five years. Whoever is tenant at that time will be responsible for making a return and paying the tax due.
- (b) Even after five years, if a rent review increases the rent by more than the rise in the Retail Price Index plus 5%, the tenant at that time must make a further return and may have to make another payment of tax.

17. **Building Regulations, Health and Safety Requirements and similar**

As new such regulations are made from time to time, it is usually the tenant who bears the cost of complying with them. Examples are the creation of disabled access or additional facilities for customers or employees.

18. **Asbestos**

The Control of Asbestos At Work Regulations 2002 came into force 21.5.2004. The person responsible for maintaining the premises, or any access to it, must assess the asbestos

risk; record the result; take appropriate steps. This needs the help of a trained person. It is likely that there will be a shortage of professionals and that therefore the charges for the assessment will be high. The cost of removing asbestos can be extremely high.

Buildings erected or altered in 1950/1960's are those most likely to contain asbestos.

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.