# BUSINESS LEASE TERMS

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## 1. Introduction.

These notes are written by James Brenan of Cubism Law as a short guide for any one who is considering taking on rented premises for a commercial use. They are only intended to explain some basic points. These notes are not a substitute for detailed advice from a solicitor.

## 2. Tenant beware.

You need to think carefully about the level of commitment you make and show to any acquisition as it goes through its deal stages. Before you invest in a solicitor carrying out searches and scrutinising the title, draft lease or contract, you ideally need heads of terms in place, laying down a basic structure which meets your requirements. You should never commit to taking particular new premises before knowing that they will be fully suitable to your needs.

Don't commission fitting-out works until you have at least a binding agreement for lease.

Think about how much time you will need to vacate your existing premises and to make good any damage to those premises (which damage might cost you in a claim or, worse still even, possibly invalidate your exercise of a right to break).

Decide which bridges need to be crossed and then cross them in order of greatest risk and importance; for example, if you intend to sell liquor check ensure as early as possible that there is no restrictive covenant on the land title which prohibits this type of trading and be sure you can obtain the necessary licence. If the intended use needs a particular planning permission in place, check with the local council that the permission exists. If it exists but has not yet been implemented check when it will expire - most will expire after 3 years. Your solicitor will double-check and report on these matters later but you should still check them directly as they will often determine whether you decide to pursue some particular premises. You will think long and hard before going after premises while hoping to obtain a necessary planning permission, such as for change of use, as that would lengthen the odds against success and raise the risk stakes before you even start trading.

If you are being offered premises with any level of repairing duty, consider what expenditure that will require over the term of the lease and indeed when it comes to an end. Bear in mind that a duty to keep premises in repair means to put them in repair if they are not already and so you may be required to give back premises in better condition than they are now. If you don't want to speculate the cost of

having a survey carried out before you put in your bid for premises and you are concerned over their possible state, make it a term of your bid that the premises must be in at least as good repair and decorative state as they are required to be under the proposed lease. Demand that the landlord or outgoing party gives you a plan of the electrical wiring and have that tested by a NICEIC engineer – so you can stipulate that any necessary improvements are made first by the landlord.

Check the premises against the possibility of damp or timber defects just as you would do when buying a house. Have a drains survey done if your business will rely on the drains to function adequately: for example, if you are taking basement space for storage of stock or a hairdressing salon.

Consider what changes you need to make for meeting legal requirements and in particular your duty to make premises accessible to the disabled. Check any fire risk assessment and possibly obtain a consultant's report on fire safety and other health and safety matters, taking into account the requirements of the insurers. If your intended use of premises will require particular levels of services, such as a flue got kitchen fumes, parking, or access for delivery trucks at particular times, be sure that you stipulate for these in your bid and consider whether they are feasible under planning and highways controls. If you are considering having a restaurant in a city centre you will need to consider the refuse collection rules of the local council. If you intend to run a food preparing establishment, such as a bakery or any kind of take-away shop, consider the hours which the council or neighbours will allow you to operate.

There is no such thing as a "standard" lease. Every lease relationship is unique and should be treated as such by advisers to the parties, albeit landlords will often have their preferred precedents and tenants may refer to publicly available precedents and codes of practice, of which more below.

Inspect premises several times before signing the lease so that you can see that they are being cleared of all the previous occupiers' stuff and thoroughly cleaned and that any particular items you do not want are taken out and the damage is made good.

### 3. Energy Efficiency.

Under the Energy Act 2011 and its subsidiary regulations of 2015, landlords in particular must be mindful of these following dates:

- From April 2018 it will be prohibited to let premises for any term between 6 months and 99 years unless their Energy Performance Certificate – 'EPC' – rating is at level E or better

- From April 2023 all commercial premises (with certain exemptions) will have to be at level E or better.

And that level E pass standard is going to be raised but we don't know when or how high.

Those above principles are filled out by detailed rules covering:

- Situations where it will be impossible or impracticable to improve the premises
- Detail of improvements to be made under Green Deal regulations
- Exemption where cavity wall insulation would cause damage
- Difficulties in obtaining third party agreements
- Diminution in value of premises by more than 5% as a result of improvements

- Forced lettings under legal duties.

Breach of the above will leave a landlord exposed to a fine of 10% of rateable value if the period of breach is less than 3 months. Otherwise, the fine will be 20% of rateable value and up to £150,000. But a tenancy granted in breach will still be valid.

Any incoming tenant will consider a premises' EPC and its recommendation report. To be brought to the market for letting or sale, any premises must have an EPC. The EPC will also disclose 'Green Deal' information, whereby improvements can be paid for via energy bills.

Commercial premises with air conditioning systems with a total output of more than 12kw require an Energy Inspection Report, which is only valid for 5 years. This report will contain some information but by no means all you will need on environmental issues.

Any premises of more than 500 square metres which are visited by members of the public must have its EPC prominently on display.

EPCs are on public display also at the website: **www.epcregister.com**.

Matters to consider, possibly with advice of a surveyor or energy consultant can include:

- water consumption levels of taps and lavatory
- quality and compliance of cleaning products specific to the particular fabric of the premises
- the design and performance of air-conditioning and heating fittings
- smart pumps, smart meters and automatic switch-offs
- out-of-hours lighting
- minutes of any forum for discussing environmental matters as they affect building management decisions and
- refuse-sorting and collection costs.

An increasingly common feature of lease drafting is the inclusion of premises with a Carbon Reduction Credits scheme operated by the landlord. These can create an open-ended additional liability or rent – it is advisable to insist on a cap for such charges.

For new buildings, tenants will be concerned to take specific warranties from the landlords and builders.

## 4. The different methods of dealing to obtain your premises.

The ideal method is to deal privately with the intended landlord, possibly through an agent, knowing that you are the only or at least the preferred bidder. The landlord will be taking a risk by letting premises and so will be keen to find a good and reliable tenant, who will always pay the rent on time and - at the end of the lease term, unless there is a renewal or the premises are to be redeveloped - hand them back in good repair. A pre-let agreement can be entered into with a developer for premises off-plan. One of these will probably contain construction obligations and provisions for collateral warranties as well as appending a draft lease.

A second method – not as attractive but still feasible in many situations - is for you to bid in competition with other applicants. Remember that your bid will be judged not only according to the rent which you offer but also according to your covenant strength. In this situation it will be best to make your bid or

proposed heads of terms as simple and landlord-friendly as possible and then, as necessary later, let your solicitor put forward your further stipulations and amendments to the landlord's paperwork.

A third method of course is for you to take an assignment of an existing lease, or even a sub-lease, from an existing tenant. Again your covenant strength will be very relevant. In this situation you have the advantage of being able to call for a copy of the lease and to consider it with your solicitor and surveyor before making your bid. You might take over an existing business with its premises, stock and trade fixtures, and even staff contracts under a combined purchase agreement for all these elements. In this type of situation, the selling tenant typically has to apply for and obtain a landlord's licence to assign, which can be a tortuous matter with costs and risks attached. Watch out for those costs and difficulties because they are probably going arise for you in the future when you seek to pass on the premises to the next person.

A more problematic method entirely is to take premises which are linked to some business franchise or commercial tie – not covered further here.

## 5. Negotiating the deal structure and heads of terms.

Heads of terms can be very important. They set the agenda for the deal that follows. Time spent in getting the heads right is usually repaid in much more time saved in the drafting stage.

On the other hand, heads are not compulsory and it may be more expedient to leave some topic aside for later consideration.

Nor are heads, in general, of contractual binding force. Only where the lease term will be for no more than 3 years and there is 'part performance' of informally agreed terms would there be a possibility of their being contractually binding.

There are published property industry norms concerning the contents of leases, in the form of The Code for Leasing Business Premises in England and Wales – which lays down a model for heads of terms - and the RICS's 2006 Code of Practice for Service Charges in Commercial Property.

Your solicitor's role therefore is to ensure that you understand all the legal consequences of your proposed acquisition. It is sometimes said that this leaves you, the client, on your own to decide over the commercial aspects. Life, however, tends not to be so simple and issues often do not fall neatly into 'legal' and 'commercial' categories: some are mixed, technical, call them what you will but they require you and your expert adviser to work intelligently as a team to get the best outcome.

A critical decision will be whether you should proceed straight to the grant of a lease or whether you should have a prior exchange of contracts which will exhibit an agreed draft lease, possibly with some clause (such as the completion date or the rent amount) left to be determined later in accordance with the contract. It is cheaper to go straight to the grant of lease but there may be a good reason to incur the expense and risk of having a contract in place at an intermediate stage. The premises, for example, may be still under construction and needful of checking and measuring before an engrossment lease can be issued.

A lower form of commitment which you can obtain from a seller or proposed landlord is a lock-out covenant - which debars that party from showing or offering the premises to another interested party

for a defined period. A small premium, refundable later against the rent or premium, is usually expected.

It can be a serious disadvantage to agree to pay the seller or landlord's costs – but some times this is commercially necessary, in which event you must place your solicitor in funds for giving an undertaking.

The implied threat with any demands in deal negotiation has to be that if you are not satisfied with the response you will walk away.

### 6. Incentives for new tenants.

If you are looking at taking an assignment of lease and you think that the lease's terms are too onerous – for example, the rent is excessive according to present market values – the easiest option is to walk away and find better. You can also negotiate for the assigning tenant to pay you a reverse premium for taking the premises off their hands. That party might also be in such dire straits that they can threaten the landlord with their own insolvency unless a deed of variation of lease is granted which reduces the rent to an acceptable level. It is rare for landlords to agree to relax the terms of a lease in order to make it more attractive to an assignee. Landlords will, to the contrary, be looking to hold onto the covenants which they have – making the outgoing tenant enter into an authorised guarantee agreement (assuming that the lease was granted in 1996 or later) and demanding a good covenant or adequate security in the form of a personal guarantee or rent deposit from the incoming assignee. The situation has to be assessed by the proposed assignee from the angle of what is commercially wise, whereas from the outgoing party's point of view the issue will be more about what the landlord lawfully can demand – which will turn on a detailed application of rules from the Landlord and Tenant Act 1988 and its encrustation of case law.

If you are taking on empty premises, so that you will enter into a new lease with the landlord then you will have a wider range of possibilities before you when negotiating the deal terms. If the landlord is in principle amenable to granting some incentive, this is likely to be as a part of a package of terms – which you will need to consider as a whole and with the benefit of advice from your solicitor, surveyor and sometimes your tax adviser as well.

Many landlords offer reverse premiums or rent-free periods, followed by their desired rent as a headline rent – which is obviously a method for them to say to the rest of the world that their rent levels are still riding high. There is nothing wrong with participating in such a charade so long as you, first, ensure that any rent review provisions do not similarly deem such incentives to have been made as an assumption upon which the new rent is to be fixed, and, secondly, you familiarise yourself with the tax consequences. The tenant should be aware of timing issues in regard to its receipt of any incentive payment and the tax year in which that will fall.

If you are taking premises in a new shopping mall or centre - as of course these are still opening around the country, since their developers did not see the present recession coming – you should consider a rent phasing arrangement whereby the rent amount is related to the occupancy of the surrounding premises. In this context, the lease will have to be drafted carefully to define what constitutes a letting. The "keep open" clause will also need careful thought here. You might also want to insist on a break option exercisable in case the mall or centre fails to take off as hoped.

Another possibility in such a context is that the landlords will offer a base rent – which they might say is calculated to represent say 80% of 'market value', which any way will be conjectural where their centre or mall is the sum total of the local market – and then offer you a turnover-based rent for the surplus. If you were seriously tempted by such an arrangement and if the lease term were to be long enough to contain rent reviews then you would need to negotiate very closely over the lower and upper levels of the reviewed rent. A side letter arrangement is sometimes used to lay down parameters for a rent review when there is a partly turn-over based rent. Side letters of course are problematic in regard to their binding effect on successors in title and specific advice should be researched in each instance.

Where the rent varies during the first 5 years so that the rent for the balance of those years becomes fixed during them, Stamp Duty will need to be recalculated, a new return made and a new payment is due. Where the rent for the future remains uncertain throughout the whole of the first 5 years, as will be the case where a turnover rent applies, there has to be a retrospective reassessment at the end of 5 years, and the rent for the remaining term is deemed to be the highest amount payable in respect of any consecutive 12 calendar month period so far. There are further rules regarding 'abnormal rent increases' which are beyond the scope of these notes. Suffice to say that if you are entering into a lease with any degree of uncertainty over future rents, e.g. where there is an option mid-term to convert for fixed rent to turnover rent, you need to make sure that your conveyancer is technically astute enough to nail the Stamp Duty ramifications and be prepared for a lot of detailed advices as well as deferred disclosures and tax payments. (When taking an assignment of such a lease, your conveyancer will need to obtain disclosure of the SDLT returns and payments made.)

Another popular "sweetener" device in a bear market is for the tenant to take a break clause. Any condition attached to the break right needs to be scrutinised with great care – see further below.

### 7. To be or not to be ... protected by the Landlord and Tenant Act 1954.

This question is entwined with another one which, on its face, is a commercial issue and not a legal one, namely: 'What is the best duration period for the lease's term?' It's actually an example of how the law impacts on commercial decisions and so of why it helps any business person to seek out the best legal advice they can afford for the long term benefits which that advice brings. Good solicitors are wise persons of affairs who will stop and explain nuances of law that inform good decisions at the many crossroads to be gone through in transactions. They are just conveyancing functionaries, who typically have nothing to say on such issues.

You can shop around and find the least expensive and ostensibly fastest service from a conveyancer, to handle your lease acquisition, and you'll be easily pleased to find one say in some country town or suburb or conveyancing factory practice or even a web-based service that offers a fixed price/no frills service at a far lower fee that you can expect to pay to a proper specialist. But - as the saying goes - *'You get what you pay for'*. (If you were about to undergo open-heart surgery would you seek out the cheapest and fastest surgeon or would you look for the one whose patients tend to survive the longest? So why take chances over such a major matter in the trajectory of your business's life and success or failure?) Another saying is that you can only, at most, find 2 out of the following 3 qualities of service in any supplier: cheap, fast and good. As speed is always essential in any pursuit of business premises on good terms, you are then left with the choice of 'cheap' or 'good' for the second quality of service.

If your lease is protected by the 1954 Act you will be in a stronger position when it expires, with regard to staying on if you want to (which you probably will want to do if your business is successful), without

being asked to pay a significantly greater rent - that is, a rent based on radically worse valuation assumptions compared to those which would normally arise in a rent situation or on a renewal of lease protected by the Act. The question is sensitive to the facts, present and future. By taking a strategic view informed by far-seeing advice, you can plan for the future, e.g. your retirement having sold the business and assigned the premises. Thus, these questions are about protecting and building asset value.

In some situations it can make almost no difference if your lease is 'inside' or 'outside' the 1954 Act whereas in others it can make such a massive difference that you could - years later - want to do something dreadful to which ever adviser allowed you to make unfortunate decisions. Even if, when you look back, you may recall that the landlord would never have budged on the question of 'inside/outside the Act' and that you absolutely had to have these premises for reasons at the time, you may also know that you could probably have negotiated more wisely, with much better long term outcomes, on other related and critical points such as length of term and break option.

Here are examples of scenarios where you may live to regret taking a short lease outside the 1954 Act:

- During the lease term, you have carried out expensive improvements to the premises.

- Your business is location-dependent for its success.

- Your costs of moving to other premises, and taking into account strip-out and fit-out costs, will be high.

As soon as the prospective landlord states that he does not want to deal inside the Act and if your business is location-dependent or you would incur heavy costs of relocating in the future or you know you will have to invest heavily in improvements and additions, you should test this point by suggesting it could be 'a deal-breaker' and looking out for alternative premises inside the Act. If the landlord sticks on the point, you should reconsider term duration and break or renewal option rights.

A statutory renewal entitles you to a downwards and upwards rent review whereas any typical rent review mid-term will be upwards only.

An advantage of the Act's protection, compared with having an option to renew, is that you can withdraw from taking up the renewal term if, once the new rent is established, you find yourself unwilling or unable to pay it – albeit there would be costs to pay.

An advantage of taking an assignment of an older/existing lease is that it may carry the Act's protection, whereas landlords are commonly now insisting on excluding the Act for new lettings.

Tenancies at will and those granted for a fixed term of 6 months or less are outside the Act's protection. A tenancy of one year or less only has partial rights under the Act: the tenant cannot give a notice to the landlord calling for a new lease but can still carry on occupying the premises under the old terms until it chooses to leave (on giving notice) or it is terminated by the landlord following the Act's notice procedure.

A tenancy for a 'term of years certain' can be excluded by agreement, following a stipulated procedure, from the Act's protection. Thus, a periodic tenancy cannot be so excluded.

## 8. The demise.

This term refers to the definition of the space to be let, according to such things as a plan and boundary structures and the length of lease term being given. These aspects should be defined as accurately as possible. Leases of 7 years and over and those being granted to come into effect more that 3 months into the future are required to be registered at the Land Registry and so the Registry's requirements for proper plans will have to be followed.

The length of term can have an effect on the rental value, depending on the local market for premises.

You should ensure that the term date – i.e. the date when the lease will expire – falls on the last day of a rental period or that there is express provision for the last rental payment to be apportioned. If you do not take this precaution then you will be liable for what will appear to be a surplus rent for the last period, as there is no implied rule for apportionment.

## 9. Included rights.

You should stipulate for any which will be essential or useful for your business in order to avoid arguments later over what may be implied. Resist having any essential ancillary rights granted to you by a side-letter, as that is an inferior level of protection. If there is to be such a letter, it should say that the landlord will disclose it to any party intending to buy the reversion.

Signage rights can be mentioned and even defined regarding details such as projection and illumination.

When the draft lease arrives you should look out for excluded rights, such as a declaration that you have no rights of light or air so as to prevent the landlord from developing its adjacent land or space.

## 10. Covenant strength and reinforcement.

If your trading vehicle is a limited company with a small net worth it will not be very attractive to any landlord. Consider what level of rent deposit or personal guarantee you are willing to offer. Consider making any guarantee releasable after a certain period once your company has established a record of paying rent on time. Stipulate whether the guarantee will be effective in the event that the premises are assigned and your company gives a statutory guarantee for the incoming party.

Watch out when the draft lease arrives that the original landlord does not provide for a release of its continuing responsibilities upon assigning the reversion, or that there will be adequate cover if it does.

Equally, make sure that your solicitor considers your proposed landlord's title to the premises – even if there is no strict legal necessity for him to show title - and that you consider the landlord's reliability. If he owns under lease himself you will be at risk of losing your premises if his lease is forfeited, albeit you will have certain protection which is potentially uncertain and expensive to enforce. Also, if there is a superior landlord then you will probably have to pay double the usual fees for seeking any licence under the lease.

If you are acquiring premises in a serviced building or shopping mall consider the risk of scheme failure and its implications for you as a tenant.

### 11. Options to break or to renew.

One of these needs to be carefully thought through and then defined in the lease. Again, it will have an effect on the rent, which a valuer will advise upon in any detail.

An option to break may be made conditional upon compliance with the lease, in which case you must insist that this is intended to refer to "substantial" compliance only, so as to disregard minimal breaches. It would still be a risky wording to have and it is far better to make the right unconditional. The above Code of Practice advises that only the following conditions should be imposed: (i) that the main rent, and not service charges, must be paid up to date; (ii) that the tenant leaves the property on time, and (iii) that any sub-lease has been terminated.

From a Stamp Duty perspective, it is cheaper to have a short lease with an option to renew than to have a longer lease with an option to break. You will have to make a new declaration to the Inland Revenue – possibly accompanied by a payment of further tax, depending on the details - upon exercising the option, whereas if you exercise a right to break you will have paid duty in respect of the longer term and you will not be entitled to any refund. Otherwise, each arrangement is capable of giving the same outcome: it can be just a question of whether you prefer to be bound to the longer term, so that any slip up in giving the notice of exercise of break option locks you in, or whether you prefer to be bound by the shorter term, in which case vice-versa.

An option to break should be designed so that the break date is the last day of a rental period, or your lease should contain an express right in your favour for the apportionment of rent in that last period. Otherwise, you are liable for the full period's rent even though you may only enjoy the use of the premises for a small part of it.

### 12. The permitted use.

You must take advice to ensure that the permitted use is not in breach of town planning law and is covered by any other necessary public consent. Landlords always exclude any implied warranty to this effect.

If the permitted use is defined by reference to the Town and Country Planning (Use Classes) Order 1987, read through that Order in the applicable form and take advice.

Specific uses may also be prohibited, whether for reasons of landlord's taste or estate management policy.

Under the Competition Act 1998, a landlord which seeks to impose a restriction in a lease designed to limit competition (for example, limiting the range of goods able to be sold in particular premises) acts unlawfully unless the restriction can be justified under any of 4 available criteria. These are: (1) that the agreement contributes to improving production or distribution or to promoting technical or economic progress; (2) that it allows consumers a fair share of the resulting benefit; (3) that it's indispensable to achievement of those first objectives; and (4) that it does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. Landlords actually are required to keep written policies and evidence to justify such restrictions as they purport to impose and seeking sight of these may be a good idea for your pre-lease enquiries. The question arises of the

applicable geographical area for assessing the competition effect of restriction, which will vary according to the facts. For retail convenience stores, the area seems to be within around half a mile. For more specialist retail, the area of distance is likely to be greater.

Some flexibility in the wording of the 'user' restriction is usually advisable for both sides. Consider having the ability to seek landlord's consent to a variation of the use, possibly within certain defined classes under the above Order.

The narrower the permitted use, the less valuable the premises may be upon rent review and lease renewal.

## 13. The rent.

The amount is obviously a commercial matter but it will be affected by a range of legal points. Here are a few:

- will it be subject to VAT?
- if so, can you claim back the VAT?
- will you get a rent-free period?
- the payment intervals.
- beware of a 'headline rent' which is an inflated amount to compensate for benefits such as a rent-free period; it may be better just to pay the market rent and forego the benefits, especially as headline rents are designed to contaminate the market's perception of what the premises are worth.
- indexed-linked rents are often a bad idea: if the relevant index (typically the RPI) goes up by a lot (say more than 5%) this may easily coincide with an economic decline which causes the open market value of the premises to go in the opposite direction, downwards; they are also notoriously cumbersome arrangements to operate in practice due to time intervals in the publishing of the index and the possibility of change to the method of compiling the index.

Any rent review regime will need to be considered in detail by your solicitor, regarding its procedure and the definitions of the new rent and the assumptions and disregards. In particular you must avoid having any wording which artificially inflates the rent, for example by deeming your fitting-out works to have been done under a duty or at the landlord's cost or by deeming the hypothetical lease to include a rent-free period. Also, watch out for assumptions concerning energy performance, especially if the design of premises makes them energy expensive.

Any turnover-related rent will need special consideration. These are demanded by landlords who want to benefit from future growth in your turnover. They are common in certain industries such as car parking, hotels and shopping mall units. Some turnover rent provisions are so complicated that you may need advice from an accountant as much as from a surveyor and solicitor.

## 14. Outgoings.

You should check directly with the local council what the annual business rates will be and make similar enquiries regarding water rates.

It can be a bad idea to agree a rent which is inclusive of the landlord paying rates. If the landlord defaults you will still be held liable by the council, as the rateable occupier.

You should check that all services are separately metered and if they are not insist that the landlord arranges and pays for this to your satisfaction. Agree where any new meters will be placed.

## 15. The repairing scheme and service charges.

You may be free of any repairing obligation, or have one which is limited by a schedule of condition, or be liable to keep only interior surfaces and plate glass in repair, or you may have a full repairing and insuring duty regarding the structure as well as the interior. A duty to keep in repair will mean that you must put the premises into repair if they are not already and will apply to the exterior (even if your tenancy is one of part of a building) unless the contrary is made clear. Alongside any lower level of repairing duty you may be asked to contribute a service charge towards the insurance, repair and cleaning of the building which houses the premises. It is important that you fully understand which level of duty is to apply and what the implications will be for your expenditure over the period of lease. When considering the proposed repairing duty you will need to have regard to the risks covered by the landlord's buildings insurance policy.

Any requirement on you to take measures to reduce energy consumption and emissions can amount to a duty to make improvements and these might also be rentalised against you upon reviews, depending on the lease wording. Insist that any "green" objectives are voluntary and contained in a non-binding side letter. If they are mandatory, agree a lower rent on their account.

If you are asked to pay a service charge you should consider:

- the commencement and ending date of the landlord's accounting year.
- if these do not coincide with the beginning and end dates of your lease, having a fixed amount for the opening period.
- your percentage contribution towards the costs of the building as a whole and how this has been assessed – the law automatically allows such shares as between tenants to be modified to respond to changes to a building, and so it is not appropriate for landlords to reserve the power of modification, and especially as they like to reserve it in very subjective terms to suit themselves.
- what services are to be provided relative to your own needs and to what extent these are going to leave the landlord eventually, when you leave the premises, with a better and more valuable building than exists now – do they for example include environmental improvements?
- a fixed contribution or a capped contribution instead.
- investigate and take advice if necessary on the life expectancy of capital items and equipment such as the roof, any communal heating system and lifts in the building and your exposure to pay towards replacing these at the end of their life, or at such time within your lease term when the landlord thinks they should be replaced - these are more factors in favour of having a capped liability.
- any sinking fund or a depreciation reserve fund.

You should consider excluding from your responsibility any liability to remedy any inherent defects in the property and stipulating that these are for the landlord to remedy instead.

The above points underline the good sense in investing in a survey and full schedule of condition before you take on new premises.

You should also consider taking a covenant from the landlord for the repair and decoration of other parts of the building containing the premises: this duty is sometimes not volunteered by landlords when it is needed for your benefit. You need advice on how much improvement for the benefit of the landlord's investment value can be included in repairs, noting that laws will inevitably be receptive to this when there are environmental issues.

### 16. Assigning or sub-letting.

The less freedom that you have in these regards, the more wary you should be and the less rent you should be paying. When the draft lease arrives you will need to consider laying down some criteria in your favour by which the landlord must consider any application for permission to assign; landlords usually lay down plenty in their own favour to give a basis for refusal.

Any right to sub-let should be at an open market rent regardless if that is less than the passing rent and so leaves you having to make up a shortfall in the rent payable under your lease. Otherwise, if you have agreed to pay a higher than market rent or if the market rent falls, you will find that the premises are impossible to sub-let. The British Property Federation is opposed to any requirement that sublease rent must match the level in the lease. This is also contrary to the RICS Code of Practice for Commercial Leases and probably contrary to the Competition Act 1998.

Some leases contain an "offer-back" provision whereby you can be required to surrender the premises instead of assigning them. You will need detailed advice on the related notice procedure and valuation formula.

### 17. Making alterations upon moving in and later.

These will typically have to be regulated by a licence for alterations, for which landlords seek to recover their professional costs. You can make your bid conditional upon the licence being granted at the same time as the lease. Clear your proposed internal partitioning with the landlord before you sign your lease, or you may find – in the light of environment saving rules – that they will not be allowed, because partitioning can adversely affect emissions and energy consumption.

You can stipulate that the licence to alter must not require the premises to be reinstated at the end of the lease term. You should also require the lease to say that any alterations which improve the environmental performance of the premises should not be made subject to the need to reinstate.

The disadvantage from dealing with improvements simultaneously with the commencement of the lease is that you will miss out on the opportunity to follow the notice procedure and so set yourself up to be entitled to claim compensation for them – under sections 1 to 3 of the Landlord and Tenant Act 1927 - upon the lease ending and if it is not to be renewed under the 1954 Act.

This area is more fully explained in other notes written by James Brenan: "Additions and Improvements to Leasehold Premises".

**18. Insurance issues.**

It would be unusual for these to be the subject of any negotiations at the heads of terms stage, other than that you are required to cover the cost, or a proportionate part, of the premium each year. You should still obtain a copy of the relevant policy so that you can peruse its conditions and take advice on them, as well as the current year's schedule.

Your solicitor will need to consider a number of points concerning the insurance of your proposed premises. The first is that the landlord's policy covers all "usual risks". Next, check that the premises insured comprise the whole of the relevant building and any common areas, including access roads and car parking, etc. Plate glass in windows is usually the tenant's responsibility to insure. Thirdly, the "loss of rent" cover should be adequate so that you are not liable to pay rent once any rent suspension period has expired in case reinstatement works are still by then not completed – and that this ties in with any rent increases stipulated by the lease. (You should insure your own fitting out works as well as your contents, of course, and review the necessary other heads of cover which you will need, which include: public liability, occupier's liability, employer's liability, and possibly business interruption.) If premises cannot be reinstated by the period covered by loss of rent insurance then there should be a right for each party to terminate the lease. The need to notify insurers of your proposed use and any alterations should not be overlooked.

It is notoriously difficult to challenge a landlord's choice of insurer because the comparison is as much over reputation and ability to pay on claims as it is over the price of cover, and courts regard those choices as justifiably subjective by nature. The most you can expect is that the cost is limited to what is reasonable and that the landlord is frank about any commission which it earns through the placing of cover. You can even try to require wording in the lease whereby such commission is credited to you.

**19. Trading times.**

If your premises are not directly accessible from the public highway and you require access at all times, you should so stipulate.

You may be bound by a "keep open" covenant.

**20. Summary.**

Each of the above issues can cut against the tenant or against the landlord. A particular term which you want may raise drafting issues, or even transaction design ones, and so you should always take advice from a suitably experienced and knowledgeable solicitor and increasingly from a building surveyor as well.

Regarding green issues, here is a check-list of 'due diligence' questions - taken mainly from a recent article in "The Conveyancer" by Professor Susan Bright of Oxford University and an EU-funded research project, called "Sustainable Improvements in the Commercial Sector".

At the pre-tenancy stage you should:

- Ask the landlord to hand over its recent environmental survey and then have this examined by your own surveyor.
- Include environmental objectives in any heads of terms.
- Require the landlord to supply information about good environmental management of the building.
- Have your surveyor give you a check-list of green credentials which are satisfied or will have to be added at some party's expense.
- Have your fit-out design and works checked against environmental and disability discrimination requirements.
- Establish a building management committee with representatives of all stakeholders.
- Agree a joint environmental management plan.

Then during the tenancy, which will be reflected increasingly in lease terms, the following green issues may arise:

- Negotiation and implementation of an environmental management plan.
- A duty to run all equipment efficiently.
- A commitment to regular environmental audits.
- Possibly, environmental improvements to be included within repairing duties.
- Environmental standards to be used as a yard-stick to assess all proposals for alterations.
- Maintaining a regular forum of consultation over the need for improvements and their implementation.
- The continual need for advice on all sides as to where the environmental buck stops and issues of enforcement and contribution.
- No reinstatement of environmental improvements.
- Training events.
- Monitoring of service suppliers over efficiency and green targets.

When the title documents, replies to enquiries, search results and draft lease arrive, your solicitor should advise you on any issues arising without delay. It can be far less useful to know of a problem and the possible ways of responding to it when you are just about to conclude the transaction.

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