

Negotiating Commercial and Business Leases

We have taken a moment to put together some useful pointers for landlords and tenants when negotiating business leases...

Landlords

Investment Properties - Recovering Rent Arrears

In the case of reversionary purchases - buying properties subject to existing leases - check whether the leases are governed by the old law or the new (under the Landlord and Tenant (Covenants) Act 1995) or both. Collection of rent arrears, and more fundamentally, Landlords liability as a whole are dramatically affected by which regime governs which lease. This may be of particular relevance to landlords buying at auction.

Investment Properties - Rent Maximisation

Consider dispensing with rent reviews and have provision that rent increases in accordance with the retail price index throughout the term of the lease. This may prove helpful if the government proceeds with plans to outlaw "upward only rent reviews". Those plans are currently vague and the property industry will resist it strongly but the government has declared for some time that they are unhappy with upward only rent reviews and an RPI linked rent may be a solution. They also provide reasonable certainty and are far easier to forecast than rent reviews from a tenant's point of view and therefore may prove popular with tenants as well although it does mean that rent continues to rise even in a market which is falling. A tenant taking premises in a "high market" may find an RPI linkage unattractive.

Tenants

Schedules of Condition

Agree a photographic schedule of condition at the outset of the lease and, if possible, on assignment (on an assignment the photographic condition would have to be dealt with as a variation to the lease in the landlord's "licence to assign" (the document where the landlord consents to the lease being transferred)). Having a photographic schedule substantially reduces the prospect of an expensive disagreement later about what the tenant is liable for in terms of repairs. It also makes for less protracted and potentially fairer rent reviews.

Restrictions of Landlord's Right to Re-Enter

Consider asking to remove the landlord's right to terminate the lease except with a court order. If you do not, you risk a landlord taking "peaceable entry" which, in plain English, means taking back occupation by entering the premises and changing the locks. This is slightly less attractive to landlords than it used to be but, as a precaution, you are advised to negotiate its removal. The landlord still has rights to recover possession and protect its investment but it can only do so by court order. Given the possible amount at stake in a longer lease or development relationship, this is not unreasonable.

Right for Lender to Step into Tenant's Shoes

Also with having a capital value include a right for a bank to step into the tenant's shoes before the landlord can recover possession. Again, whilst this might, at first instance, not appear to be particularly beneficial to the tenant, it can be extremely beneficial to any directors who may have given personal guarantees to the bank – it is clearly in their interest that the bank is able to recover as much money as possible in the event of an insolvency, for instance. Your business is also more likely to leverage finance on its lease if the bank can have some level of control over their investment.

Tenant-Only Breaks at Rent Review

Ideally, include a "tenant-only break clause" concurrent with rent reviews. Since rent reviews are normally uncapped, the increase may be enough to close a business, so negotiating a break is highly desirable.

Get Tenant to Insure in Leases of Whole Building

If the lease is of the whole of the building, try and negotiate that you, as the tenant, insures and maintains the building. This has the advantage of controlling the costs and also may assist in relation to irrecoverable VAT which can arise where the landlord maintains.

Restrict Landlord is Right to Ask for Guarantors

Do not automatically give an unauthorised guarantee agreement and attempt to negotiate the lease so that the landlord can only require it where it is reasonable to do so.

Buyer to Give Indemnity on Sale

Ensure that you take a counter indemnity from an assignee, if necessary, taking security over the asset of the assignee.

Get Landlord to Cap Service Charges

Service charges should always be capped if possible, otherwise they are the equivalent of an open cheque and so you may otherwise want to carry out a survey to see what you are getting yourself into.

NEED TO KNOW MORE?

For further information on trade mark protection, contact Maitland Kalton. Should you prefer to telephone, call us on +44 (0)207 278 1817.

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