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Commercial and Business Leases

Safeguarding your interests in
commercial property deals and leases



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Your guide to Commercial and Business Leases

You have asked us to act for you in connection with the grant of a new Lease or the assignment (purchase) of an existing Lease.

The purpose of this guide is to advise you of various important legal aspects connected with Leases. In this brief guide we will draw your attention to a few matters to which you should give consideration but by its very nature we cannot deal with each and every aspect of the Lease. You must therefore carefully read the Lease and advise us of any aspects on which you require further clarification or in respect of which you are particularly concerned.

Our governing body which is The Law Society have endorsed a Code of Practice relating to commercial Leases and which is designed to be helpful to business Landlords and Tenants. We would recommend that you look at and carefully read the Code of Practice which can be found at

<https://www.rics.org/profession-standards/rics-standards-and-guidance/sector-standards/real-estate-standards/code-for-leasing-business-premises-1st-edition> as soon as possible and certainly prior to finalising negotiations with the prospective Landlord.

All the terms in a commercial Lease are negotiable and potentially flexible. Therefore, we recommend that you consult a property advisor such as a member of the Royal Institution of Chartered Surveyors or the Incorporated Society of Valuers and Auctioneers as early as possible in your negotiations in order to establish the likely competition for the premises that you are considering leasing, that you understand the Landlord's objectives and that you ensure that the terms that are being negotiated reflect current market conditions. The relationship between you and your prospective Landlord will continue after the Lease has been signed and therefore you should have a genuine dialogue in negotiating in an open and honest way the proposed terms of the Lease.

If you are the Landlord and have a mortgage on the property that you are letting, you will need the consent of your lender to the proposed Lease. You will also need to obtain an Energy Performance Certificate prior to letting the property.

We strongly advise you not to undertake any work to the premises you intend to lease until completion of the Lease since if you do so and either you or your prospective Landlord decides not to proceed with the Lease you may find it very difficult to recover any of the costs you have incurred.

We will deal with the various aspects under the following headings:

1. The Term (length) of the Lease

By signing a new Lease or taking an assignment of an existing one you are agreeing with the Landlord that you will pay the rent and comply with all the Tenants' obligations set out in the Lease for the whole of the term or the remainder of it as the case may be. If you subsequently sell the Lease, then you may be released from those obligations subject as explained later in this guide, but you may have great difficulty in finding someone to take over the Lease from you if it has a long time left to run or if the Tenant's covenants are onerous. In negotiating the term of a new Lease with the Landlord you should bear in mind your own future plans, to ensure that any term granted is adequate for your purposes.

The grant of a new Lease of over seven years or the sale of an existing Lease with over seven years left to run requires to be registered at the Land Registry and there is a fee payable for registration. The longer the term the more likely it is that you will pay Stamp Duty Land Tax. If at the end of the term you stay in the premises (hold over) you will need to submit a further Stamp Duty Land Tax Return and may be liable to pay further tax as a result.

2. Guarantee

If a company is a Tenant of a Lease, then the director of that company which may include you, may be required to personally guarantee the obligations of the company for the term of the Lease. If your business failed or if you moved out of the premises, then you would have to pay the rent and comply with the other obligations of the Lease which you would therefore have to do from your personal resources.

3. Break Clauses

Some Leases contain a clause which gives the Landlord or Tenant or both the right to end the Lease earlier than the end of its term. Such clauses usually involve a specific strict timetable and require the person wishing to break the Lease to serve a notice on the other. If you have paid Stamp Duty Land Tax and later break the Lease you will not be entitled to any refund and therefore it may be preferable to negotiate a shorter Lease with an option to renew the Lease as this may avoid the tax and Land Registry fees. If a Lease is renewed a further Stamp Duty Land Tax return will be required and additional tax may be payable.

4. Assignment or sub-letting of the whole or part of the premises

We will check the Lease for you and advise you whether it allows you to assign (sell) the Lease to someone else or sub-let the whole or part of the premises.

If the Lease has been granted since 1 January 1996 it will be subject to rules which entitle the Landlord to insist that before assigning the Lease you enter into a formal agreement guaranteeing that the proposed assignee will pay the rent and comply with the other obligations. Therefore, if the person to whom you transfer the Lease fails to comply, then you will still be liable. Your liability will only come to an end when that person in turn assigns the Lease to somebody new.

If the Lease was granted before 31 December 1995 then it will not be subject to these rules and normally you would be liable to pay the rent and comply with all the Tenant's obligations for the whole of the term of the Lease irrespective of any assignment if any future Tenant under that particular Lease fails to pay the rent or comply with the covenants. It may be possible to insure against this risk and we suggest that you contact an insurance broker to enquire as to whether that will be practical.

Some Leases prohibit assignments completely. You should think very carefully before accepting such a Lease as the obligations will remain throughout its entire term.

When you come to assign the Lease, you are likely to be asked to pay your Landlord's Solicitors' fees for dealing with the assignment.

5. Rent

The rent in the Lease will be payable at an agreed figure and it is normally payable three months in advance. The rent will need to be paid regardless of your trading circumstances. Failure to pay the rent, or the other charges stated in the Lease, on the agreed time may result in the Landlord seeking to recover the debt from you and forfeit i.e. take away the Lease.

You should carefully consider the amount of rent rates, service charges and other outgoings that are payable under the Lease and ensure that you will be able to meet them. When agreeing the rent and the payment of any "incoming" capital sums you should consider instructing a Surveyor to advise whether the payments are reasonable.

Stamp Duty Land Tax (SDLT) may be payable if the rent during the term exceeds £150,000.00 approx. An SDLT Return must be completed within thirty days of the "effective date" even if no SDLT is actually payable. The effective date is usually the completion date, but it can also be the date that the transaction is substantially performed e.g. by the Tenant going into possession, or paying rent, or a premium even prior to the completion date. Therefore, if you go into possession or make a payment prior to the completion date please let us know immediately so that we can submit the Return and avoid any penalty being charged.

A Landlord may be able to charge VAT on the rent and costs incurred by him thereby increasing the amount payable by the rate of VAT.

6. Rent Review

The rent is likely to be reviewed periodically; in which case you must ensure that you understand and agree the basis upon which the rent will be changed and the procedure to be followed. Any new rent is likely to be the letting value of the property in the open market with vacant possession at the date of the review. This sum is usually arrived at by looking at recent open market lettings of similar properties in the area let on similar terms.

Some Leases contain 'Upward Only' review clauses. The effect of such a clause will be that the rent when reviewed will never fall below the rent already being paid regardless of the current market rental value of the premises. You should seek to negotiate with the Landlord a review clause allowing the rent to fall as well as rise as early as possible in your negotiations. If the rent is reviewed a further Stamp Duty Land Tax return may need to be submitted to the HM Revenue and Customs and further tax paid and you may wish to consult us at that time to negotiate any rent review and then deal with the tax implications.

7. Repairs and Insurance and Service Charges

The Lease will set out the extent of your obligations to carry out repairs to the property. You should bear in mind that an obligation to keep the property in repair automatically includes an obligation to carry out any repairs which are required at the outset even if that means that you would have to leave the property in a better condition at the end of the Lease than you found it at the start. You should therefore instruct a Surveyor to inspect the property and advise you on its condition and any repairs which are required initially or may be needed during the term of the Lease. If these are extensive then it may be possible to limit your liability by negotiation with the Landlord and by amending the Lease accordingly.

If your obligations are limited so that you are not required to keep the property in any better state of repair than it is at the outset, then you will need to have evidence of its condition in the form of a schedule prepared by the Surveyor and / or agreed photographs.

When inspecting the property, the Surveyor should include in their report comments on the services, and you will be able to consider any recommendations which they may make.

You will almost certainly be liable to keep in repair and in full working order all the fixtures, fittings and equipment which are part of the property, and which are included in the Lease to you.

Most Leases require the Tenant to comply with any Acts of Parliament which govern properties. For example, Disability Discrimination legislation make it mandatory for many buildings to be made more accessible to those with disabilities. The range of works required will vary but could include the installation of a ramp or lift, widening of doors, improved toilet facilities etc. The cost of that work is likely therefore to fall on the Tenant and you should consider that when negotiating terms with the Landlord or the present Tenant from whom you are acquiring an existing Lease. We recommend that you arrange for a specialist discrimination audit / survey prior to completing the Lease.

The Control of Asbestos at Work Regulations 2002 place a duty on a Tenant to manage the risk from asbestos in non-domestic premises and to ensure that an assessment is carried out to see if asbestos is present in the premises. We strongly recommend that you have a thorough survey / risk assessment carried out before you complete the Lease and prior to carrying out any work to the premises since the cost of complying with these regulations could be huge. You may seek an indemnity against such costs from your Landlord as part of your negotiations before completing the Lease. The Health and Safety Executive publish helpful leaflets on managing asbestos which can be found on their website at www.hse.gov.uk.

You should receive an energy efficiency certificate when taking a new Lease or having a Lease assigned to you and you should seek your Surveyor's advice on the cost of any improvements highlighted in the certificate prior to completing the transaction.

All commercial premises must have had a Fire Safety Risk Assessment carried out and again you should ask to see a copy of the audit to show to your Surveyor as it may involve you in expense to comply with the recommendations and unless you do so the Landlord's insurance of the building would be adversely affected. We would also recommend that you arrange for a qualified Fire Safety Consultant to inspect the premises on an annual basis in order to ensure continuing compliance with the regulations.

If the property which you are proposing to lease is part of a larger building or development, then you may have to contribute towards the overall costs of repair maintenance and insurance by way of a service charge.

The Lease will set out the insurance requirements. You may need additional insurance to protect your business and income over and above any insurance which may be taken out by the Landlord to cover the property. If the Landlord arranges the building insurance (which is normal) you are likely to have to contribute to those costs.

Where the Landlord insures the property, the Lease usually provides for the payment of rent to cease until the property has been reinstated after damage by an insured risk. Sometimes however the rent will resume after a period of time (e.g. three years).

If the requirements to pay the service charge / insurance etc are described as “rent” in the Lease it is possible that Stamp Duty Land Tax will be payable on these elements in addition to the rent.

8. Alterations

Most Leases restrict the Tenant’s right to alter or extend the premises. Structural or external alterations are often absolutely prohibited, whilst non-structural internal ones may be allowed with the Landlord’s written consent. Even then, it may be possible to apply for a Court Order to carry out alterations, but the Landlord can offer to make them in return for a reasonable rent increase.

At the end of the Lease, you may be entitled to compensation for any improvements you made to the premises which add to the letting value provided that you complied with the statutory requirements before commencing the work. You should therefore consult with us before commencing any such work to ensure the statutory requirements are complied with.

9. Use Clause

Most Leases restrict the use to which the property can be put.

You should carefully consider the Use Clause in the Lease to ensure that it meets with your requirements. If it does not, then the Landlord’s consent will be required to amend the Use Clause and it may also require the consent of the Local Planning Authority for a change of use. We advise you to contact the Local Planning Authority prior to signing the Lease to check whether they would agree a change of use. As a Tenant you will want flexibility and if the Use Clause is too restrictive you may have difficulty in assigning or subletting. However, the wider the Use Clause is the higher the rent is likely to be.

10. Costs

On the grant of a new Lease one of the terms may well be that you will be responsible for the Landlord’s costs. If this is the case, we will be asked to give an undertaking that those costs will be paid whether or not you do proceed to complete the Lease. We will obtain an estimate of those costs and we will need to ask you to put us in funds to meet them at the outset in order to cover that undertaking.

11. Dispute Resolution

Leases usually provide for any disputes to be decided either by arbitration or by an independent expert rather than by an application to a Court. Awards by Arbitrators and determinations by independent experts have some things in common, but in other respects are quite different.

The main points of difference are that Arbitrators decide any dispute according to the evidence submitted to them and cannot carry out their own research whereas an expert would do so, and an Arbitrator must conduct a hearing at which both parties attend whereas an expert need not hold a meeting. An Arbitrator can order either side to pay all or part of the others costs whereas an expert cannot (unless the Lease provides otherwise). An Arbitrator may be required to give the reason for their decision whereas an expert will not. Finally, an Arbitrator’s decision is subject to an appeal to the High Court on a point of law whereas an expert’s decision is not.

12. Repossession

The Lease will usually contain a clause (called a forfeiture clause) giving the Landlord the right to re-possess (re-enter) the property if the Tenant fails to pay the rent or breaks any of the other obligations. If a Landlord seeks repossession the Tenant (or sub-Tenant) may be entitled to relief from forfeiture i.e. the right to retain the property despite the breach provided the Tenant does make good the breach.

13. Renewal of Lease

Under the Landlord and Tenant Act 1954 Part II, business Tenants have a right to claim a new tenancy at an up-to-date rent at the end of the current Lease. A Landlord can oppose such a Lease in certain defined circumstances. If you are asked to Contract out of the provisions of this Act, you must be aware that you will lose the automatic right to renew your Lease along with possible compensation claim if the Landlord seeks to recover possession on certain grounds.

We hope that this short guide has helped you in understanding more about what steps are involved when purchasing your home. We would be pleased to meet with you to discuss any questions that you may have.

Please call us on 01305 768888

We will then put you in touch with a member of our experienced Property team.

Please visit www.pengillys.co.uk where full details of our Property team are available.

For further details about Pengillys and how we work, please refer to our Terms of Business and Privacy Policy which are available on our website or on request as printed documents.

FRAUD WARNING

Please note we will **not** change our bank details throughout the course of the transaction. If you receive an email from us asking you to send monies to a different account to that noted in both the completions statement and this report please telephone us on 01305 768888 and ask for the accounts team.

Similarly, please do not email us bank details for payment of any proceeds of sale. If you do so, it is entirely at your own risk and we will endeavour to verify those details by telephone before making payment but accept no responsibility if monies are transferred to an incorrect account.

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We can also advise on:

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