

49 **Common
traps when
renting
commercial
property**
(And how to avoid them)

Avoiding common traps when renting commercial property

For most businesses, the renting of commercial property represents a major financial decision. Our commercial property team understands this. We also understand the importance of communicating with everyone involved in the process, the importance of acting quickly so that there are no delays and, most importantly, in providing a value for money service.

Commercial property transactions can often be complicated. It is not uncommon for Commercial Leases and Agreements to contain over 50 pages of detailed provisions, all of which can affect you financially. New legislation of which clients are often unaware can further complicate matters, imposing additional obligations on tenants, without actually being written into the lease. Consequently, we would always recommend instructing a solicitor to interpret and negotiate the terms before agreeing a lease. Ideally this should be prior to the communication of the Heads of Terms which record your agreement with the landlord. Failure to do so can prove expensive.

We have assembled a team of expert property lawyers with many years experience and knowledge of dealing with commercial property transactions.

Our services are competitively priced and the team will ensure that the transaction proceeds as quickly and smoothly as possible.

Please contact us for further information about our services and details of our costs without obligation. See the last page of this document (page 11) for our contact phone numbers and office and email addresses. Or visit our website at www.bishopslaw.com

GENERAL MATTERS

1 If my place is unusable due to fire damage, I can stop paying the rent and look for somewhere else.

If your business premises are destroyed or seriously damaged, you will have all the problems of finding alternative premises from which to trade. But what about the old premises? The law says that the lease continues and you must carry on paying the rent until the end of the lease.

2 I do not need to worry about insuring the property - that is the landlord's problem.

The lease will deal with who is responsible for the insurance, including what is covered by the policy. What is covered by the policy requires careful consideration and in certain instances you may need to take out your own cover as well. It is vital that you ensure that all eventualities are covered.

3 If I am renting commercial premises, there is no need to carry out searches against the property.

Landlords make no warranty as to the suitability of the premises for your purposes. It is important that you make all relevant searches and enquiries in relation to the premises prior to the commencement of the lease. Once you have signed up to the lease you will be liable for the rent. Consequently you simply cannot stop paying rent if something arises that affects the suitability of the premises for your business. Searches can reveal issues such as:

- That the Local Authority are planning to introduce a pedestrian area in the street on which your premises are situated;
- That the land may be common land or registered as a village or town green. This will prevent any planned development or construction taking place.
- The planning history relating to the premises. Many tenants assume that planning permission is the landlord's problem, however breaches of planning control can be enforced for up to 10 years after the breach occurred. It is important to check that all planning permissions have been complied with.
- If the property carries an obligation to contribute to the cost of repairing the chancel of the local parish church. This will almost certainly be responsibility of the tenant.

4 I am renting property to use as a workshop. The lease allows me to use the premises for any purpose – I assume this is advantageous to me.

This is not always the case. The use to which the premises can be put may have the effect of increasing the amount of rent payable when the landlord comes to review the rent in the future. The broader the use to which the premises can be put, the more valuable the premises.

5 I am renting premises for use as a butcher's shop. The lease permits this use but no other. I assume this is not a problem for me.

Whilst it is fine for your business purposes, the restriction may cause problems in the future. For example, if your business is not a success and you need to transfer the lease, then any person to whom you assign the lease would also have to use it as a butcher's shop. Consequently it may prove difficult to find a suitable tenant.

6 I am not registered for VAT and the landlord has insisted on adding VAT to the rent I agreed.

It will depend on the terms of the lease as to whether the landlord can do this. However this matter should be clarified when the lease is initially negotiated.

7 My lease gives me a right to park 5 cars in designated parts of the communal car park. The new landlord claims they are not bound by these rights and has reduced the number of spaces allocated to me.

Unfortunately seemingly simple matters like car parking are very complicated from a legal perspective and are often not properly dealt with by the landlord in the lease. Consequently it is possible that the new landlord will not be bound by these provisions.

8 My landlord has stated that there will be car parking at the premises.

Not necessarily. The lease will need to be checked to establish whether or not there is an allocated parking space or spaces or whether there is only a right to park on a 'first come first served basis' in a communal car park.

9 I plan to rent the premises through a limited company. If this company becomes insolvent, I can walk away from the property and the lease.

Not necessarily. It is likely that the landlord will try to obtain personal guarantees from the directors of the company. Careful consideration should be given to the terms of any personal guarantees provided. For example, the tenant should aim to include a term enabling any guarantee to be released on assignment.

10 The success of my business will not affect the rent which I have to pay.

It might! It all depends upon the terms of the lease. The landlord's ability to change or 'review' the rent is a very important part of the lease. It requires careful consideration when the lease is being drafted.

11 I do not need to be concerned about Asbestos Regulations.

Under the Control of Asbestos Regulations all commercial premises must have a report detailing the presence of asbestos at the premises. This report must be updated at least annually. As tenant, the lease may make you liable to comply with these obligations which in turn can prove costly. It is important that this matter is covered in the lease negotiations and prior to the lease being granted so as to remove any liability for the tenant in complying with the Control of Asbestos Regulations.

12 I do not need to be concerned about Fire Regulations.

Under the Regulatory Reform (Fire Safety) Order specific rules for the preparation and updating of a risk assessment and fire precautions will attach to both the landlord and the tenant., It is essential that both parties liaise to ensure they not only know and apply the Regulations correctly but dovetail their activities to prevent loss or damage occurring, A criminal prosecution is likely to follow any failure to comply as these rules are for the protection of your employees and the general public. We can advise you on all aspects of leases and help protect your interest at the negotiation stage. This includes

advising on the appropriate searches and enquiries that should be made relating to the premises.

RENT REVIEW

13 I cannot challenge the increase in rent which the landlord has imposed.

It all depends upon the terms of the lease. The landlord's ability to change or 'review' the rent is a very important part of the lease. It requires careful consideration when the lease is being drafted.

14 I am negotiating a new rent with my landlord. The rent is likely to increase as the landlord has insisted that the rent is assessed as if the lease were for 10 years even though the unexpired term is only 5 years.

Rent review is a very complex area and whether or not the landlord is permitted to do this will depend on the terms of the lease. The terms of the rent review clause in the lease require careful consideration when the lease is being negotiated and when the rent is being reviewed.

15 Under my rent review clause, the landlord is permitted to serve a notice specifying the new rent. Unless I object to this rent within a specified period of time, the landlord is entitled to enforce this rent regardless of how high it is.

Yes, he might be able to! Rent review is a very complex area and whether or not the landlord is permitted to do this will depend on the terms of the lease. The terms of the rent review clause in the lease require careful consideration when the lease is being negotiated and when the rent is being reviewed.

16 My landlord should have exercised his right to review the rent 18 months ago, but as rents were depressed then, he has waited until now when they have risen. He is now proposing to increase the rent and backdate it to last year.

Whether or not the landlord can do this will depend on the terms of the lease. Often leases will allow the landlord to increase the rent even after the specified day. The lease should provide that whenever the rent is reviewed it is always reviewed as at the stated rent review date. This is to avoid situations where landlords wait for the market to improve before starting the review. We can advise on all aspects of rent review and protect your interest when the lease is being negotiated.

LEASE RENEWAL, TERMINATION AND SECURITY OF TENURE LEGISLATION

17 I want to sell my business but will be unable to as my lease has nearly expired and no one will want to purchase when there is such a short lease left unexpired.

Seek advice immediately! Most business tenants have a right to insist on their landlord granting them a new lease.

18 I have a right to renew my lease, however the landlord is insisting that I accept a lease in the standard form which places many more obligations on me.

The security of tenure legislation is designed to protect tenants. Landlords can

only change the terms of the lease on renewal in very limited circumstances.

19 I have to vacate the premises as my landlord has served a notice on me claiming to 'forfeit' (end) the lease.

Seek advice immediately! In certain circumstances a landlord can bring a lease to an end if you have broken the terms of the lease. However, this area of law is particularly complex and there are often rights for tenants to claim relief.

20 I have the right to terminate my lease half way through the term. I served notice on the landlord but as the date stated on the notice was incorrect, I understand that the notice is invalid and I will have to continue paying rent.

Options to end a lease through this mechanism are very complicated and advice should be taken before exercising them. However, the law does protect the tenant and it is possible that your notice may still be valid even though the date on the notice was incorrect.

21 I am secretary of a tennis club and we rent our premises. Our lease ends in 2 months time and we have been told by the landlord that we have to vacate the premises by this date as the landlord can obtain a higher rent from commercial tenants.

Even though you are not a commercial organisation, you will probably have security of tenure as you will be classed as a 'business tenant'. Consequently, the landlord will have to give you at least 6 months notice accompanied by one of the statutory grounds for possession. Obtaining a higher rent is not a statutory ground.

22 My lease ends next month and I do not want to renew. My landlord says that I should have provided 3 months notice of termination. Therefore I will either have to remain at the property for the necessary period or pay 3 months rent in lieu.

As long as you leave before the end of the lease you do not need to give the landlord any notice of your intention to vacate. However, if you remain at the premises beyond the term of the lease, the situation will be different.

23 I have been asked to accept a lease which is contracted out of the security of tenure legislation.

The security of tenure legislation is designed to protect tenants. Consequently, you would be giving up valuable rights and should negotiate to receive something in return.

24 My lease has ended and my landlord is seeking possession, claiming he has grounds under the security of tenure legislation, I plan to surrender my interest in the lease.

Seek advice immediately! Possession is only available in limited circumstances and on proof of specified facts.

25 I have to vacate the premises by the end of the month as I never signed a written lease and the landlord has asked me to leave.

This will depend on the precise circumstances under which occupation of the

property was taken. It may be possible that you have the right to stay on as short term leases do not have to be in writing to be legally valid. Equally tenants of business premises are protected under security of tenure legislation.

26 My landlord has established a right to possession under the security of tenure legislation and I understand that I am not entitled to claim compensation.

Seek advice immediately! In many circumstances a tenant who does not get a new lease will be entitled to compensation.

27 I rent a shop in a mall of similar shops. The shop next door only allows one person to enter at a time for security reasons and attracts a poor standard of clientele who put off my customers by drinking and swearing. This has impacted on my business and I understand there is nothing I can do about it.

The local authority may be able to help with anti-social behaviour matters. However, your landlord will also have obligations under the terms of the lease to protect you from this form of harassment. In an extreme case you may be able to bring the lease to an end if the landlord refuses to help. **We can advise you on all aspects of lease renewal and termination, including your rights under security of tenure legislation.**

REPAIRING OBLIGATIONS AND IMPROVEMENTS TO THE PREMISES

28 If I am renting commercial property I do not need a survey.

The physical state of the property is very important. If the tenant is responsible for the repairs, under a normal repairing covenant you will probably have to put the premises into a good state of repair and not just keep them in the condition they are in at present.

Equally you may have to improve the condition of the premises so as to comply with any new government legislation imposed after the lease commences. The wording of the repairing clause also requires careful consideration. Phrases such as 'good condition' can add greatly to the tenant's obligations.

Consequently, it is important that you establish at the outset exactly what your repairing obligations are.

29 I have made improvements to the property and the lease has come to an end. I have been told that I cannot obtain compensation.

You should always seek advice before you carry out any improvements to the property. However, in certain circumstances you may be entitled to claim compensation.

30 I can make alterations and improvements to the premises without the permission of the landlord.

It is likely that you will have to obtain permission from the landlord. The terms of the lease will determine whether or not you have to obtain permission and equally whether or not the landlord can refuse.

31 I cannot make alterations to the premises as the lease expressly states that I cannot.

Seek advice immediately! Again, the terms of the lease require careful consideration, however there are ways in which even an absolute prohibition on making alterations can be avoided.

32 The improvements I have made to the premises will not affect the rent I have to pay.

They might! It all depends upon the terms of the lease. The landlord's ability to change or 'review' the rent is a very important part of the lease. The terms of any rent review require careful consideration when the lease is being drafted.

33 I do not have to pay for alterations to the premises which provide for disabled access as this is the responsibility of the landlord.

It all depends upon the terms of the lease, but it is likely that it will be the responsibility of the tenant.

34 I am liable for the repairs to my building, but as it is so old I have been told by the landlord that the only way it can be 'repaired' is by pulling it down and starting afresh.

It depends upon the terms of the repairing obligation, but a normal obligation to repair would not require the complete reconstruction of the premises.

35 My landlord and I entered into an oral agreement for me to rent his shop. We agreed the rent and that I could stay there for 5 years, but that is all. The premises are now in a poor state of repair and my landlord has informed me that the repairs are my responsibility.

Unless there is some express agreement in the lease as to who is responsible for the repairs, neither landlord nor tenant is responsible. Consequently, it is always best to agree matters expressly and in writing.

We can advise you on your repairing obligations and rights regarding improvements to the premises and ultimately protect your interest when the lease is being negotiated.

PLANNING MATTERS

36 I want to change the use of the premises. I have checked the lease and there is nothing stating that I cannot so I plan to go ahead and make the alterations.

This is not always the case. There may be entries against the freehold title that restrict alterations to the property which will also bind you.

Planning consent may be required for any change of use and you may also need to seek Building Regulation approval in relation to the methods and materials used in the alterations.

37 I would like to make alterations to my premises, but need the consent of my landlord to apply for planning permission. As the landlord will not provide consent, I cannot make the alterations.

Whether or not the landlord is permitted to do this will depend on the terms of the lease. We can advise you on all planning matters associated with the premises.

SUBLETTING

- 38 I am about to sublet the premises and the landlord is insisting that I charge a rent greater than the market rent.**

Many landlords will insist on this as a matter of course. However, the Government backed Code of Conduct for Commercial Leases states that this should not be the norm.

- 39 My landlord is about to terminate the lease as my subtenant has broken the terms of my lease. There is nothing I can do about this.**

The terms of any sublease require careful consideration at the negotiation stage so as to avoid this problem. However, the law may allow you to prohibit the actions of the subtenant so as to prevent the terms of your lease being breached in the future.

- 40 As a subtenant I use the premises as a takeaway which is allowed by the terms of my lease. However, I am required to stop using the premises as a takeaway as the head landlord has informed me that I am in breach of the terms of the head lease.**

The terms of any sublease need careful consideration at the negotiation stage so as to avoid this problem.

However, the law may still allow the head landlord to stop the subtenant's use in these circumstances. This problem should have been foreseen when the lease was being negotiated.

We can advise you on the terms of any subletting and protect your interests when the sublease is being negotiated.

LEASE ASSIGNMENT

- 41 I am about to assign my lease and the landlord has insisted that I provide a guarantee to the landlord that the assignee will pay the rent.**

Many landlords will insist on this as a matter of course. However, the Government backed Code of Conduct for Commercial Leases states that this should not be the norm.

- 42 I am about to assign my lease and have been advised that I do not need the consent of the landlord.**

This is not always the case. It is unusual in a commercial lease to find that consent is required, however it will depend on the terms of the lease.

The circumstances in which consent can be withheld should be determined when the lease is being negotiated.

- 43 I want to assign the lease but the landlord is refusing to provide consent.**

The circumstances in which the landlord can withhold consent depend partly on the terms of the lease and partly on the general law.

Normally a landlord cannot withhold consent unreasonably.

44 My landlord is taking a long time to grant or refuse consent to the assignment of the lease and as there is nothing I can do to speed up the process I am likely to lose the prospective tenant.

A landlord cannot delay unreasonably in making a decision. He must say yes or give reasonable grounds for refusal within a reasonable period of time.

This will usually be a few weeks only. If the landlord does delay unreasonably and you lose money because of this you may be entitled to claim compensation.

45 I have a lease in my own name but have been advised to set up a limited company to trade under. I have been told that this will not affect my lease.

It might. As well as restricting assignment, many leases also prohibit parties other than the 'Tenant' from occupying or using the premises. As the company is looked on as a separate legal entity, running the business through the company could represent a breach of the terms of the lease. This is on the basis that the company would be occupying the property rather than you.

We can advise you on all aspects of lease assignment and protect your interests when the lease is being negotiated.

SERVICE CHARGE

46 I cannot challenge the alteration to the service charge contribution which the landlord has imposed.

This will depend on the terms of the lease.

47 I pay a service charge. I am unhappy as to the amount the landlord claims he is spending. However, I am obliged to contribute to this via the service charge.

Service charges are a very complex part of the lease and need careful consideration when the lease is being negotiated. There is, however, a Code of Conduct for Service Charges which may give you rights over and above those in the lease.

48 I pay a service charge and the landlord has provided certified accounts detailing expenditure over the last year. I have been told that this cannot be challenged.

Matters such as this should be covered in the lease. The Code of Conduct for Service Charges may also provide some protection. We can advise on all aspects of service charges and can help protect your interests at the negotiation stage.

REMINDER

49 I have signed my lease and not taken legal advice from a solicitor.

Once the lease is signed you will be bound by the contents of it. As most leases contain over 50 pages of detailed provisions, which can affect you financially, we would strongly recommend that a solicitor is instructed to interpret and negotiate the terms prior to the lease being signed. **We can advise on all aspects of the lease and help protect your interests at the negotiation stage.**

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