

• GUIDE TO TAKING A LEASE OF COMMERCIAL PROPERTY IN ENGLAND & WALES

Where you agree the terms directly with the landlord and without the use of an agent, it is wise to contact Collas Crill at an early stage so that we can assist you in the negotiation of the terms of the lease.

Where agents are involved in the negotiations, these agreed terms are documented in a memorandum of Heads of Terms. It is sensible to contact us before finalising the Heads of Terms so that we can ensure that nothing has been included which would adversely impact on you.

Once our instructions are confirmed by you, we will write to the landlord's solicitors to request the usual documents including:

TITLE DOCUMENTS

The title deeds will more often than not consist of official copies of the registered title. These are now very easily obtained from the Land Registry online (which has made the process quicker). If the property is leasehold, we will also request a copy of the lease.

DRAFT LEASE

The landlord's solicitor will provide us with a draft lease for review. We will check this thoroughly to ensure that the lease complies with the agreed Heads of Terms. We will also review it to make the lease more favourable towards you as tenant, as the landlord's solicitor will have drafted it in a form strongly in favour of the landlord.

Depending on the Heads of Terms other documentation may be needed, such as a Rent Deposit Deed where the tenant is providing a rent deposit, or a Licence to Alter if the tenant is intending to carry out works at the property.

If the parties agree to delay completion of the lease until certain events have taken place, such as once the landlord has completed

certain works, or once planning consent is obtained then an Agreement for Lease will be provided. The agreement for lease is a contract under which the parties agree to enter into the lease once certain conditions have been met.

CHECKING THE TITLE

Once we have the title documents, we will check them to ensure the extent of the property and to ensure that the landlord is the lawful owner and has the right to let the property. We will also check for any defects in title and ensure that it can be used for the proposed use.

COMMERCIAL PROPERTY STANDARD ENQUIRIES (CPSE ENQUIRIES)

There are a standard set of forms used in every commercial transaction which the Landlord completes and provides to the Tenant. The CPSE1 enquiries raise questions in respect of the property title, including any rights affecting it including rights of access, physical condition, environmental matters, planning and VAT. The enquiries are extremely comprehensive and not every question will be relevant to the transaction. There are also additional enquiries raised regarding the management of the leasehold property and where the property is subject to leases.

While the replies given by the landlord are often at best vague and at worst deficient, the landlord must complete these forms accurately, and you are entitled to rely on the replies given. If there are any inaccuracies or where the reply is misleading, the Landlord may be liable in the civil offence of misrepresentation or even guilty of the criminal offence of fraud (fraud by false representation or fraudulently failing to disclose information).

We will check the replies carefully and check any supporting documents supplied. If, during the course of investigating title, there are any matters which are unclear or not satisfactory, these will be raised with the landlord's solicitor.

We will also raise additional enquiries throughout the transaction. Even though the CPSE enquiries are substantive, they cannot cover every eventuality. As with CPSE replies, you are entitled to rely on the accuracy of the replies given so that you can make an informed decision as to whether you want to proceed.

It is important to remember that if the Landlord told you anything during initial negotiations which materially influenced your decision to take the lease, you inform us at the earliest opportunity so that we can confirm the statement in writing; otherwise it cannot be relied upon once the lease has completed.

INSPECTION OF THE PROPERTY

We also need to establish the extent of the premises of which you are taking a lease. Often a tenant will take part of the landlord's building, and we will check with you that the definition of the property is correct. For instance, if you are taking a lease of the ground floor of a building, you do not want to be responsible for repairing other floors, so the definition of the property is very important. We will request a lease plan from the landlord's solicitors and ask you to check that it is correct.

We will not normally inspect the property at any stage of the process and consequently, you will need to inform us of any discrepancies or unusual features at the property so that we can raise enquiries. You should pay careful attention to the following matters:

- discrepancies regarding the boundary lines (by reference to the Title Plan)
- the existence of other occupiers
- whether the property is located next to or near to a river, village green or railway
- whether the property is accessed by a road which appears to be a private road
- evidence of rights of way or other rights enjoyed by third parties
- any alterations and extensions to the property

PLANNING

Where the property has been altered or extended, we will need to ensure that the building works were completed in accordance with all relevant planning permissions and building regulations. Copies of these permissions, and any accompanying warranties and guarantees, are provided by the landlord to prove that the modifications are not in contravention of planning laws.

You will also need to be satisfied that the property may be used for the purpose for which you intend. The local search will often reveal the current planning use and if this is not suitable for your requirements, you may need to apply for permission for change of use.

SEARCHES

As part of our review of title and on receipt of a plan of the property from the landlord's solicitor we will carry out appropriate searches. The searches do take some time (although they be expedited by the search provider for a fee) and normally arrive 2 - 3 weeks after being ordered. The main searches that we request are:

Local authority search

Local councils maintain a large amount of data relating to properties in their area and searches of these records will reveal (among other things) whether the property is:

- affected by nearby road schemes or parking restrictions
- the subject of a Compulsory Purchase Order

- accessed by a road adopted by the Council and maintainable at public expense
- subject to breaches of planning laws
- a listed building

The search result will also disclose any planning history and details of recent planning applications which may have been granted or refused. You should be aware that the local authority search only provides information as to the specific property searched against. We can carry out an additional search "Plansearch" which provides further detail re the planning status of the surrounding area.

Drainage and water search

We obtain the drainage search from the appropriate utility company for the area, which will confirm whether:

- surface water and foul water at the property is connected to the public sewer
- the property is connected to mains water
- there are any known sewers or mains drains running through the boundaries of the property

Environmental search

An environmental search provides details of the historic use of the property in question and its proximity to other environmental risks (such as flooding - although a more detailed flood search can also be requested). It is important to remember that a local authority can serve a remediation notice where land has been contaminated. The remediation notice will require the land or buildings to be 'cleaned up'.

Where it can, a local authority will serve the remediation notice on the person who has caused the contamination. However, if that person cannot be found, the notice is served on the owner or occupier of the land even though someone else has caused the contamination. The effect of this may be that as occupier of the premises, responsibility for contamination may fall on you.

Chancel repair liability search

This search will reveal whether the property is in an area that makes it likely to be liable to pay a contribution towards the chancel repairs of a pre-reformation local parish church. Such obligations stem from mediaeval times, where rectorial land previously owned by the church to fund the local rector had been sold and the new owner took on the repairing obligation attached to that land. This means that any property located within the boundaries of a parish where such liability exists, could be required to pay for a proportion of the costs associated with the upkeep of the chancel.

The rights affect some 5,200 pre-reformation churches across England and Wales. In an effort to clarify these potentially onerous liabilities, The Government gave the churches until 2013 to note their right at the Land Registry on the registers of title of all the properties concerned. Failure to register means that this liability will not be binding after 2013 and cannot be enforced. If the search reveals that the property is potentially liable for such repairs, we will recommend that you obtain an insurance policy if the landlord does not already have cover. We will obtain a quotation as to the cost, and arrange it for you after completion.

Mining search

If the property is in an area at risk from mining-related subsidence, we can order a search from the Coal Authority which holds and maintains the national coal-mining database. The search result will confirm whether the property has been subject to a mining related subsidence claim and/or is situated on land suffering, or likely to suffer, from ground instability.

Energy Performance Certificates

In most cases, a landlord of a commercial property is required to provide an Energy Performance Certificate to the prospective tenant. This should be prepared before the landlord markets the property, but where the certificate is not produced at the outset, we will need to obtain this from the landlord's

solicitors before the matter can complete. This will give you information about the energy efficiency of the property and the accompanying recommendation report will inform you as to how the energy efficiency can be improved.

VALUATIONS AND SURVEYS

Before taking a property, you should ensure that you are satisfied as to the physical state and condition of the property, particularly if you are taking on responsibility for maintaining it. Broadly speaking, in English law there is no duty on the part of the landlord to disclose defects in the physical condition of the property. While this is raised by way of a CPSE enquiry, the landlord will more often than not reply that you are to rely on your own survey and the onus falls onto you to discover any defects such as subsidence or damp etc.

As the survey results may affect the wording of the lease (particularly the repairing covenants) it is important that you provide us with a copy of the report at the earliest opportunity. We may need to modify the lease so that you only need keep the property in the same condition as evidenced by a photographic schedule of condition. Getting the extent of the liability of repair right at an early stage will save you money. At the end of the lease the landlord would be able to serve on the tenant a schedule of dilapidations, which insist that the tenant rectify a list of faulty items at the end of the term.

You should also ask your surveyor to advise you not only on the state of repair and condition of the property, but also on the building as a whole. In all likelihood, you will need to contribute to the maintenance of the building as a whole by way of a service charge.

ASBESTOS

Asbestos is a highly dangerous substance which historically was used commonly in building works. Owners and occupants of commercial property have a duty to manage asbestos and are expected to assess the asbestos at the property and to manage any asbestos found.

Once you have taken the lease you may be considered to be the duty holder and therefore to manage any asbestos, which can include removal (which can be expensive). As part of our standard enquiries we ask for the landlord's risk assessment, any report and details of how any asbestos is managed. It may be necessary for work to be carried out to remove any risk prior to completion of the lease.

ALTERATIONS, DEVELOPMENT AND REPAIR

You should make us aware as soon as possible if you are looking to make any alterations to the property as in addition to planning consent, you may also need the landlord's consent to the proposed works. There are also regulations governing:

Replacement windows

As from 2002, the installation of replacement windows, roof lights or glazed doors must either have building regulations approval or have been carried out by a person registered under the Fenestration Self Assessment Scheme by the Glass and Glazing Federation (who will issue a FENSA Certificate confirming compliance with the regulations).

Installation of central heating boilers

As from 2004, the installation of new boilers or water tanks must either have building regulations approval or have been installed by a person registered under the OFTEC, HETAS or CORGI Scheme (who will issue a Compliance Certificate confirming observance of the regulations).

Electrical works

As from 2005, in certain cases electrical repair work or alterations will need to comply with the Part P requirements of the building regulations and be carried out by NICEIC registered person (who will issue an ELECSA Certificate confirming compliance with the regulations). It is a criminal offence if you fail to comply with parts of the latest building regulations and some planning regulations. Local Authorities have the power to require the removal or alteration of work which does not comply.

ASSIGNMENT

If you wish to assign the lease in the future, you will be required by the landlord to enter into an Authorised Guarantee Agreement. The purpose of this document is to guarantee the performance of the incoming tenant. It is important to note that if the incoming tenant does not comply with the terms of the lease, the landlord can (and will) call on you as the previous tenant to comply with the lease terms. The effect of this is that the landlord can require you to pay the rent if the new tenant does not do so. You may also be required to take the lease back in the place of the defaulting tenant. This gives the landlord protection and encourages outgoing tenants to choose carefully the person or company to whom or to which they assign the lease. Your commitments may not have ended when you assign the lease and leave the premises.

PRE-COMPLETION

Once we have reviewed the title, carried out our searches and received the replies to our enquiries, we will provide a lease report setting out the main aspects of the property and the lease together with the lease itself and any other supporting documents. Once received, you will need to agree a completion date with the landlord.

FUNDS

Once you are happy with the documents and a completion date has been decided on, we will write to you with a bill and completion statement showing the amount required from you in order to complete the lease. We will need to receive the full amount required in cleared funds in order to complete. The funds can be sent by way of a CHAPS or BACS transfer and we will let you have our account details nearer the time.

INSURANCE

Normally, the landlord will insure the property and the tenant will reimburse the landlord either through insurance rent, or by way of the service charge. The tenant will be responsible for the contents insurance and any other business insurance. The tenant is also normally responsible for insuring the plate glass.

COMPLETION

On the agreed completion date, we will send the monies to the landlord's solicitor and normally, will complete the lease over the telephone with the landlord's solicitor.

POST COMPLETION

Stamp Duty Land Tax ("SDLT")

Following completion, we will send you a completed SDLT form for you to check and return to us. When we receive the signed form from you we will submit it to HMRC on your behalf, together with any payment due. We will need to obtain your approval before the return is submitted and you will be asked to review the form and sign it to confirm that the details of the transaction are correct.

We will usually ensure that we have the full amount required for SDLT from you prior to completion to avoid penalties. However if you decide not to provide us with the funds required before the completion date please be aware of increased costs to you if you do not comply with HMRC's deadlines.

Registration

If the lease is for a term of seven years or more, we will be required to register it at the Land Registry. There is a fee payable to register a lease. We will need to submit the SDLT form before registration can take place.

If the lease is less than seven years in duration, we can note the rights which are granted to the tenant within the lease on the landlord's title.

Once the application to the Land Registry has been completed (which can take up to 4 or 5 weeks) we will forward you the up-to-date office copy entries showing your registered title, together with any deeds or documents in our possession.

BREAK CLAUSES

If the lease contains a break clause, enabling you to terminate the lease part way through the term, you are responsible for implementing the break. You need to ensure that you follow the timetable and comply with any conditions which are included in the break clause. The landlord may argue that the break is not effective if the terms contained in the lease are not followed to the exact letter.

SECURITY OF TENURE

Unless the landlord served a notice on you in the prescribed form at the beginning of the lease, then you will have security of tenure. This means that the lease will not automatically end at the end of the term. The landlord will need to serve a further notice to terminate the lease, and may only terminate the lease on specified grounds. Likewise, you as tenant can serve a notice at the end of the term requesting a new lease.

FOR MORE INFORMATION, PLEASE CONTACT:



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