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COMMERCIAL LEASES – ADVICE FOR NEW TENANTS

Many businesses rent commercial property. The types of property, length of lease, level of rent and repairing obligations can vary enormously. A lease is a contract. Leases are often quite lengthy and can contain onerous obligations. It is essential that before any tenant enters into a lease that they have considered the following:-

- Are the premises suitable?
- Is Planning Permission required?
- Is the level of rent fair?
- What are the maintenance obligations?
- Are there rent review clauses?
- Does the property require to be altered?
- Is VAT payable on the rent?
- Is Stamp Duty Land Tax payable?
- How long are you tied into the lease for?
- Are you liable for the landlord's legal costs?
- Should I obtain legal advice?

Landlords will prepare leases which favour the landlords. As a result, in our experience, they often turn out to be much more expensive for the tenant than originally thought. By taking professional advice from both a solicitor and a surveyor at the outset you are likely to save yourself expense in the long term.

Generally, the same legal considerations apply in respect of leases for small shops as they do for leases of major industrial premises. The legal work involved for small premises can often involve the same amount of work as for much larger premises. It is our policy to give an estimate of costs at the outset.

Take Legal Advice!

These comments are provided for guidance only. Each situation has to be examined on its own merits and circumstances and you should not therefore rely on the above without taking specific advice in relation to any particular matter.

Should I obtain legal advice?

The options open to you are:-

Option 1

DIY You could attend to matters yourself and not obtain legal advice.

Advantage

You would not incur any legal costs.

Disadvantages include

- You will be entering into a contract which may contain hidden costs such as expensive maintenance obligations, upwards only rent reviews, property management costs and other landlord's costs. In the long term your saving on legal costs may amount to little should you incur further unexpected costs hidden within the terms of the lease.
- The premises may not be suitable for various reasons including:-
 - Planning Permission is required/may not be available;
 - Services are not available;
 - Neighbouring Developments will adversely affect the premises;
 - Structural defects.

Option 2

Take Legal Advice Miller Hendry are experienced in advising tenants and can advise you.

Advantage

We will likely save you money over the term of the lease;

We will protect your interests by carrying out legal due diligence.

Disadvantage

Some cost will be incurred. We will give you an estimate of the costs at the outset.

What Do Miller Hendry Do?

When we are acting on behalf of commercial tenants we will normally carry out the following:-

- (a) Examine the lease document and report to you on the terms.
This is essential in every case. All tenants must fully understand the potential liabilities (including maintenance obligations) that they are taking on.
- (b) Conclude a pre lease contract (missives). This happens in most cases. The Landlord may issue an Offer of Lease which should be considered carefully as it may contain additional obligations to those set out in the lease itself.
- (c) Examine and revise additional documentation from the landlord (such as Guarantees, Rent Deposit Agreement, Licence for Works etc.)
- (d) Examine the landlords title to ensure, amongst other things, that the landlord owns the property and can validly grant the lease.

We have described the procedure we follow/the work we carry out in more detail in the Schedule attached.

Legal Costs in acting for Tenants leasing Commercial Property

The costs incurred in advising tenants leasing commercial property can vary enormously. In general terms the leases and lease documentation will be prepared by the landlords and the terms of the lease will favour the landlords. In order to reduce a tenant's liability and protect their interests the detailed terms of the lease documents should be negotiated. Most landlords will accept a bit of come and go, particularly on maintenance obligations, and significant savings in future costs can be made. However, if we negotiate on your behalf then we will charge a fee for this work. It is our practice to provide an estimate of fees at the outset, although the final figure will depend on what work is actually involved.

How to Save on Legal Costs

To protect clients' interests we would always recommend that a full legal due diligence process is carried out. However, we recognise that there are financial constraints on businesses. To save on costs clients do sometimes instruct us to limit the work we carry out. Please be aware that each step of the legal process which is omitted has certain consequences and does involve some risk to the tenant:-

1. You could accept the landlords documentation as produced, without amendment.
2. You could try not to enter into missives.
3. You could proceed without an examination of the landlord's title.

We are happy to explain both the potential short term savings and also the risks attached to these course of action.

Costs will depend on the way in which the lease is taken. The Schedule attached sets out some of these.

SCHEDULE

When acting for new tenants, the lease may be by way of a new lease, a transfer of an existing lease or a sub-lease.

New Lease

This is normally the simplest form of commercial lease transaction. In this situation the tenant leases from the landlord and a new lease is prepared. You can either:-

- (a) Accept the terms of the lease, or
- (b) Negotiate and amend the terms of the lease.

Transfer of Existing Lease (Assignment)

This is often a more complex form of commercial lease transaction. In this situation the lease is transferred from the current tenant to the new tenant and involves preparation of an Assignment of Lease (the document transferring the lease). As the lease is already in place, an incoming tenant will normally be expected to accept it without any variation. The lease should be examined and you should understand its terms before agreeing to the transfer of the lease to you. The landlord may be entitled to refuse acceptance of the new tenant or may impose conditions prior to him consenting to the transfer of the lease.

Sub-Lease

Many leases are now taken by way of a sub-lease from an existing tenant under the lease. This is generally the most complex of the lease transactions and often the most expensive for a new tenant. Such transactions involve examining the head lease and also the terms of the sub-lease. We would not recommend proceeding by way of a sub-lease unless you are willing to incur considerable legal fees at the beginning or are willing to take the risk of minimal legal work but potential unforeseen costs.

Offer of Lease/Assignment of Lease/Sub-lease

In many situations a formal offer requires to be put in place. This can be because of time constraints or for a variety of other reasons. The use of formal offers will increase costs. Landlords often insist on an offer being in place and they are almost always used for assignment and sub-leases.

Stamp Duty Land Tax Return (SDLT)

In many cases an SDLT Return requires to be made even if no SDLT is payable. We can submit this on your behalf. Where an SDLT Certificate is required, landlords will insist that it is obtained.

Ancillary Matters

There are a variety of ancillary matters which can arise during the course of the transaction and which will add to the cost including:-

1. Guarantees
2. Rent Deposit Agreements
3. Licence for Works (alterations)
4. Schedules of Condition

Examination of Title

We would recommend that the landlords title is examined in every case. This is:-

1. To check that the landlord actually owns/has good title to the property. If not, then the whole lease can fall with catastrophic results for the tenant.
2. To check that there are no securities over the property (or if there are that the lenders have consented to the lease). If a property is repossessed then unless the security holder has agreed to the lease then the lease may fall.

Surveys

Surveyors can advise on rent levels, the condition of the property and maintenance obligations. They can also negotiate rent terms (e.g. rent free periods). In our experience, the cost of their services is usually recouped from savings they achieve.