

LEASE GUIDE

This information guide is intended to provide you with a brief outline of the work involved when we act for a tenant taking a lease of commercial premises and to offer a brief insight into the mechanics and terminology behind it. It is by no means a comprehensive guide to the law, nor to all matters involved in the process. However, it contains useful information which we hope will assist you to understand the process more clearly. If you have any questions about the contents of this information guide, please do not hesitate to contact us and we will be happy to assist.

This is intended to advise a company taking a lease of commercial property.

In most cases, the Landlord and prospective Tenant agree the terms of the lease. It is wise to contact your solicitors at this stage as we can assist you in the negotiation of these terms. Where agents are involved in the negotiations, these agreed terms are documented in a memorandum of Heads of Terms. These are sent to the solicitors acting for the Landlord and those acting for the Tenant. Once instructions are confirmed, the Tenant's solicitors will write to the Landlord's solicitors to request documents including the following:

Title Documents

These are either copies of the original Title Deeds or Official Copies of the Registered Title and Title Plan (depending upon whether the property is unregistered or registered) and, if the property is leasehold, a copy of the Lease.

Draft Lease

The Landlord's solicitors will provide a draft lease. The Tenant's solicitors will firstly check that the lease complies with the heads of terms which we receive from the agent. We will then consider suitable amendments to make the lease more favourable to the Tenant. There may be other draft documentation provided, such as a Rent Deposit Deed if the Tenant is providing a rent deposit, or a Licence to Alter if the Tenant is intending to alter the Property. In certain circumstances the parties agree to complete the lease once certain events have occurred. For instance, they may agree to complete the lease once the Landlord has completed certain works, or once planning consent is obtained. In these circumstances, an Agreement for Lease is prepared, which gives certainty to the parties that the Lease will complete when the conditions have been met.

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. Not every question will be relevant to anyone transaction but a standard form is used and then completed as appropriate. We also raise enquiries regarding the management of the leased property, including any service charge and insurance details.

The Landlord is under a duty to complete these forms as accurately as possible and you are entitled to rely on the information provided in them. If any reply to a question is inaccurate or 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).

Please note that the replies given by Landlords are often vague. When we send you these, we would ask that you read them carefully and let us know if you have any particular concerns.

Planning Documents

If the property has been altered or extended in any way, you will want 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 to prove that the modifications are both sound and 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. We will discuss this with you once we receive the results of the local search.

Checking the Title

Once the Landlord's solicitors provide the Title documents, they will be examined to ensure the accuracy and extent of property and land which is the subject of the Lease, to ensure that the Landlord is the owner of the property and has the legal right to let it, and that there are no defects in the legal title. In law, we call this 'investigating title'.

We will also examine the information provided in the CPSE forms 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 Solicitors.

The enquiries may be a combination of general questions appropriate to every property, and specific questions about the particular property in question. Usually, the enquiries are sent at the start of the transaction and the Landlord replies to them through his or her Solicitor. Additional enquiries will often be raised after the making of the initial enquiries, right up to completion, as further information relating to the property or the transaction comes to light, or further points need to be queried. Again, you are entitled to rely on the accuracy of the Landlord's replies so that you can make an informed decision about whether or not you wish to take the Lease.

It is important 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.

It is very important that we 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.

As we will not actually see or inspect the property, we will rely upon you to report to us any unusual features or discrepancies you uncover during the course of your own inspection of the property, so that appropriate enquiries can be raised. When doing so, please pay particular attention to the following:

- discrepancies regarding the boundary lines (by reference to the Title Plan); .
- the existence of non-owning occupiers;
- whether the property abuts a river, village green or railway;
- whether the property abuts a road which appears to be a private road;
- evidence of rights of way or other rights enjoyed by neighbours or the public;
- alterations and extensions to the property

If a defect in the Title to the property becomes apparent, we will ask the Landlord to rectify it. This is sometimes done by way of obtaining retrospective consent, as in the case of a breach of Planning regulations, or by obtaining an insurance policy (called an 'Indemnity Policy'), which we, or the Landlord's Solicitor, can arrange on your behalf.

If a defect in title is not rectified, a Lender may refuse to lend money on the property unless, and until, the defect is corrected as it will undoubtedly affect both its value and marketability.

We will need to ensure that the Lease allows you to charge the Property if you intend to obtain bank funding.

Searches

Upon receipt of a plan of the property, it will be necessary for us to put in hand various searches. The term 'property searches' covers a number of different searches offered by Local Councils, Government Agencies, utilities and commercial organisations, the aim of which is to provide you with information about any potential restriction, benefits and conditions which affect the property and, ultimately, your use and enjoyment of it. The main searches which are conducted are:

Local Authority Search (approximately £100.00 -£200.00)

Local Councils maintain a large amount of data relating to properties in their area and searches of these records will reveal whether the property is:

- affected by nearby road schemes or parking restrictions;
- the subject of a Compulsory Purchase Order;
- in a conservation area;
- abutting a road adopted by the Council and maintainable at public expense;
- subject to breaches of planning laws;
- in a smokeless zone;
- subject to a Tree Preservation Order; or
- a listed building.

It will also disclose any planning history and details of recent planning applications which may have been granted or refused. Please note that the Local Authority search only relates to the specific property searched and will not give any information relating to adjoining properties or undeveloped land in the area.

Drainage and Water Search (approximately £90.00)

The water utility companies offer a specialist search 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; and
- there are any known sewers or mains drains running through the boundaries of the property.

Environmental Search (approximately £180.00)

Would you please note that you should consider your position as to environmental matters. A Local Authority can serve a Remediation Notice where land has been contaminated. The Remediation Notice requires 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. This means that once you have taken the Lease, responsibility may fall to you as occupier. You obviously will wish to avoid this and an Environmental Report assesses any potential environmental risks associated with

the property. For this reason, we strongly recommend that you commission an Environmental Report at this stage.

Chancel Repair Liability Search (approximately £15.00)

This search will reveal whether the property is liable to pay a contribution towards the chancel repairs of a pre-reformation local parish church. Such obligations stem from mediaeval times where former 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 of the church tithes goes back to 1189 and they 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 September 2013 to note their right at the Land Registry on the Registers of Title of all the properties concerned. Failure to register may mean that this liability will not be binding after September 2013 and may not be enforceable.

If the search reveals that the property is potentially liable for such repairs, we will recommend that you obtain an insurance policy. We will obtain a quotation as to the cost, and arrange it for you after completion.

Mining Search (approximately £100.00)

The Coal Authority holds and maintains the national coal-mining database and its search report will confirm if the property has been subject to a mining related subsidence claim and/or is situated on land suffering from ground instability.

Because we have to pay the relevant authorities for the cost of these searches, we cannot order them until such time as we have received a payment on account from you (we usually request around £700.00 at the commencement of a transaction). It can take the relevant authorities up to three weeks to process the information provided in the search results, so it is important, if you would like the transaction to proceed quickly, to let us have the money requested as soon as possible. If speed is not of the essence, you may want us to delay commissioning searches until you have received a satisfactory survey and have secured funding, but, obviously, this will result in a delay in Completion.

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 & Surveys

It is important, when taking a lease, that you satisfy yourself as to the state and condition of the property *before* taking the Lease. 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. Rather, the onus is on the Tenant to discover defects (for example, rising damp, subsidence, drainage defects, woodworm, etc.) by way of survey, inspection and any relevant specialist reports.

Accordingly, it is strongly recommended that you commission a full structural survey, together with any recommended specialist reports, to ensure you are fully versed in the scale and type of repair work which may be required and the likely cost. If in doubt about which type of survey to order, please do obtain expert advice. The result of the survey may affect the wording of the Lease so it is important that you inform us of the report. It may be appropriate to provide a schedule of condition so that the tenant is only obliged to keep the Property in no better condition than it is in at the start of the Lease term. It is important to establish the condition of the property and the level of repair which is appropriate because the Landlord is likely to require the property to be returned in the same condition as it was at the start of the Lease. The Landlord would be able to serve the Tenant with a list of faults (a schedule of dilapidations) which it can insist are rectified by the Tenant at the end of the Lease term.

You must also ensure that you inspect the Property yourself and test as many items as possible (such as the central heating, electrical and water systems).

Please 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. This is because you may be required under the terms of the lease to contribute towards the cost of any major or structural repairs to other parts of the building (including the roof, foundations and walls, etc.) and to the common parts via the service charge provisions in the Lease.

Please note, as a general rule, issues as to the *physical* state and condition of the property are not matters of title and are the remit of your Surveyor, not your Solicitor. We do not generally raise enquiries regarding the structural condition of the property.

If, following the various investigations, you wish to renegotiate the terms with the Landlord, you should do this through the Agent (if there is one).

Asbestos

Asbestos is a highly dangerous substance which used to be 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

If it is your intention to make any alterations to the property, either after Completion or in the future, please tell us, as there may be further considerations which need to be explored or additional enquiries to be raised of the Landlord and the Local Authority.

There is also a wealth of legislation now in place with regard to building works of which you should be aware. The most important are:

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).

Failure to comply with parts of the latest Building Regulations and some Planning regulations is a criminal offence and Local Authorities have the power to require the removal or alteration of work which does not comply. This legislation is also constantly changing and we would strongly advise that, before undertaking any building works (structural or non-structural, internal or external), that you contact the Local Authority to enquire what consents may be necessary; even if your building Contractor says consent is not required. Subsequent intervention by the Council could prevent you from using the property for the purpose you require, so it is important to deal with this prior to completion of the Lease. Wherever possible, ask the Council to confirm their advice in writing.

Also remember that you may only make alterations if you have the prior written consent of the Landlord, who is likely to charge a fee for granting consent. The Landlord may also reserve the right to have the property re-instated at your expense at the end of the Lease term.

Assignment

If you wish to assign the Lease you will be required by the Landlord to enter into an Authorised Guarantee Agreement. The reason for this is so that you guarantee the performance of the incoming tenant; if the incoming tenant does not comply with the terms of the Lease, the Landlord can then call on you as the previous tenant to comply with the Lease terms. This means 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. It is important that you recognise that your commitments do not necessarily end when you assign the Lease.

Pre-Completion

Once we have agreed the documents with the Landlord's solicitors and have received engrossment copies, completed our enquiries, and are satisfied with the results of your searches, we will make an appointment for you to come in and sign the documentation. Alternatively, we can send the documents to you by post for signature. We will provide you with a lease report, to explain the main facets of the Lease. If you have any queries after you have read this, please let us know as soon as possible as it may be necessary for us to suggest further amendments, which will need to be agreed with the Landlord's solicitors. At this point, you will need to decide on a Completion date. Usually the term of the lease begins on the date that the Lease completes, but the documents can be completed with a different term commencement date to suit the parties. For instance, the Tenant may have been in occupation already, or does not intend to take occupation for some time but wants the certainty of legal completion. Please be aware that completion can only take place on a weekday.

Funds

Once a completion date is set, we will write to you with a bill and completion statement showing the financial side of your transaction and the amount required from you in order to complete. It is vital we receive the full amount required in cleared funds, to avoid delays in effecting Completion.

It is wise to ensure that the amount required for completion is sent to us in advance of the completion date by way of a CHAPS transfer (same day electronic bank transfer). Your Bank may charge a fee for this service. We will inform you of our account details nearer the time.

Final Searches

Immediately before Completion, some last-minute searches are made, which include:

- A Land Registry Search - this will reveal whether any further undisclosed mortgages or charges have been registered against the property since the date of the Office Copy Entries which were provided in the Contract package.

Insurance

The Landlord insures its property and the Tenant pays a fair proportion of the insurance premium. The Tenant is responsible for business insurance, including contents. Usually the Tenant is responsible for the insurance of plate glass.

Completion

On the day of Completion, we will wire any monies required by the Landlord (such as the rent deposit) to the Landlord's solicitors through the electronic banking system.

Post Completion

Immediately following Completion, we will send you a completed Stamp Duty Land Tax form for you to check and return to us. When we receive the signed form from you we will submit it to HM Revenue and Customs 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.

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 Stamp Duty Land Tax 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. The Land Registry currently charges £40.00 for this service.

HMRC requires that you pay the stamp duty land tax within 30 days of the completion date. If you do not pay within this deadline, there will be an automatic £100.00 penalty levied. A charge of £200.00 is charged if HMRC does not receive the payment within three months of completion, and charges escalate for late payment subsequent to that. We will usually ensure that we have the full amount required for SDL T from you prior to completion to avoid so that we can handle this on your behalf, thereby avoiding any difficulties. 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.

Once this process 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. If there are any indemnity policies put in place on your behalf, these will also be sent to you once registration of your Title at HM Land Registry is complete. If you prefer, we can keep your original Title Deeds and documents in our strong room, free of charge, until such time as they are required by you.

If the Lease contains a break clause, enabling the Tenant to terminate the Lease part way through the Lease term, please note that the responsibility for implementing the break, if one is required, lies with you as the Tenant. 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 letter.

Timescales

It is not possible to give a standard indication as to how long the process can take. If the Landlord's solicitors act with reasonable speed, it is possible for the transaction within between six and eight weeks. However, this will depend on how quickly the Landlord wants to complete the lease and whether any complications arise.

For further information and advice regarding any of the legal aspects mentioned above please do not hesitate to contact us on 0115 9888 777 or email info@fraserbrown.com

