

Commercial Leases

As a result of rents falling and businesses facing difficult times a lot of properties are now coming up for re-letting, sub-letting or assigning, making it vitally important to seek expert advice. Joanne Hoban reports.

Sub-letting occurs when the original tenant becomes the landlord and an assignment occurs where a new tenant takes over a lease completely from the original tenant, allowing that tenant to relinquish all obligations under the lease. The term of the sub-letting can be shorter than that of the original lease and the original tenant may or may not go back into possession in advance of the conclusion of the term of the sub-lease.

With many commercial premises coming available for letting in such circumstances recently it is vital that both landlords and tenants seek expert advice in relation to commercial leases, as negotiating such leases is very different than residential letting and have far more serious implications for the parties involved.

Checklist

The following matters should form part of any checklist for landlords and tenants in relation the negotiation of commercial leases.

- ▶ What is the rent payable in relation to that premises? Is there a security deposit required and in what circumstances will the security deposit be returned?
- ▶ What are the additional costs associated with the taking on of the lease either by way of assignment, sub-letting or by way of a new lease? These may include utilities, rates and service charges. It is important to check that the previous tenant

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discharged all or any arrears in respect of utilities and also that rates that are the sole responsibility of the occupant. Your legal advisor will need to ensure that there is a full indemnity in respect of any unpaid rates by the previous occupant. It is also vital to check whether VAT is payable on the rent.

- ▶ Check the length of the lease. Under the Civil Law (Miscellaneous Provisions) Act 2008 there are welcomed changes in this area for landlords and tenants when the previous restriction on short term lettings to a period of less than five years to avoid the tenant acquiring a statutory right to renew a lease was changed, allowing tenants to contract out of statutory right of renewal even after the date of commencement of the lease. This is subject to the tenant executing a valid written Deed of Renunciation and receiving independent legal advice in relation to the implications of

such a renunciation. This results in more flexible letting and encourages tenants to enter into leases without fear of losing their tenancy within a short time and encouraging them to invest in fit-outs. It also provided peace of mind to landlords facilitating the creation of sub-lettings for longer periods and enabling landlords to recover possession at the end of the term of the head-lease without any difficulty.

- ▶ This change now extends beyond the original restriction to office tenants only, to the retail sector and general commercial property market and introduces a degree of flexibility for landlords and tenants in securing lettings and reflecting their commercial needs.
- ▶ Check if there is an option to terminate and the notice requirements of same as well as any other conditions attached to the right to terminate and who may terminate.
- ▶ What are the planning requirements? The permitted use will be reflected in the lease however many landlords will not provide any warranty in respect of planning permissions and therefore planning permission should be checked thoroughly by tenants as well as any requirements for planning permission or consent of the Landlord in relation to signage. If a possible change of use is likely make sure there is a provision ensuring that the Landlord will provide consent to that change of usage which consent could be unreasonably withheld.
- ▶ It is important to ensure that there is no doubt as to the premises that are being leased and often a plan attached to the lease will provide much needed information in this regard, also the common areas should be identified and details as to who will be responsible for those common areas and if appropriate the amount of service charge applicable.
- ▶ It should be reflected in the lease who is responsible for the maintenance of the internal and external parts of the relevant

building and who will pay for the improvements if required at the commencement of the Lease.

► Is there a clause in the lease allowing the tenant to sub-let or assign with the consent of the landlord and is it reflected that the consent again cannot be unreasonably withheld? If there is no such clause in the lease the landlord will be in a much stronger position but may need to be more flexible particularly in the current environment as in the alternative the landlord faces losing a tenant altogether as a result of inflexibility. From the landlords perspective it would be important to ensure that the appropriate bank references and previous landlord's references are obtained in respect of any prospective tenant looking to take on an assignment or sub-letting of the premises. Looking for a good candidate to take on the premises will save time in the long run. Establishing a good line of communication between landlord and tenant through the relevant agents, legal advisors and directly should be established from the outset otherwise delays can result in losing a prospective tenant.

► Is there a rent review clause in the Lease? Often there is a standard rent review clause in leases and generally up to now the standard clause allows for an upward only rent review which is agreed at the outset. As recently as Monday, March 30th it was suggested on the Prime Time current affairs programme that new legislation should be brought in to allow for downward rent reviews regardless of the terms of the Lease given the current economic climate. It would be important for a prospective sub-tenant or assignee to check whether a review has occurred yet and if it has occurred what is the increase. If no review has occurred to date and the date has passed for that rent review the new tenant is left with the possibility that they could be shortly served with a notice increasing the rent and in the

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circumstances this would be an unwelcome surprise.

► It is important also to check how disputes between the parties will be resolved either by mediation or arbitration thus keeping disputes outside of the Courts.

There have been some important recent changes in the law in relation to commercial leases and hopefully further changes are to come in order to create more flexibility for both landlords and

tenants negotiating such transaction. One thing is for certain and that is that the intricacies of negotiating a commercial lease are far more complicated and those in relation to residential lettings. As a result it is all the more important to ensure that professional advice is sought at the very outset in order to ensure that negotiation of a commercial lease adequately reflects the landlords and the tenant's intentions and in order to protect the party's relevant commercial interests.

The above information is provided as a guide only and legal advice should always be obtained in relation to the negotiation of a commercial lease.



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