

AN INTRODUCTION TO COMMERCIAL LEASING
IN SCOTLAND

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1. INTRODUCTION

"It's just a simple lease"

It is often assumed by clients that if they are to take a lease of a property there are set terms and conditions which will apply. In some cases this is broadly true. In particular, there is a code for agricultural properties and domestic lettings, which lays down the basic framework which applies to such lettings. However, even in such cases there can be quite a variety of terms and conditions imported into the leases and it is therefore dangerous to assume that there are set terms which apply. In the case involving the let of a commercial property, the Landlord has even more freedom as there are very few, if any, rules which govern the terms and conditions of such a lease. When you purchase or sell a property then there is a single transaction whereby in exchange for the price, the title to the property is transferred. The terms and conditions of the offer define the property for sale and what is to happen if the price is not paid on time. With a lease there is provision for an ongoing relationship between the Landlord and the Tenant and this inevitably makes the contract between the parties more complex. It is important that the lease is carefully examined to make sure that the tenant appreciates the extent of his obligations and receives no surprise demands from the Landlord.

2. REPAIRS

"It was like this when I took it over" - So What!

This is probably one of the most important clauses in the lease. However, it is also the clause which many Tenants give least thought to when they take on a lease. Most commercial leases include a full repairing and insuring clause. This means that the Tenant has full responsibility for carrying out all repairs to the property and also for paying the premium on the Landlords' buildings insurance policy. There can be variants on the standard style whereby the Landlord carries out certain maintenance, but nearly always he will recover any expenses he has incurred from the Tenant via a service charge. Where there are several different occupiers in one building it is more efficient for the landlord to carry out basic repairs to the structure of the building and to bill each of the tenants via the service charge. Sometimes where there is a short term lease (for, say, less than five years), Tenants have often been able to negotiate an internal repairing lease. In such a lease, the Tenant is only responsible for the maintenance of the interior of the subjects let. Where the Tenant benefits from a less onerous repairing obligation his rent will often be higher, but the great advantage for the Tenant is that their liability is limited and quantified. However, even in an internal repairing lease, the Tenant must take care to avoid taking any obligation to upgrade the property.

Another variant on the repairing obligation is an obligation on the Tenant to maintain the property in the same condition as at the date of entry. The classic full repairing and insuring lease means that the Tenant must give back the property to the Landlord in excellent order, regardless of its state at the commencement of the lease. This can be a very onerous obligation and therefore it should not be undertaken unless the Tenant fully appreciates what is involved. A detailed survey of the property is essential. If one adopts the lesser obligation of maintaining the property in basically the same condition as at the date of entry, then it is clearly important that a record of the condition is drawn up which can be referred to if at the end of the lease there is a dispute as to the condition at the commencement of the lease. Normally this will comprise a Schedule of Condition with photographs annexed.

3. DILAPIDATIONS

"You must be joking - it's unreal!"

This is an item which is becoming more and more important and which is one that can sometimes be a shock to the Tenant. While, technically in terms of most leases the Landlord is able at any time to come in, inspect the property and then serve on the Tenant a Schedule detailing all the items which require repair, in practice this most often happens at the end of the lease. The Landlord will inspect and then serve a Schedule which will probably deal with many different defects and wants of repair, some of which may not be the Tenant's responsibility. Tenants should never assume that everything on the Schedule is their responsibility and it is important that any Schedule is examined very carefully. If the lease is a full repairing and insuring lease, it is much more difficult for the Tenant to resist responsibility. It may also be the case that the original friendly Landlord may have sold his interest to a new Landlord who is only interested in making the most out of his property.

4. ALIENATION

"I am going to give up the lease and hand in the keys" - You can't!

This is a very important clause. The Tenant has no right to surrender his interest in the Lease unless he is granted a specific right so to do. The more usual provision is that, if the Tenant wishes to dispose of his interest in the lease, he must find someone to take it over. From the Tenant's point of view, an assignation is the most desirable option as the assignee assumes the full responsibilities of the Tenant under the lease and relieves the outgoing Tenant of their responsibility. However, assignations are not always easy to achieve and, in particular, if the tenant was a company or individual of substance, the Landlord may be very reluctant to accept anyone who is of lower financial standing in the place of the original tenant. To a certain extent an objective view must be applied. The Landlord cannot normally impose conditions for the assignation unrelated to the ability of the proposed Tenant to pay the rent and perform the Tenants' obligations of the lease. For instance, the Landlord cannot simply use the request for permission to assign as an opportunity to gain an increase in the rent. If the Landlord has good grounds for refusing permission

to assign, it may be still be possible for the Tenant to sub-let the property. This means that while the original Tenant is still liable to the Landlord in terms of the Lease he can seek to impose similar obligations on the sub-Tenant.

It is often the case in leases, that Landlords will attempt to introduce joint and several liability whereby the original Tenant continues to be liable throughout the lease, jointly and severally, with all future assignees. This, in fact, unlike the position that previously pertained in England, binds in not only the original Tenant but also every subsequent assignee. By statute, the situation has now changed in England so that the original Tenant does not have a continuing liability and there is no good reason why such a provision should be accepted in any Scottish lease. In our experience most landlords accept deletion of such a clause.

5. MONETARY PAYMENTS

"Have I to pay that as well?"

In addition to the rent, the Tenant should also be aware that they will have various other payments to make, including the local authority rates, insurance premium, the service charge, if any, VAT on rent and possibly the Landlord's legal fees. Given the current economic climate, it is normally possible to resist paying the Landlords' legal fees for the granting of the Lease, but it is usual for the Tenant to have to bear the Landlord's legal costs for approving any assignation or any other application for consent. The Tenant should also look carefully at any service charge. A low rent may mask a high service charge provision.

6. REASONABLENESS

"He can't do that - can he?"

Landlords always state that they will be reasonable. However, generally speaking, in Scotland, the law does not assume that a party will act reasonably unless it is specifically stated. There have been some cases which have given rise to the view that it may be possible to imply that reasonableness must prevail in certain circumstances. However, it is always better to make sure that the Landlord's discretion will be exercised reasonably by specifically declaring this to be so. This can be particularly important in connection with the approval of any assignee and also in connection with any change of use of the property. If an assignee wishes to use the property for a different purpose it is important that the Landlord cannot arbitrarily withhold his consent to such a change of use. The Landlord might wish to withhold consent for reasons totally unrelated to the lease, e.g. he has another outlet in the same business which might be adversely affected by competition for trade. If the Landlord's consent is qualified that it is not to be unreasonably withheld, the Tenant might well be able to argue that it was unreasonable for the Landlord to withhold consent on that basis.

7. TIME

"I was only a few days late"

Generally speaking, time should always be regarded as of the essence. There have been various cases in connection with Rent Reviews, which have indicated that even if the tenant or the Landlord is late in serving notices, unless time is made specifically of the essence then it may be possible to redeem the situation by serving an appropriate notice late. This should never be relied upon and it should always be assumed that timescales laid down in the lease must be strictly adhered to.

While there might be some argument that latitude be given on timescales in Rent Reviews, there is absolutely no doubt that both break clauses and the termination provisions for non-payment of rent are very strictly construed. If a formal Notice is served demanding that arrears of rent are paid within fourteen days then the Landlord is entitled to terminate the Lease if they are not paid within the fourteen days, even though they may be proffered on the fifteenth day. This may seem unfair but as the decision was made by the House of Lords, it is undoubtedly now the law. Accordingly, Tenants cannot be advised too strongly that if the Landlord serves a Notice threatening to terminate the Lease then if it is not strictly adhered to, the Landlord may indeed be able to terminate the Lease without any compensation for the Tenants.

8. TERMINATION OF THE LEASE

"But the lease has ended - or has it?"

Contrary to many people's view, the Lease does not automatically terminate at the end. It is necessary for either the Landlord or the Tenant to serve Notice on the other indicating that they are intending to end the lease. If nothing is done, the Lease continues on a year to year basis. Forty days' Notice is the safe minimum period of Notice although a longer period of notice may be desirable.

This is a brief summary highlighting some of the salient features that Tenants can encounter when leasing property. By its nature, it is inevitably general and is no substitute for obtaining advice on any individual Lease from a Solicitor. While it has been carefully prepared and is thought to actually reflect the Law as at the date of preparation, Balfour + Manson LLP accept **no liability** in respect of any of the items stated herein where they are not specifically advising a Tenant in connection with a specific Lease.