



bulletin

Retail – January 2010

Keep the legals simple and focused – and save fees!

As a retailer taking a new unit, are you getting what you want from your lawyers? You expect:

- value for money;
- a commercially negotiated lease;
- the transaction undertaken for a fixed fee; and
- completed within your timeframe.

Read on and see if your lawyers are delivering...

As a commercial law firm, we carry out retail leasing work for both landlords and tenants. When acting for landlords, we see so many cases of tenants' lawyers over complicating and delaying transactions by focusing on issues in leases which are not important, and sometimes missing the issues which are important!

All this does is lengthen the time it takes to get the lease signed, and more importantly for the client, increase legal costs. The key consideration any law firm should adopt when acting for a retail tenant taking a new lease is simplicity! The legal process does not need to be lengthy or costly - provided things are kept as simple as possible.

It is essential to always bear in mind the main aim of the exercise, which is to ensure that the tenant ends up with a lease which:

- provides maximum sale flexibility - the tenant wants to know that it can assign or sublet the lease (or sell its business) in the future without the buyer's lawyers focusing on any problems with the lease;
- provides maximum operating flexibility - the tenant wants to know that it can operate from the unit

without undue interference from the landlord and carry out alterations/refits without the landlord imposing unreasonable conditions or being able to withhold consent;

- does not contain any onerous or unusual terms; and
- is not going to penalise the tenant at rent review because it contains an unfair/onerous rent review clause.

It is the job of the tenant's lawyer to achieve this objective. To do this, there are only a few major areas which need to be addressed:

- Check that the lease reflects the Heads of Terms - correct rent, term etc. This sounds obvious but we have seen many cases when acting for a tenant where the landlord's lawyer has inserted the wrong rent into the lease.
- Check that the alienation provisions give the tenant maximum flexibility to assign/sublet, without any onerous or unusual provisions. For example:
 - ideally, the outgoing tenant should only have to give an authorised guarantee agreement to the landlord if reasonable - rather than as an absolute requirement; and
 - the covenant test to be satisfied by the incoming tenant on an assignment should simply be its ability to pay the lease rents, rather than have to comply with any profit or other test.
- Check the user provisions. For retailers, check that the tenant can change use easily within Class A1 and that there are no unusual or onerous conditions attached to landlord's consent which would make it difficult for the tenant to change use.

Normally a change of use is only required on an assignment - by the incoming tenant. It is obviously very important that it can do so easily - otherwise the assignment may fall through.

- Check the rent review clause and ensure that the hypothetical premises/term and user reflect the terms of the lease and that the rent review clause is standard. What the tenant does not want is any artificial or unduly wide assumptions which could have the effect of inflating the rent at review – for example an assumption that the use is an open A1 use when the actual use in the lease is restricted to a card shop.
- Check the service charge provisions to ensure that they comply with the main elements of the Code for Service Charges in Leases.
- In a shopping centre lease, do not waste time in deleting large parts of the service charge clause or deleting items from the list of services which the landlord is providing. These provisions will be standard throughout the centre and the landlord is unlikely to allow deletions.
- Check the insured risks - is terrorism covered? Why is this such an issue?

If this issue is not properly addressed the worst case scenario may be that:

- the centre/building in which the unit is located is destroyed by an act of terrorism;
- the landlord's policy does not cover terrorism and the landlord has not insured against terrorism;
- the lease does not contain the relevant provisions to protect the tenant;
- the tenant is liable to pay rent on a unit which it cannot occupy;
- the landlord attempts to recover the cost of repairing the centre through the service charge.

That is of course the worst case scenario and is unlikely to ever happen - but why take the risk in your lease?

Therefore, if terrorist damage is not included as an insured risk, include the relevant uninsured risks provisions in accordance with industry norm.

Over the past few years we have seen an increase in the attention which tenants' lawyers focus on terrorism, and how the lease deals with it. A form of wording has developed within the industry, which protects the tenant, and will normally be accepted by most landlords.

- Check that there is a tenant break option at the end of the rent cessation period where there is damage to the building. Otherwise, the tenant may have to pay rent on premises it cannot occupy!

As for other provisions in the lease, we are not saying that these should be ignored completely, but they will normally be of a standard nature and as long as the

lawyer has checked that they are standard there is no need to waste a great deal of time in amending them. Examples of such clauses are:

- tenant's covenant to comply with planning provisions;
- tenant's covenant to comply with statutory requirements;
- rights granted to tenant;
- rights reserved to landlord.

Adopting the above guidelines should lead to quicker lease negotiations and therefore keep costs down, but most importantly the tenant should not be in any worse position.

How much should this cost?

By focusing on key areas, and not wasting time on deliberating unimportant lease provisions, legal fees should be kept to a reasonable amount. As a guide, for negotiating an Agreement for Lease/Lease in an established shopping centre, legal fees should be a fixed fee in the range £3,000-£3,500, plus VAT.

More information

If you would like to discuss any of the above points, or if you require assistance on any leasehold acquisitions, please contact Nigel Griffiths or Daniela Damiani in our Commercial Property team:



Nigel Griffiths, Partner
Bradley Court, Park Place, Cardiff. CF10 3DP
T: 01792 634 598, M: 07970 844463
E: nigel.griffiths@morgan-cole.com



Daniela Damiani, Solicitor
Bradley Court, Park Place, Cardiff. CF10 3DP
T: 01792 634 574
E: daniela.damiani@morgan-cole.com

This publication is © Morgan Cole and may not be reproduced without our express permission. Recipients may forward this publication and view, print and download the contents for personal use only. The contents must not be used for any commercial purposes and the material in this publication or any part of it is not to be incorporated or distributed in any work or in any publication in any form without the prior written consent of Morgan Cole.

Professional advice should always be sought where you require assistance in specific areas of the law. No responsibility can be accepted for any action based on these articles.