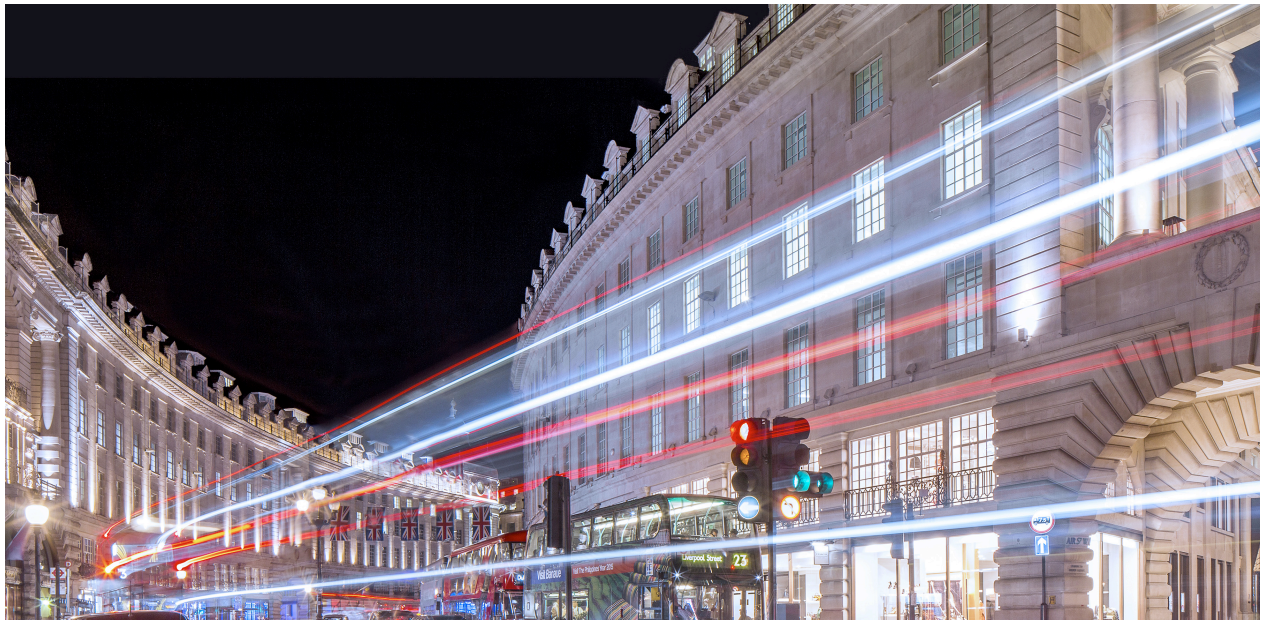


A helpful checklist for negotiating Heads of Terms for Commercial Tenancies



Negotiating terms for a lease of business premises can be a difficult experience, especially if you are unfamiliar with leases or inexperienced in dealing with landlords. It is therefore wise to seek out professional advice at an early stage so your advisers have the opportunity to negotiate the best possible deal on your behalf.

If you choose to go it alone, the following is a list of some of the key points which you will need to consider:

Paying too much rent? The only way is up!

Before beginning any negotiation, do your homework! As most commercial leases contain upwards only rent reviews after five years it is important to make sure that the property is not over rented to begin with.

We recommend that valuation advice is taken as early as possible to gauge whether the asking rent is reasonable. Otherwise, take the time to compare the asking rent with the rent payable for other similar premises on the market. Depending on the demand for the premises, you may find that the landlord is not only looking for a certain level of rent, but is also looking for additional security (e.g. the taking of a rent deposit, requesting a personal guarantor).

Rent deposit Vs Personal Guarantee

Depending on how long your company has been trading a well advised Landlord will often ask for some form of security to guarantee that you will perform your obligations under the lease. Put simply a rent deposit involves putting up a pot of money that the Landlord can dip into throughout the term if you fail to comply with your obligations whilst a personal guarantee will render you personally liable if your company fails to comply with the terms of the Lease – thereby negating the benefits of putting the lease into a company name in the first instance.

Whilst ultimately a matter of preference think carefully as to whether you would rather commit a defined sum by way of security or your personal assets.

How long am I committed?

The term (or length) of the proposed lease is important for both parties but perhaps more so to you as tenant. Without wishing to curb enthusiasm, it is worth considering a contingency plan in the event that the project does not work out as planned. Consider also your initial start up costs such as professional advice and fitting out costs in light of the length of the term. When budgeting do not forget that Stamp Duty Land Tax may be payable on the grant of the lease.

If you agree to a shorter lease, think carefully about how much of your budget you want to spend on improving premises which may return to the landlord sooner rather than later.

What can I do to the premises once I am there?

Few commercial properties are let on a “ready to move into” basis and most tenants will want to fit out the premises to their own specification and make their mark on it. Landlords are reluctant to permit tenants to carry out structural alterations to the premises as this could have adverse consequences for the value of their investment – so if you need to take down a load bearing wall it is best to raise this early on!

In addition do you need to install any plant (air conditioning, extraction, etc.) which may require cables and ducting to be run through the remainder of the Building? If so you will need to make sure you have adequate rights to install any necessary conducting media. Most Landlord’s will permit non-structural internal alterations with the Landlord’s prior consent, however, this can lead to an administrative burden whereby consent is required each time you want to put up a partition wall and often the costs of obtaining consent are to be paid by the Tenant.

One way around this is to specify alterations which will not require consent (installation of partition walls, air conditioning, racking or alterations to the shop front for example).

What happens at the end of the lease?

Having spent years building up the business you are unlikely to want to have to relocate at the end of the term. In most cases, business tenants which remain in occupation at the end of the term of a lease, have a right to call for a new lease of the premises at market rent but otherwise on terms no less favourable than those contained in the old lease.

You will likely find that if you are taking a short lease, the landlord will insist that this right is excluded. If this right is excluded and you want to remain in the premises, you will need to negotiate with the landlord for a renewal of the lease.

What about my fit out?

Having kitted the premises out Landlords often require all alterations to be removed at the expiry of the Lease which can be a costly exercise if you are looking to move to bigger premises or cut your losses if things haven't gone to plan. In addition some alterations may have improved the value of the premises (such as air conditioning or a new drainage system) and be costly to remove.

When negotiating heads of terms it is important to list any alterations which the parties agree do not need to be removed at the expiry of the term to make the transition as smooth as possible.

What if things don't go to plan?

If things start to go wrong, you may decide that it is time to cut your losses and walk away from the premises.

One way to do this is to negotiate one or more rights to determine (often called break rights or rights to break) the lease at a stipulated point. Break rights can be either fixed (can only be exercised on one or more stipulated dates throughout the term) or can be rolling (can be exercised on or after a certain date during the term). They can be expressed to be exercisable by either the landlord or the tenant or both. Beware of any conditions attached to a right to break as these conditions must be strictly complied with otherwise you can lose the right!

Are there any other ways to get out?

One other way to free yourself of unwanted lease obligations is to find somebody who is willing to take the obligations from you. You may also have a party who is willing to perform your obligations on your behalf as a subtenant.

The ability to assign (i.e. transfer) and sublet the whole or part of the premises is an important exit strategy for a tenant. Be wary of the landlord who prohibits you from doing this. Ideally, the lease will contain as much flexibility as possible for you to pass on your obligations although you will likely have to seek the landlord's consent before doing so.

In addition to the ability to assign it is important to have a wide permitted use under the lease (e.g. "use as a retail shop" as opposed to "use as a shop for the retail of woman's clothing and vintage crockery") so as to ensure that the number of people who may wish to acquire your lease is as wide as possible.

The premises are in a poor state of repair, who is responsible!?

Whilst slightly shabby premises may seem attractive due to the offer of lower rent, if you enter into a lease, you will likely take on an obligation to maintain the premises to a high standard, often better than the standard of the property at the date of the lease! If the premises have seen better days, you could agree with the landlord that you will keep the premises in the condition that they are in at the date of the lease, but no better – if this is agreed make sure a detailed photographic schedule of condition (not just a few quick snaps!!) is attached to the lease and referred to in the repairing obligations. Take care to inspect the state and condition of the property thoroughly and, if you have any concerns, have a survey carried out.

I have repaired my premises but the landlord is still asking for more...

If your premises forms part of a larger building, it is likely that you will be asked to contribute a proportion of the landlord's cost of maintaining the building. Care should be taken to minimise your service charge contributions. Try negotiating a yearly service charge cap with the landlord so that you at least know the maximum you may have to pay in a year. To avoid unpleasant surprises, you should also ask the landlord during the negotiations whether any significant expenditure is planned.

If you have any queries about this checklist or would like us to act on your behalf to negotiate and settle a commercial lease please call us on 020 7436 5151 or email us at info@cbglaw.co.uk