

LawWorks IHPBD

Property training session

24 April 2024

Types of property (1)

- **Freehold**

- Owned land, not time limited
- Usually registered at the Land Registry

- **Lease**

- Time limited interest in land – long (e.g. 99 years), medium (e.g. 35 years) or short (e.g. 3 years)
- Exclusive possession during the term
- Lease of 7+ years is usually registrable at the Land Registry
- Generally made in writing and signed as a deed (trustee + witness, or two trustees)

Types of property (2)

- **Licence to Occupy**

- “Licensor” and “Licensee”
- Temporary permission to occupy – not a lease or an interest in land and never registrable at the Land Registry
- Licensee has no exclusive possession
- Suitable for a short term or rolling arrangement of up to 12 months. For example, WeWork office agreement or a temporary exhibition space

- **Tenancy at Will**

- “Landlord” and “Tenant”
- Precarious agreement – Landlord can terminate at will (without cause and on short notice) so provides no certainty for the Tenant
- Suitable only for very short term use. For example, at the end of the term of the lease if the Landlord has allowed the Tenant to stay on for a few weeks, or while the form of lease is being negotiated and signed

Taking on a new lease (1)

- **Due diligence** of the property – Land Registry checks, searches, questions of landlord (Commercial Property Standard Enquiries)
- Negotiating a **Heads of Terms** – this first step could help to raise key issues early
- **Registration** – leases of 7+ years typically require registration at the Land Registry
- **Stamp Duty Land Tax** – calculated on the lease term and rents
 - Generally, charities are exempt from payment of SDLT provided that the property is being used for charitable purposes. However, you still need to submit a return (with no payment) if your lease exceeds the SDLT threshold

Taking on a new lease (2)

- Ensure compliance with **Charities Act** requirements
 - A specialist area of law
 - If you are a charity selling, leasing (as landlord), or mortgaging land there are procedural requirements to be met
 - A landlord charity must certify that it has power under its trusts to effect the disposition and that they have complied with the relevant provisions of the Charities Act (in particular that they have obtained an independent advisor's report confirming (amongst other things) that the terms of the lease are the best that could be reasonably obtained for the charity)
 - For any charity entering into lease documents (whether landlord or tenant) certain statements must be included in the lease required by the Charities Act and the Land Registry

Taking on a new lease (3)

- Consider the **financial security** requirements of the landlord
 - Guarantor or rent deposit (3, 6, 9, 12 months)
- **Term** of the lease
 - Term length and certainty vs. flexibility
 - Landlord and/or tenant right to break early (subject to conditions)
 - Security of tenure under the Landlord and Tenant Act 1954
- **Rent**
 - Frequency of payment, for example quarterly or monthly
 - Will there be a rent review? If so, will the rent be reviewed on an open market or index-linked basis? How frequently will the rent be reviewed?

Lease provisions – Repair and Insurance

- The lease sets out all the responsibilities of the Landlord and the Tenant
 - The drafting varies from lease to lease and so must be closely checked
- Where the tenant has for example **one floor within a building**, the starting position is that:
 - The Tenant is responsible for repair and decoration of the **internal** parts of their premises
 - The Landlord is responsible for maintaining the **structure** of the building and any external common parts (e.g. estate car park, landscaping), the costs of which the Tenant pays through service charge (so, ultimately still at the Tenant's cost)
 - The Landlord **insures** the building and the Tenant's premises (but not the Tenant's contents), and the Tenant repays the Landlord the cost through an insurance rent (so, ultimately still at the Tenant's cost)

Lease provisions – Repair and Insurance

- A typical lease repairing obligation states that the Tenant must keep its premises in “**good repair and condition**”
 - This is interpreted as a requirement to **put and keep** in good repair – i.e. the Tenant is required to return the property to the landlord at the end of the lease in a good state, even if it was not in a good state at lease commencement
- If you are negotiating a new lease, try and agree that this “good repair and condition” obligation is **limited** by reference to a **schedule of condition**
 - Photos are taken of the premises at the lease start date, which are collated into a document which is appended to the lease
 - At the end of the term of the lease, the premises do not need to be returned to the Landlord in any better state than shown in the photographic schedule of condition – this limits the Tenant’s obligations for pre-existing repair issues

Lease provisions – Service Charge

- Where the Landlord provides services to a multi let building or estate, typically an annual **service charge** will be paid by the Tenant
 - For example, the service charge might cover: hot water, heating and ventilation, receptionist/building manager, maintenance and repairs of common parts (internal and external), landscaping
- The Landlord typically prepares an annual budget in advance of planned expenditure. The Tenant pays the service charge quarterly in advance (alongside rent) on the basis of this budget and at the end of the year is a reconciliation of the budget against actual expenditure.
- When negotiating a new lease, try and agree a **service charge cap**
 - This limits the annual service charge payable by the Tenant to the agreed amount

Repair issues during the lease term

- Check the lease **definition** of the **premises**:
 - Is the area of disrepair within the premises let to the Tenant? If so, you are responsible for repair
 - Or, is it in a separate area owned by the Landlord but which the Tenant has a right to use (for example, common parts)? If so, the Landlord may be responsible for repair
- Check if the terms of the lease **require the Landlord** to maintain the area: usually this is found in the services clauses
 - Note that you may still need to contribute to the cost of repairs
 - If not, and the premises is not let to the tenant, the landlord may face potential liability under the Occupier's Liability Act which imposes a duty of care on the landlord (in respect of unlet areas) to all lawful visitors to ensure that they are reasonably safe for the purpose for which they are on the premises

Exiting the lease early

- Check the lease for any **contractual break right**
 - Who has the right to break – Landlord and/or Tenant
 - When is the break date (specific date(s) or rolling)
 - What conditions must be met? Any break payment?
 - Accurate service of the break notice, in accordance with the lease terms, is crucial
- Consider **assignment (transfer)** or **subletting** to a third party
 - Usually will require landlord consent (not to be unreasonably withheld or delayed)
 - Other conditions are likely to apply, set out in the **alienation** or **dealings** clause of the lease

Exiting the lease early

- Consider approaching the Landlord for agreement to a **lease surrender**
 - There is no general Tenant right to surrender the lease early
 - The Tenant must rely on open negotiation with the landlord to agree terms of the surrender
 - May require payment of a surrender premium, which may be substantial

At the end of the lease term – renewal?

- The starting position at law is that most commercial leases will benefit from the **security of tenure** provisions set out the Landlord and Tenant Act 1954
 - This means that, at the end of the lease term, the Tenant has a statutory right to request a renewal lease, which the Landlord can only oppose on certain limited grounds. The Tenant is entitled to compensation in the event that the Landlord successfully opposes the renewal
- In the current commercial rental market, many new leases are ***contracted out*** of security of tenure (by agreement between the Landlord and Tenant)
 - This means that, at the end of the lease term, the Tenant does not have a right to remain in the property and must rely on open negotiation with the Landlord for a new lease
 - There are some procedural steps to contracting out: service of a “Warning Notice” by the Landlord and swearing of a statutory declaration by the Tenant

Business rates

- **Mandatory rates relief:** If you are a charity and your premises is wholly or mainly used for charitable purposes, you can claim an 80% reduction in your rates bill
 - Supreme Court *Nuffield Health* case in 2023
 - You can backdate mandatory relief claims for the last 6 years
- **Discretionary rates relief:** You can further apply for discretionary relief in respect of the remaining 20% (but the grant of this additional relief is uncommon)
 - If you are not eligible for mandatory relief you may still be able to claim up to 100% discretionary relief
- For **complex matters** (for example, challenging rateable value) consider whether your charity may benefit from rates advice from a specialist: some will act on a pro bono or reduced fees basis