

Commercial leases in Guernsey: what should tenants watch out for?

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In any lease negotiation, a prospective tenant's focus will be on securing the correct space, where the rent and term are both acceptable and suitable. Aside from agreeing on these principal terms of the lease, there are other important matters to consider. A prudent tenant would be well advised to keep these matters at the forefront of their mind when entering negotiations for a commercial lease.

Repair obligations

Foremost, it is critical to agree the basis of the tenant's repairing obligations. What is fair and reasonable will depend, to a large degree, on the space.

For "grade A" office space, a landlord will expect a full repairing and insuring lease (**FRI lease**). A FRI lease requires a tenant to keep the premises in "good and substantial repair and condition". Such an obligation will encompass renewing and replacing any part, or parts, of the demised premises that are no longer in the requisite "good and substantial condition". In the case of FRI leases, a potential tenant needs to have a good understanding of the current condition of all the component parts that make up the "demised premises". Even if any part requires replacing or renewing on day one, it will likely be the tenant's responsibility under an FRI lease.

Limiting repair obligations

Where premises can be regarded as secondary, or "grade B" in quality, it would be reasonable for a tenant to consider limiting any agreed repair obligations, whether "good and substantial" or "good and tenantable", by reference to a photographic (and, preferably, also written) schedule of condition. Provided the schedule of condition is comprehensive and annexed to the lease on the commencement date, it should serve as evidential protection to the tenant. It shows the landlord that the tenant has no obligation to keep the premises in any better state of repair or condition than already evidenced in the schedule. From a landlord's perspective, the schedule must be

comprehensive and detailed (in writing and photographs, as noted above), as any ambiguity to the state or condition of what is noted in the schedule will most likely be construed in favour of the tenant.

Extent of the demise

It is also important to pay attention to what is said to form part of the demised premises. Generally, the premises will be defined to specifically include the "landlord's fixtures and fittings" and/or "plant and machinery". This item category will encompass heating and cooling equipment, for example, air conditioning plants and equipment. At the negotiation stage, it is open to a tenant to seek to limit its obligations for such equipment, particularly where that equipment may be nearing the end of its working life. Possible mitigations include carving out the equipment from the definition of the premises or assigning responsibility for the renewal and replacement of such equipment where it becomes "beyond economic repair".

Service charge

Another area of exposure a prospective tenant should consider is the service charge. Typically, the service charge is established to minimise the risk of a landlord having to make up any shortfall out of their pocket - which is not unfair. However, this does expose tenants to the possibility they will have to pay for things they did not expect. Again, various possible mitigations could be explored at the lease negotiation stage, including agreeing on specific carve outs and possibly a capped liability to the service charge.

A focus on a fair delineation of responsibility as to parts of the demised premises for which the tenant and landlord are responsible should serve to reduce any unforeseen exposure to costs of replacement and renewal during the term. Also, and importantly, to any terminal dilapidations at the end of the lease. Dilapidations claims can easily run into hundreds of thousands of pounds for leases of sizeable commercial space. So, it is always prudent to pay close attention to repair obligations from the outset of negotiations, seeking appropriate advice where necessary. Taking early advice from a commercial property legal specialist before heads of terms are agreed upon gives the tenant a further opportunity to protect their position. Although heads of terms are not legally binding, it can be difficult to reopen negotiations further down the line once agreed.

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