

Leasing

Some things to consider when negotiating a lease

Gross rent and net rent

Gross rent usually means the tenant pays rent only and all other costs including rates are borne by the landlord. Net rent means the tenant is responsible for certain costs such as rates and insurance in addition to paying the rent. Tenants usually benefit from negotiating a gross rent.

Length of lease

Always seek a very long lease and break it into rights of renewal.

For example, a hairdresser might try to negotiate a 21 year lease broken into seven rights for the hairdresser to renew the lease. In this way, the tenant has control and can bring the lease to an end at the conclusion of any three year period. Do not confuse this with rent reviews.

The 21 year lease having seven rent reviews will tie the tenant to the premises for 21 years.

Tenants can ask for any combination of rights of renewal they wish. Those starting in business might prefer shorter initial periods.

Rent Holiday

Landlords sometimes have to entice tenants. There are many devices used. One of them is to offer a rent free period if the tenant is prepared to pay merely the rates. Another is to provide fully carpeted and partitioned space. Tenants should be on their toes and ready to ask landlords to help them out with establishment costs in exchange for becoming tenants.

If you can set up your business in such a way that you can move it, you will find your negotiating position at the right of renewal stage much stronger.

Arbitration Clause

Don't have a bar of it. It involves paying a valuer and turns out to be an expensive process. Have the lease changed to provide for alternative disputes resolution and provide for a pendulum clause (see below). Alternative disputes resolution should prove to be cheaper than arbitration.

Assignment

If you were to sell your business, would you continue to be responsible for the rent? Usually this is the case. Have a clause in the lease, which releases you from paying rent if you assign the lease. The landlord will be concerned in case the new tenant is not as secure as you. Therefore, the clause will need to be worded to provide reasonable protection to prevent you assigning to a person or company, which has no substance.

Burglary

Try to put as much of the responsibility for burglary on to the landlord. Build this into the lease document. Look round the premises and see where burglars might be able to get in and require the landlord to take reasonable steps to prevent this. Consider asking for burglar alarms and a monitoring system as part of the package.

Caveats

Some leases provide for a clause preventing the tenant from registering an interest in the property. It might be prudent to delete this clause.

Climate control

If you are renting air conditioned space check its efficiency and also for any health risks.

Competing tenants

Ensure there is a clause in the lease preventing the landlord from offering space to a competitor.

Default interest rate

If you can't pay the rent don't make the situation worse by agreeing to a default interest rate.

Demolition clause

Sometimes landlords want their premises for demolition and rebuilding. Make sure any such clause is fair to you, as tenant. How about some compensation for relocating? What other costs will you incur and how much time will you need?

Elevators

If you are renting in a multi story building check how long it takes to get from the ground floor to your office and vice versa, particularly at rush times.

GST

Ensure it is clear as to whether you are paying your rent GST inclusive or exclusive.

Insurance

There is a wide range of possibilities for insurance. Consider indemnity value of property, replacement, loss of rents and so on. Also consider the various policies insurance companies offer and the wide variety of premiums available. If the landlord chooses the insurance company, premiums might be higher than the tenant's choice, and this may not suit a tenant who has agreed to pay the insurance.

If there are other tenants in the building make sure your share of the insurance premium is not paying for **their** business activity: for example, if another tenant is operating a joinery business on the premises and there is no approved fire wall between the joinery area and other tenants, the whole building will be insured at the rate for joinery and this is very high. It is normal for all tenants to pay outgoings on the basis of area occupied. Likewise, if there is one water meter at the premises and a tenant who uses vast quantities of water, all tenants would be equally liable for the cost of water used. Negotiate to pay any outgoings on the basis of "standard" use, not exceptional use.

Where possible, have the landlord responsible for paying insurance. If not, try to maintain control. Don't hand your landlord a blank cheque for insurance.

Limited Liability Company

If you have a limited liability company, sign the lease in the name of the company. Avoid giving your personal guarantee. If you cannot avoid this, negotiate a time limit or dollar value limit for the guarantee. The one time you cannot do this is if there is a big demand for the building you want to rent.

Maintenance

Make sure the landlord is responsible for maintaining the exterior of the building in good repair.

Nuisance

Beware of possible nuisances in the form of noise, bad odours and so on.

If there are other tenants on the premises, be careful that the access to your premises is not affected by the activities of those other tenants for example, large delivery trucks to the next door tenant, blocking your doorway.

Partial or total destruction of building

Read this part of the lease carefully and make sure you are fully protected. Ensure you will not have an ongoing obligation for rent of premises you cannot use.

Partitions, carpets

Internal fitments may not belong to the landlord. Find out whether you have to buy these in addition to paying your rent.

Pendulum clause

There can be very significant differences in valuations. Often valuers for the landlord value the rent higher than valuers for the tenant. Agreements which have a pendulum clause work as follows:-

The tenant states his/her opinion of how much the rent should be. The landlord does the same. The arbitrator then says what the rent should be. The lease agreement then provides for the rent to be either the landlords figure or the tenants figure, whichever is closer to the arbitration figure.

The effect of this is for tenant and landlord to have to be fair. Both figures are therefore likely to be close. There is then a much better chance of compromise and considerable cost saving as a consequence.

Ratchet Clause

Landlords will usually include a clause saying the rent cannot go down. Be sure to either delete this or, at least, negotiate something acceptable to you. My landlord has agreed to a reduction in rent if there were a negative CPI of more than 2%.

Security

Consider not only the premises but also the parking. If you have female staff, can they get to a car park safely if working late?

Signs

Make sure you have plenty of scope for putting signs on the building so you are as visible as possible to the public. Obtain an undertaking to prevent other tenants putting up signs which may obscure yours.

Suitability

"No warranty or representation expressed or implied has been or is made by the landlord that the premises are now suitable or will remain suitable for adequate use by the tenant or that any use of the premises by the tenant will comply with the by laws or ordinances or other requirements of any authority having jurisdiction." This clause is taken directly from a deed of lease document, prepared by the Auckland District Law Society 1993.

Surely, tenants should always delete a clause, which reads like this.

The Building Act 1991

Ensure you are not made responsible for costs of compliance.

The Lease

Usually leases are drawn up by solicitors for the landlord and the tenant pays. This is a ridiculous situation. If the tenant is going to pay, the tenant should insist on using his/her own solicitor.

Alternatively, make the landlord pay or arrange for sharing the costs, preferably on the basis that your own solicitor will prepare the document.

Read the lease carefully. Make sure you understand it and insist on altering anything you don't like.

Valuers

Beware valuations. When I negotiated my lease I offered approximately 2/3 rds of the amount the valuer said the space was worth and my landlord accepted.

The time honoured advice of shopping around applies particularly to leasing.

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