Lessons on a lease by a litigator: “Things I wish I’d known before I signed…”

“As a litigator, I regularly act for landlords or tenants where disputes have arisen in relation to their commercial lease and only too often I hear phrases like “I wish I’d known my lease said that” or “I wish I had insisted on including that provision in my lease.”

This series of short articles picks up on some of these common misconceptions and oversights and highlights points which both landlords and tenants should be aware of before signing their lease.

Lesson 1: The obligation to keep the premises in repair

Today, I am looking at the common obligation on a tenant to “keep its premises in good repair and condition”.

A premises is in good repair where its physical condition has not deteriorated, i.e. where nothing is broken, damaged or missing, there are no cracks or holes, and where everything is weather-tight.

This provision often comes into play at, or just before, the expiry of the lease term when the landlord claims that the tenant has not kept the premises in good repair (known as a claim for dilapidations) and the landlord is entitled to damages. Faced with a schedule of dilapidations served by its landlord, an all too familiar question from a tenant is “surely I don’t have to repair that item as it was already damaged or broken when I took on the premises and it is in no worse state now?”.

Sadly, in the absence of any express limit on the repairing obligation, case law confirms that an obligation to keep a premises in repair includes an obligation to put the premises into repair if it is in disrepair at the start of

the lease. The rationale behind this is that a tenant cannot perform its covenant to keep the premises in repair unless it first puts the premises into repair.

What can the tenant do?

To avoid this situation, the tenant should inspect the premises for disrepair with a surveyor before taking on the lease. Where the premises are found to be not in good repair, the tenant should then seek to limit its repairing obligation to keeping the premises in the same state as they were at the grant of the lease.

If the landlord will agree to limiting the repairing obligation in this way, the parties will usually agree a photographic schedule of condition (showing the state of the premises at the date of the grant of the lease) and this should be signed by both parties and annexed to the lease. The relevant provision of the lease can then be extended to add wording along the lines that "*the tenant shall not be required to put the premises into any better state of repair or condition than it was in at the date of this lease as evidenced by the Schedule of Condition*".

Alternatively, if the landlord is not prepared to limit the repairing obligation, the tenant should assess the potential costs to put the premises into good repair and seek to negotiate a deal on any premium or the rent payable under the lease to allow for the cost of remedial works.

Find out more

This is the first in a series of lessons for tenants and landlords in relation to the provisions of a commercial lease. The next lesson will be looking at how a landlord can ensure that the terms of the lease allow it to recover all costs it may incur where a tenant is in breach of covenant.

If you require any further assistance or advice in relation to commercial lease disputes or negotiating commercial leases, please contact our property disputes team.

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