

# shops & offices

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## **Introduction**

Our Shops & Offices factsheet provides information covering a broad spectrum of legal issues relating to the use and ownership of commercial premises with links to other related factsheets which may be of interest.

## **Air space and subsoil**

Unless specifically excluded from the lease, the air space and subsoil are deemed to be included within the property. Where the property is defined to be the interior then it is clear that the air space above and subsoil beneath cannot be included. Very often on a lease of a whole building there will be specific provisions excluding these from the extent of the property. This would impact on the Tenants ability to say erect signage or install air conditioning units on a roof or wall. If the airspace is excluded then this would amount to trespass. If it were included, all that would be required would be Landlord's consent.

## **Assignment**

A lease will often include the right for a Tenant to assign the lease. An assignment is effectively a transfer to a new owner, and as with a house sale, a sale price can be agreed. The lease will set out any conditions that need to be satisfied before an assignment can occur such as obtaining the Landlord's prior consent.

## **Auctions**

Buying a property at auction can be fraught with difficulties. A pack should be available before the auction as of course once the hammer falls the contract is binding. With agricultural land care needs to be given as to whether there are any footpaths crossing the land any environmental issues, and whether there are any discharge consents etc. Land may be put into auction because the seller is under a duty to obtain best price such as a mortgagee or an executor, but it might be in auction because there is a problem with the title.

## **Break clauses**

At the time the lease was granted a clause allowing the Tenant to bring the lease to an end early may have been negotiated and this is known as a "Break Clause". Usually a clause of this type will provide for the right for the Tenant to end the lease at a given date provided he has given the Landlord requisite notice and has complied with his obligations in the lease up to that point. There may be further conditions attached such as payment of a premium.

## **Business Leases**

Business leases come in a wide variety of forms, usually dependent on the length of the term and the proposed rent. They all follow the same general format although institutional leases i.e. leases which are suitable for institutional investors usually contain much more detailed provisions. The lease will include details of the landlord, the tenant, the rent, obligations on the part of the tenant, obligations on the part of the landlord and some general provisions. There may be provision for the rent to increase or a provision for either side to bring the lease to an end early. In the main business leases fall within the provisions of the Landlord & Tenant Act 1954 allowing the tenant to ask for a new lease at the end of the term (see [Renewal](#)).

## **Buying Commercial Property**

The following is a check list of matters to consider when buying commercial premises and instructing solicitors:

### **Funding**

- Is funding in place or an offer made in principle? Are funds available at short notice to pay a 10% deposit? Have you considered Stamp Duty Land Tax payable?

### **Tax**

- Are you being separately advised as to the tax consequences and trading structures?
- Are you registered for Vat?

### **Fixtures and Non Fixtures**

- What fixtures do you expect to acquire?
- Is there any machinery, ornaments, etc that you expect to acquire?

### **Environmental Matters**

- Are you aware of any environmental matters issues?

### **Employees**

- Are you expecting to take over existing employees?

### **Future Development**

- Are you expecting to pay any additional sums to the seller should you obtain any new planning permission for all or part of the property?

### **Inspection**

- Have you inspected the site, checked for footpaths, and other evidence of use by third parties?
- What way does the land run – is surface water likely to run on adjoining land or into ditches?

## **Chancel Repair Liability**

While there is no definitive register stating whether a property is liable to make a payment, a search can reveal whether it is located in a parish which could charge for repairs. Insurance can then be obtained to cover any potential liability.

From October 2013 Chancel Repair Liability will only affect buyers of properties if the liability has been registered at the Land Registry. Churches have until that date to register their right to recover any money otherwise the right is lost.

## **Conditional Contracts**

A conditional contract is an agreement or contract conditional upon a specific event, the occurrence of which, at the date of the agreement, is uncertain. A common example is a contract conditional upon the buyer getting planning permission.

This simple explanation belies the complexity of the drafting involved in the preparation of such agreements which often relate to very valuable land or buildings. Poorly drawn documents can result in substantial loss.

## **Dilapidations**

Dilapidations is the legal term where a tenant has not complied with the obligations as to repair and decoration in the lease and items need to be remedied. The lease will usually allow the landlord to serve notice of dilapidations on the tenant and where the tenant fails to carry out those works within a specified period the landlord may then carry out the works at the tenant's cost. A landlord may also serve a Schedule of Dilapidations at the end of the lease based on how much it would cost to put the property back into repair. A landlord will usually have the right to forfeit the lease for breach of covenant but must first go through a statutory procedure. It will usually fall to surveyors to argue dilapidations and the costs of repair.

## **Forfeiture**

A lease will usually provide for the Landlord to be able to forfeit or terminate the lease in certain circumstances. Where the Tenant has not paid rent as defined in the lease after a specified period the Landlord may be entitled to peaceably re-enter i.e. take back the property which amounts to a forfeiture. If the Tenant has not complied with other covenants in the lease then the Landlord must serve notice after which he is entitled to go to court to seek possession. A Tenant may be entitled to seek relief from forfeiture which would involve the Tenant putting the Landlord into the position he should have been had the lease been complied with in the first place. There may be provisions in the lease for the Tenant's insolvency to trigger forfeiture. Mortgage companies who have charges secured on a leasehold property are very concerned about forfeiture provision as their security could be prejudiced and will usually require provision in a lease providing for prior notification by a Landlord of the intention to forfeit to allow the mortgage company to step in if needs be.

## **Industrial Parks**

Whether you are buying or selling a whole park or a unit on an industrial park or taking a lease a number of factors need to be considered such as contamination, planning and infrastructure agreements. Individual leases and purchases are also likely to

involve site service charges for running the common areas on the site. There are taxation issues to consider on any disposal and the availability of any reliefs or allowances such as Industrial Buildings Relief and Capital Allowances.

## **Insurance**

A lease will usually oblige a Landlord to insure the property or a whole building if the property forms part and recover the cost of insurance from the Tenant. Very often this will specifically be reserved as rent, is known as "Insurance Rent", and will be payable in the same way as the rent itself. The lease will set out the risks that the Landlord is to insure against but it should be noted that any plate glass will usually fall to the Tenant to insure. The lease will usually specify an additional sum for a specific period's loss of rent such as 3 years. (see [Rent Suspension](#)).

## **Landlord's Consent**

Where a tenant wants to do something under the lease, such as carry out alterations, sell, or sublet, he will very often require the consent of the landlord. A landlord may be under a duty to act reasonably in considering the grant of consent and this depends on the wording of the lease. If the landlord is not under a duty, then he has absolute veto, although there are certain circumstances, most notably in the case of alterations where legislation intervenes. The lease will often stipulate certain terms before consent is given, usually in the case of an assignment or subletting. The landlord is under a statutory duty to consider such applications fairly and objectively and a failure to do so could lead to a claim by a tenant for losses that may have arisen because of the failure to give consent.

## **Options**

An option is the right to require a party to buy a property (a 'Put' option) or the right to require a party to sell a property at a given time in the future (a 'Call' option). An option agreement will involve an option period where the party with the benefit of an option can call on the other party to either sell them the property or to buy the property from them at a price and on a given date. If that right is not exercised within the option period then the option lapses and both sides are back to the position they were in before the option was entered into.

Once granted an option is usually registered at the Land Registry against the relevant title to put any interested party on notice that there is an option in place. A bank which has a mortgage over a property needs to be put on notice of the option otherwise they can sell free of it, if it post dates the charge.

## **Partnership & Companies**

Businesses can incorporate as limited companies or limited liability partnerships (LLP's) or remain unincorporated, as sole traders or traditional partnerships. The principal legal benefit of incorporation is that the business is a separate legal entity, distinct from its owners, and is liable for its own debts. This means that the share holders of a company or members of an LLP are usually only liable up to the amount of their investment in the capital of the business i.e. what they paid for their shares or membership.

By contrast, a sole trader or partners in a business are potentially liable to the extent of the whole of any personal

assets including, for example, their homes. Personal liability is not limited to their share in the partnership and each partner can be sued for all the debts of the partnership. This is known as “joint and several” liability.

LLP’s are a new business format which is a hybrid between a partnership and a limited company. They are designed to protect the partners from personal liability or have been formed by larger businesses or groups looking to carry out joint ventures or risky trading activities.

Individuals can trade as a sole trader without any formal registration or ongoing reporting obligations. Similarly, no formal documentation is required to trade as a partnership although a properly drawn partnership agreement is strongly recommended.

Companies and LLP’s are though saddled with annual reporting requirements to Companies House.

## ***Licence to occupy***

A licence to occupy is a short term arrangement where an occupier is given permission or “Licence” to stay in a property on certain terms. The key to a licence is that it is capable of being brought to an end and its possession cannot be exclusive. A licence fee will be payable and the obligations on the part of the occupier will be relatively relaxed compared to a lease. A licence to occupy is a personal right and not an interest in land so Stamp Duty Land Tax is not payable.

## ***Mortgages and Security***

Lenders will normally want security for any lending they make whether to individuals or businesses. This can range from guarantees to charges, mortgages and in the case of companies, debentures. The security will often be taken over land, whether freehold or leasehold, but in a commercial context can be over fixtures, fittings, equipment, machinery and intellectual property rights like patents and designs. Usually the security will be heavily weighted in favour of the lender and in some cases may prejudice the flexibility of the borrower to run his business.

Commercial projects will often require financing from more than one lender and this will involve multiple charge forms and other security documents such as deeds of priority or postponement.

## ***Multiple purchases and sub-sales***

We have experience acting for clients who wish to buy all or a large number of properties on a new development either for the purpose of letting or for immediate re-sale. Such purchases not only require the same level of attention to detail as if the whole site was being acquired for development (see [Site acquisition and development](#)) but also preparation, where appropriate, of bespoke sub-sale contracts. Such transactions often involve acting simultaneously for a lender who may be financing the acquisition.

## ***Renewal***

The renewal of a business lease is likely to be governed by the Landlord & Tenant Act 1954. Upon expiry of a lease the tenant is entitled to remain in the property until the statutory procedure has been concluded. Notice needs to be served by either the landlord or the tenant to invoke the renewal process. Once invoked, the ultimate decision as to whether a lease is to be granted and its terms will fall to the court to decide unless

the parties can agree in the meantime. The landlord can only oppose the grant of a lease on certain grounds specified in the Act. In some situations where the landlord is successful in opposing the grant, the tenant is entitled to statutory compensation based on the rateable value of the property. The parties may choose to bypass or contract out of the statutory procedure but this must be done before any lease or agreement for lease of the building is entered into.

## ***Rent***

Where a lease is granted a rent will be payable by the Tenant to the Landlord. A specific sum will be stated as the rent and reserved as rent in the lease. Rent can also include other sums due to the Landlord and specifically reserved as rent such as service charges, insurance premiums and even VAT. The importance of any sums being reserved as rent is that the Landlord is entitled to take back the property by peaceable re-entry where rent has not been paid in accordance with the terms of the lease. The lease may well stipulate a rent commencement date which may not be the same date as the date of the lease. Where the rent becomes payable after the date of the lease then this reflects a rent free period that the Landlord may have granted to the Tenant as part of the original deal.

## ***Rent Deposits***

If the landlord is uncertain of the financial standing of a tenant or proposed buyer of a lease he may ask for a rent deposit. A rent deposit is a sum of money lodged with the landlord to be held in case there is a non-payment of rent or other breach of covenant in the lease. Very often a separate document will be prepared documenting the terms of the deposit such as when it should be returned and what notice is required from the landlord before a deduction. The sum deposited usually equates to the rent payable under the lease such as 3 or 6 months rent. Residential rent deposits are now separately governed and cannot be held by a landlord.

## ***Rent Review***

A lease will very often contain provision allowing the rent to be reviewed at certain stages. Usually a review of the rent will not fall below the figure previously paid. There are mainly two types of review, a market based review and an index linked review. A market rent based review relies on rents being obtained on comparable properties which will give a range of potential rents which can then be whittled down to a final figure, whether by agreement or determination. An index linked review is a review whereby the rent automatically increases at a given date in line with inflation. Once the rent has been reviewed the lease will usually provide for a balancing payment to be made if the review date precedes the date the rent is agreed and determined being the difference between the old rent and the new rent plus interest in certain circumstances. The new rent will be documented by way of signed memorandum.

## ***Rent suspension***

Where a lease obliges the Landlord to insure there should also be provision for rent to be suspended where the property is destroyed or damaged by an insured risk. The Landlord will usually have insured for loss of rent, and that insurance pays the rent once suspended whilst the property is rebuilt or

reinstated. It should be noted that as soon as that period expires, the Tenant is immediately on the hook to pay the rent irrespective of whether he can actually occupy the property. A lease should include the ability for the Tenant to break the lease if the property has not been rebuilt or reinstated during the period that insurance is in place.

## Repair

A lease will include an obligation to keep the property in repair. What is key is the definition of the property. If the property includes the entirety, then the entirety must be kept in repair which will include structural walls and any roof. If the property is defined to be the interior, then the Tenant will only be obliged to keep the interior in repair which usually includes walls up to and including the plasterwork. An internal repairing lease should include provision for the Landlord to keep structural parts in repair with maybe the Tenant reimbursing a proportion of those costs. It should be noted that an obligation to keep a property in repair will include an obligation to put it into repair in the first place. Consideration should be given to capping any repairing liability by reference to a schedule of condition. (see [Schedule of Condition](#)).

## Rights

When a lease is granted very often there will be reference to rights benefiting the property. Such rights could be a right of support from other parts of a building, rights of way over an estate to get to the property, and rights to park in designated spaces. Once granted, such rights cannot be withdrawn unless expressly agreed by formal variation of the lease.

## Schedule of Condition

A lease will oblige a tenant to keep a property in repair (see [Repair](#)). If a property is in a bad state of repair a tenant should look to limit his repairing liability by reference to a Schedule of Condition. This is usually pictorial evidence of the state of repair and condition of the property at the time the lease is granted. Once in place the repairing obligation will provide that the tenant is not obliged to keep that property in any better state of repair and condition than is evidenced by that Schedule of Condition. The Schedule will then need to be kept with the lease or ideally bound into the lease so it cannot be mislaid.

## Selling Commercial Property

### Existing borrowing

- Is the price sufficient to pay off any mortgage? Are funds in place if not?

### Occupation

- Who is in actual occupation?
- Are there any tenancy agreements in place?

### Taxation

- Are you obtaining separate tax advice on the sale?
- Do you need to dispose of the property in the current or next tax year?
- Are you selling a business as a going concern?
- Do you need to charge Vat?

## Fixtures and Non Fixtures

- Are there any fixtures you intend to remove?
- Is all machinery and equipment fully owned by you?
- Do you intend to sell items not forming part of the property separately i.e. stock, and if so who will value it?

## Environmental Matters

- Are you aware of any pollution or contamination?
- Are you aware of any waste consents?
- Is an asbestos survey/Energy Performance Certificate required?

## Employees

- Do you have any employees and is it intended that the buyer takes them on?
- Do you wish to reserve the right to receive any share in future values following the grant of planning permission and if so for what period?

## Service charges

A service charge is an additional payment due under the lease in respect of services carried out by the Landlord. The Landlord may require a Tenant to contribute toward the maintenance of a building, the landscaping of common areas, lighting etc. A lease will usually set out the services to be provided in return for the payment of a service charge. Tenants will usually be obliged to pay sums on account and when accounts are prepared at the end of a financial year a balancing payment may be due, or if an overpayment has been made that may be set off against the following years charge.

## Signage

Shop leases will often have the right for the Tenant to install signage on the property with the Landlord's prior consent. The Landlord may have control over the type of signage, its colour, whether it is lit etc. However where the Tenants property comprises only the interior, the outside wall does not form part of the property therefore specific provision needs to be made to allow the Tenant to put up his signage on the outside wall.

## Site acquisition and development

It is essential when acting for a developer client in the acquisition of a property to consider all the key legal issues which may affect the ability to subsequently develop it. These include boundary issues, making sure that your client is not proposing to build outside the extent of the land he is purchasing; easement issues, making sure there are legal rights of access to the whole of the development; checking for ransom strips, pieces of land that lie between the development land and the public highway and which may be in separate ownership; checking restrictive covenants to make sure that development is not prohibited and making sure that planning consents and planning agreements are in place. These are few of the many issues which need to be covered as part of "Site Assembly".

We are experienced in acting for developers in the acquisition of land for development and the subsequent preparation for sale of the plots on the site.

## Stamp Duty Land Tax

Stamp Duty Land Tax ("SDLT") is the self assessment tax which replaced the old stamp duty for property purchases from December 2003. Historically, documents were "stamped" with the level of duty paid whereas now a Return must be sent to the Revenue with the appropriate tax payment. SDLT is calculated as a percentage of the purchase price ranging from 1% for purchases above £125,000.00 (£150,000.00 for commercial premises), 3% above £250,000.00, 4% above £500,000.00 and 5% above £1,000,000 from April 2011 (residential properties only). Certain reliefs are available. A purchase for £250,000.00 means tax of £2,500.00 whereas one penny over £250,000.00 means tax of £7,500.00. With commercial properties where VAT is paid on the price, SDLT is payable on the VAT inclusive figure – tax on tax. With leaseholds, the calculations become even more complex.

## Subletting

Subletting or underletting is where a Tenant under the lease grants a further lease to a third party. A lease will often exclude subletting, but may allow it where subletting is a letting of the whole of the property not just part. When subletting is permitted, the lease will stipulate the conditions that need to be satisfied such as obtaining Landlords consent. The sublease term must be less than the term of the superior lease otherwise the superior lease is deemed to have been assigned.

## Surrender

For whatever reason a Tenant may agree to surrender a lease back to the Landlord. A surrender can be implied by simply handing the keys back to the Landlord, but if the Landlord does not treat the lease as surrendered or act in such a way as would imply a surrender then there is no surrender and the Tenant remains liable under the lease. The safest way to effect a surrender is for all parties to enter into a formal deed which should make provision for a release of liability on all sides and the repayment of any over paid rent or service charge. The Landlord may require the Tenant to pay him a premium to accept the surrender, alternatively the Landlord may pay the Tenant a premium if he requires the property back. VAT may be chargeable on the premium depending on the VAT status of the parties.

## Use

It is imperative that any lease allows a Tenant to use the property for what he wants to use it for. A lease will contain a clause stipulating the proposed use which is known as a "User Clause". A shop or office lease may allow a general use as a shop or office but not permit other uses where a change of planning use is required. However, where a proposed use is rare, this may impact on rent review because with market rent based reviews new rents are based on rents that are comparable to other leases for similar uses. If the use is rare it is harder to find a comparable rent and accordingly the new rent may be high as a consequence. The lease may provide for a change of use but with the Landlords prior consent.

### How can Powells help?

We can advise buyers and sellers and landlords and tenants on all legal issues arising from the ownership or occupation of shops, offices and other commercial property. For advice please contact:

**Stephen Soper** on 01934 637 915, e-mail [soper@powellslaw.com](mailto:soper@powellslaw.com) or  
**Glyn Evans** on 01934 637 911, e-mail [evans@powellslaw.com](mailto:evans@powellslaw.com).

contact  
01934 623 501  
[www.powellslaw.com](http://www.powellslaw.com)

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**POWELLS**  
solicitors + advocates

7-13 Oxford Street  
Weston-super-Mare  
North Somerset BS23 1TE

Tel: 01934 623 501  
DX: 8405  
Fax: 01934 635 036  
Email: [info@powellslaw.com](mailto:info@powellslaw.com)