

Agreements to Lease – issues to consider before rushing to sign

By Sean Lynch, September 2020

The current commercial property rental market clearly favours prospective tenants due to the impact of *Covid-19*.

However, despite this, business people may still rush to sign a standard form ‘agreement to lease’ document for business premises without getting any legal input first. Apart from the commercial desire to ‘secure’ the property, part of the thinking appears to be that ‘it’s only a standard preliminary document that can be changed later’. Unfortunately, that is generally not the case and a prospective commercial tenant can find itself locked into a deal it never really wanted, or the landlord has not attended to some items which the tenant thought the landlord would attend to. They then find themselves having to correct these matters if possible, often at their own cost.

The best time to get what you want as a commercial tenant is at the very beginning, by drafting in the correct, precise ‘further terms’ within the ‘agreement to lease’ document before that document is signed. For example:

- Will some premises-related changes be required before you as tenant would be happy to take up a lease?
- If so, then those required changes need to be very clearly described, not only in terms of scope and detail but also in terms of who will undertake them, how long they will take and who will pay for them (especially if some changes will be ‘fixtures’ and will remain of benefit to the landlord on termination one day).
- If the above items are important to you as a prospective commercial tenant, then the document also needs to have a condition in your favour only, linked to the completion of these matters “to your reasonable satisfaction”. What if you are not “reasonably satisfied” or delivery is late and you have other tenancy issues arising from the delay? If you are able to, you could try to include a clause giving you the right to terminate the agreement, which you may not wish to do at that point but it will at least give you a good negotiation position to work from. Another option may include a further costs clause in your favour.
- If you do not have a correctly worded condition as referred to above then you may find yourself stuck with a long term lease which is not as good for you as you had hoped. Precision drafting is important.

Other matters to consider are:

- Have the term, renewal and rent review provisions been structured as best for you as possible in the circumstances? Often, the date on which you are required to commit for a renewal is before you know what any reviewed rent would be and so you may be agreeing to then pay an excessive market rent and then be forced to go to costly arbitration to challenge that. Some simple wording changes can assist with avoiding that risk.
- Have you tried to limit or restructure the guarantee or other security to be provided?
- Are you going to be able to use the premises as you wish under local authority rules?
- Do you want to be paying the landlord's legal fees (as fine-print wording often requires) or do you want to change that?

Other issues might be relevant in the circumstances too. The key thing though is that as a prospective commercial tenant, you turn your mind to these sorts of issues before you sign anything, and if additional wording is required for changes, precise drafting is undertaken by a skilled and experienced lawyer.

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If you require any commercial legal assistance, please contact Sean Lynch at sean@lynchandco.co.nz, or ph 09 948 8433. The above article is not intended as legal advice because each set of circumstances will differ. Specific legal advice is required for each particular case.