

COMMERCIAL LEASE MEMORANDUM FOR CLIENT

We recommend that you read the lease yourself and after we have read it a meeting be arranged to discuss the clauses, which you do not understand. You should check the commercial parts of the lease, such as the rental amount, the tenant's work etc.

When negotiating or preparing a commercial lease in a shopping plaza the following should be reviewed:

NET LEASE

The expression "net lease" means that the landlord expects the tenant to pay each and every expense in respect to the premises in addition to the rental. In a shopping centre lease you will be paying additional costs of the common expenses. They are listed in the definition of the common expenses and the common facilities in the lease. **If it is an existing plaza you should be able to obtain the average amount of common expense cost.**

LEASED AREA

Very often the rental is based on the price per square foot per annum and each square foot measurement can be significant in the total cost. The parties must be satisfied on the square footage and when in doubt it must be measured. Some leases include the measurement from the internal walls and some include the walls themselves. **Where there is any doubt you should have the area measured.**

LANDLORD'S WORK

The landlord will provide usually the structure and this schedule or list of the work that the landlord will do should be reviewed very carefully by the tenant. There should be consultation with the landlord as to when the work will commence and end. **You should watch for the clause, which states that all items not mentioned as landlord's work would be required to be done by the tenant.**

TENANT'S WORK

The tenant will usually have to make the leasehold improvements and it is important to realize the cost of the total improvements required. An estimate from the tenant's own architect or contractors desirable before agreeing to the lease.

TERM

The period for which you should lease is set out and in some cases there is an option to renew. Where the tenant has made improvements, he will look to recover his investment over the term of the lease period.

OPTION TO RENEW

The usual problem with option to renew is the determination of what the rent will be or should be at a future given date. The inflation is unpredictable and so are the commercial circumstances. An arbitration clause could be inserted but arbitration can be quite expensive.

To successfully exercise the option to renew you must have given the notice in writing in accordance with the terms set out in the lease and within the time period. You should keep a careful mental note or in your diary years ahead to ensure that the tenant has given the proper notice to landlord for the renewal.

OPENING

The commencement date of the lease is quite important. In some cases there may be a rent-free period allowed for the tenant to set up his business. In a shopping plaza the management is usually anxious to have a joint opening date.

RENTAL

The rental may be a fixed basic amount or a percentage of the sales. The tenant should carefully review his business projections to determine at what point of achieving the gross rental the additional percentage rental will become payable. Your accountant should be of help in this regard.

PROMOTION

The landlord may expect a percentage of your gross to be spent on promotion. Such expenses should be calculated from the formula provided and fully undertaken to make sure that they form apart of your expected expenses.

RESTRICTIVE USE

Shopping plazas will restrict the use of the tenant's premises to a specific use as the landlord is attempting to put in as many different businesses as possible in the same shopping plaza. The wording of the permitted use is important to ensure that all the activities that the tenant does are included.

NON-COMPETITION

The landlord will very often provide an agreement that he will not permit any other similar shop to compete in that shopping centre and will sometimes also expect that the tenant will not open up another shop nearer the shopping plaza and send the clients there. If these clauses are important you should read them and review them with me.

LAST MONTH'S RENT

If the landlord the tenant also collects the last month's rent should seek interest on it.

THE LANDLORD'S OBLIGATIONS

The landlord will usually provide that structural repairs are to be paid by him. The tenant will usually provide cleaning and day-to-day maintenance. Between these two activities there is a large number of different types of expenses that can arise and the parties should negotiate carefully each item to ensure that there are not surprises.

INSURANCE

The tenant should ask his insurance company to review the amount of insurance premium that would become payable under the requirements of the landlord and he should ask the agent to review that clause and give him a quotation accordingly. The usual tenancy for the landlord is to shift the onus of all the insurance to the tenant. The insurance may not appear at the time of the drafting of the lease to be an important problem as most of the concentration is devoted to negotiating the amount of rent. However, in the event of a fire contingency or damage or injury to a person there provisions can become very important. The tenant should not only ask for the premium but fully understand each situation in which the indemnity will become payable.

REGISTRATION OF LEASE

If the lease of the premises is in the Land Titles area the tenant should register it if it exceeds the term of four years. In the Registry Act area the registration would be desirable if it exceeds seven years time. In the event of non-registration, if the landlord sold the property the new owner can ignore the lease. Registration is important and

I will register the lease or notice if you instruct me.

INCORPORATION

If the lease also commences with a new venture it is important to have the lease for the tenant in the name of a corporation from the beginning. If the corporation has not been formed the clause should be inserted indicating to the landlord that upon incorporation the lease will be binding on the corporation formed and that the person who signs should no longer remain liable after such event. This arrangement is extremely important from the tenant's point of view to avoid liability personally.

GUARANTORS

In some leases the landlord may seek a guarantee of another party. From the tenant's point of view an additional guarantor is not desirable as he may become personally liable.

DEFAULT

In the event of a default of the tenant to pay the rent the landlord has a right to take possession of the goods in a commercial lease and sell them to recover his rent. He may also re-enter the premises or lock the tenant out through a bailiff. The landlord is required to minimize his damages by attempting to rent to another party. In the event of such default the landlord can ask the tenant to pay the difference or the rent until the new tenant is found.

SCHEDULES

Commercial leases often contain lengthy schedules setting out the work that the landlord will do and the tenant will do. The tenant to ensure every detail of the work to be done should carefully review these and your contractor should also review that to give you a quotation.

FIRE

In the event of fire the clause would often be inserted as to what the landlord would do in the event of a fire causing major damage. Usually, there is a time period in which the landlord will notify the tenant as to whether he will be able to repairs it or not. If he cannot repair it rent should no longer become payable.

DRAFTING

The lease does not have to be in complex language to make the intention of the parties known to each other. The lease is a contract between the parties and as long as the meaning is clear and all the possible contingencies have been included that can be foreseen no verbose language is needed.

OFFER TO LEASE

An offer to lease when accepted forms a complete and binding contract. The usual problem is that it is at this moment that the offer is turned over after signature to the lawyer. The lawyer then attempts to prepare a lease in the detailed form with the other solicitor and they can end up negotiating at length as to what other clauses should be included to give full effect to the offer to ensure that lengthy time and expenses are not spent to try and negotiate words which were never discussed with the parties at the time of the offer.

UTILITIES

The lease should set out clearly which utility services should be paid by the landlord and which will be paid by the tenant.

PARKING

Where parking is provided for the tenant or his customers, the additional rental payable, if any, or the arrangement of which parking spaces will be available should be set out clearly and in detail.

MUNICIPAL LICENCES

If the local municipality requires any particular kind of a licence your offer to lease must be conditional upon obtaining such licence. If your particular business requires any special licence from the Province they should also be obtained or in the alternative the offer should be made conditional.

REAL ESTATE COMMISSION

The landlord usually pays the real estate commission. This clause should be carefully examined and the commission agreement should be set out clearly and agreed upon before signing.

SIGNS

If putting up of a sign is important then agreement should be made in the lease as to the kind of sign to be put up and if the landlord's approval will be required to put up the sign.

SUB-LEASE

If you intend to have a sub-lease then your right to assign the lease of a portion of the lease should be set out clearly in the lease agreement.

SHARING OF EXPENSES

The tenants may share certain common expenses to the landlord. The landlord may charge the management fee to manage the premises. The formula for the sharing should be carefully set out and the tenant should ask for periodic financial statements from the landlord.

ZONING

Before you sign the lease, you should know from the municipality that the use of the property you have in mind is permitted.

Negotiating Lease

To minimize the cost of legal fees you should negotiate the terms of the lease and changes in the draft lease. A memorandum prepared by the lawyer commenting on the clauses could form the basis of your negotiations.

Assignment of Lease

Assignment of lease legally has the effect of transferring all the rights of the present tenant (assignor) the new party (assignee). Usually the lesser (Landlord) will ask for the continued guarantee of the assignor to pay if the assignee does not pay. Instead of assignment you can also have a sublease. The sublease has the legal effect of making the new party (sub lessee) a tenant of the sub lesser. In this case the obligation of the subleases to be responsible for the rent continues of the sub lessee does not pay the rent. At the time of obtaining a sublease or assignment the new tenant should carefully read the existing lease as those terms will apply to the new tenant (assignee or the sub lessee). The consent of the superior landlord must be obtained to ensure that the sublease or assignment is effective.

FEES

The cost of the review of the lease will be based on time spent. To draft it would take much longer and the fees would be based on time spent. Please do not hesitate to discuss fees with me. Any preparations and work you do can help to minimize the time and cost. This memorandum is prepared to save you considerable time in understanding the basic mechanics of the lease and the provisions you should keep in mind and to save the legal cost in what otherwise would end up being a discussion in a meeting. This memorandum is not exhaustive. Particular leases and doubtful clauses should be checked with me and discussed. I have spent considerable time preparing this memorandum and it will help minimize the cost of legal fees to the client.

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