

The art of negotiation

Business owners arguably have more than ever to think about during this current decade of disruption. Commercial leases, whether office or industrial, are one of the most important to get right. **Alex Bell** quizzes real estate expert Alisa Sweeney of Thomson Snell & Passmore, who has been advising tenants since the 1990s

Does my rent review always have to be upwards only?

A client recently didn't have an agent representing him while negotiating the lease he was going to take on and he was dealing directly with the landlord's agent. The agent said to him 'it's completely normal to have an upward-only rent review'. It's very rare *not* to have an upward-only rent review. But having said that, if you genuinely think it's potentially a falling market, if you're taking space somewhere where perhaps the market rate is going to go down – due to lack of development and lack of investment in the area – then, potentially, you would want to have the ability for the rent to go downwards as well. It's always something worth thinking about. You also need to remember that it doesn't necessarily mean that the rent will *definitely* go up. It just means that it can't go down.

How do I negotiate when a premises can be used for a whole host of uses?

There are fewer use classes now under the planning law, which means they are more generic and therefore wider. So, if you aren't going to use the premises for a fairly specific use, you want to make sure the rent review provisions take account of that as it might end up being that the landlord could argue that you should be paying higher rent.

Are leases generally shorter now?

Yes, as people want more flexibility, particularly with offices. With a shorter lease, up to five years, the chances are you're not going to have a rent review. If you're putting a lot of machinery in a warehouse or industrial unit, you're likely to have a longer lease which would most of the time include tenant breaks. Here you need to consider what the assumptions and disregards are and

what the hypothetical lease term is. There's an argument that if there are regular break options in there, then that retains flexibility to the tenant, so therefore the rent should be higher.

What if I'm taking a big space with a high rent?

Have a surveyor who advises on the valuation and rent.



andrusk/stock.adobe.com

Why is 1954 relevant to lease renewals?

The 1954 act gives business tenants a right of security of tenure. If it applies and you are served notice in accordance with the act, you're technically allowed to stay in the premises on substantially the same terms, with a new market rate. If your renewal excludes the 1954 act then the tenant doesn't have the automatic right to stay at the end of the tenancy. It's generally in a tenant's favour to have the protection.

I'm looking to do a lease renewal or regear of some sort – what are the best steps to take?

Rather than having to renegotiate the whole of the new lease, think about doing a lease by reference, where it's substantially the same terms and all that's changing is the rent and the term. It's often simpler, quicker and therefore cheaper.

What might be another strong option?

A reversionary lease is one that effectively kicks in in the future. So if you know you want to stay, know what you want including any extras going forward, this is an option. The benefit is getting it all sorted now, rather than in a couple of years' time.

Where might a deed of variation come in?

If you don't want there to be a break going forward, you want to change the rent, you want the landlord to be able to do different alterations... then you can have a deed of

variation. You do have to be a bit careful with certain deeds of variation, though.

I hear 'dilapidations' a lot when it comes to leases...

It's important to think about whether any existing dilapidations and obligations to reinstate the premises are being carried over, or are you starting afresh? Landlords will nearly always want dilapidations carried over, tenants will often not.

What are the main reasons for a regear coming into play?

Usually when parties are adding a break right or when you are getting an extra rent-free period, perhaps.

Do I need to think about repairing responsibilities within the lease?

Yes. You need to think about where this comes into play, whether this is done through service charges or whether you are going to be responsible for overseeing any repairs that are needed. Try and agree to a schedule of conditions so there are no obligations to put them in a better state of repair than they were at the beginning.

How do I go about approaching 'service charges'?

It's a big one. Depending on what type of occupier you are and what sort of estate you're occupying, you need to understand exactly what's included in the service

charge. For industrial units, for instance, it's not unusual to still have access roads and drainage systems that haven't been adopted and therefore might have to be maintained – and the service charge might cover that. Try to at least have a cap on the service charge.

How important is alienation?

Very. It gives flexibility to you to assign or underlet the lease. You don't want the landlord to have too many obligations to be met to sign the lease. To add to that, a rent suspension clause is also important. If there's some kind of damage to the access road getting to the premises and you can't occupy it, then the rent doesn't have to be paid for that time.

What about utilities?

You need to be careful to think about what utilities are on site, how they work and if you're paying towards them. With industrial units it can often not be clear-cut.

Finally, what about business rates?

Don't forget them and whether or not the landlord has elected them for VAT purposes. It's not so bad if you are a VAT registered limited company.

Subletting and assignment

What if you no longer need all that space? Harry Wilshaw, solicitor at Lewis Denley, says: "Tenants usually do not foresee the importance of having the right to sublet or assign the lease as, originally, they intend to remain at the premises the entire term. However, that does not mean they should not consider an 'exit strategy' should something unforeseeable occur during the lease term. Should the lease become a significant financial burden, the opportunity or possibility to assign or sublet to another suitable tenant can be a financially astute strategy to exit the lease. The restrictions around the tenant's right to assign or sublet therefore needs to be strongly considered and negotiated to ensure that they can exercise this right reasonably, without being at the landlord's mercy."