

## Landlord's agents:

A commercial property agent advertising property 'for sale' or 'to let' acts for the landlord or vendor not for you, the prospective purchaser or tenant. Their objective is to generally maximise value by way of price paid and length of lease and to minimise their client's exposure to any residual liability, costs and risk of default. Any 'advice' given by an agent in the process of negotiation is to facilitate a sale whether on a freehold or leasehold basis. They have to respond honestly in relation to any enquiries made and have a legal obligation not to misrepresent or mis-describe the property in a way that would otherwise mislead any party into entering into a binding contract. They have a duty to report all offers in writing to their client.

## Tenant of Choice:

In a competitive market, where property costs are rising, being the 'Tenant of Choice' will help you to secure a property against competition. Being organised, with professional representation helps in the negotiation process and can sometimes result in a lower rent being paid or greater concessions secured in some situations. Any recommendation that a Landlord's agent makes to their client regarding your suitability as a buyer or tenant will depend on their client's overall objectives. It should include consideration of these issues, set against the overall level of your offer and your ability to 'perform' compared to that of the competition.

## Caveat Emptor:

The key to success, as in any negotiation, is to be prepared, to know what questions to ask and what can or cannot be achieved. It is, however, 'Buyer Beware' and, as such, it is up to you, the prospective purchaser or tenant, to obtain your own independent valuation, survey, legal and other advice as to whether the property is suitable for your needs and purpose, at the price quoted. Property is an expensive resource – it can easily turn from a business asset to a liability. The true cost of a property is never just the rent but all the other costs and risks as well as opportunities allocated to you under a contract or lease. If you are acting without professional representation, all discussions and correspondence by you as 'principal' should be clearly understood and stated to be 'subject to contract' unless you confirm otherwise. Contracts can be created verbally as well as in writing and a lease can be created orally if it is for less than 3 years.

## Appointing a

## Professional Advisor:

If you are seeking to appoint a property professional you should give them a clear brief and ask for Terms of Engagement which includes their scope of services, how fees and expenses are to be remunerated, including abortive fees or fees for introductions to properties that they introduce to you which you then acquire independently of them.

The Terms of Engagement should include termination provisions, Professional Indemnity Insurance (PI) and the firm's complaints handling procedure (CHP). Terms should be agreed by you in writing.

Your advisor should confirm whether they have any conflicts of interest (such as in interest in the property or a related or competing instruction) and, if one were to arise, how that would be dealt with.

You should be prepared to provide information in accordance with the requirements of the Money Laundering Regulations, namely providing proof of identity, address and sources of funds, as appropriate. The professional may ask who your other professional advisers are.

## What is your 'brief':

When looking for property it is advisable to have a clear brief and budget at the outset. Your 'brief' should include location, access/profile, parking, cost (as above), size, servicing, duration of occupancy required, proposed use in terms of town planning, any 'special' requirements, including fitting out, and your date of occupation.

The budget should include not just rent, but rates and service charges, funding for fit out and alterations plus a contingency for repairs that the landlord will not pick up and any unforeseen costs. It should include all fees including legal costs, Stamp Duty Land Tax (SDLT) and VAT if not recoverable.

It may be that a first stage of any formal advice is assistance to put a budget together to form part of the business plan. You should be able to address these issues before starting the process and know who needs to be on your professional team and that they are appointed ready to act quickly once a property is found.

The 'wider' your brief can be, the more choice you are likely to have. As a generality, there will be far more properties available to lease and only a few to buy. More unusual requirements will take longer to secure.

## Types of Acquisition Structures:

Properties can be acquired freehold with vacant possession or subject to existing leases; by way of a new lease from a landlord; via a sub-lease where there is already a lease in place for a limited period and by assignment where a lease is for sale.

A lease may be for sale at a 'premium', to include fixtures and fittings and fit out or a profit rent; it may be at 'nil' premium or 'reverse' premium where there are recognised liabilities attached to the lease. In any lease acquisition, you need to know the liabilities that will fall to you on acquiring the property.

## Property Searching:

Finding the 'best' property takes time, unless there is abundance due to little demand. Your advisor should give you an idea of the likely time it will take to locate and secure a suitable property so your expectations are managed. You may need a contingency plan.

There are various ways of finding property from 'door knocking' and 'word of mouth' to desk top, market searches and acquiring land for a 'build to suit' development. Nonetheless you need a clear idea of what you are looking for before you start whilst being prepared to adapt your thinking in the light of feedback and responses from the search.

## Negotiating lease terms

Whether you are looking to own or lease, the rent or price should be agreed after all terms have been agreed. Your advisers should consider; the appropriate lease terms to address and points arising; that any break clauses are appropriately worded so that they are operable and that you understand the implications of whether the lease is 'inside' or 'outside' the security of tenure provisions of the Landlord and Tenant Act 1954 (as amended). If a break clause is required then it should be 'Tenant only' and without conditions other than to provide vacant possession and have paid the rents properly demanded up to date as at the break date.

This follows on from a 'due diligence' process to establish whether the property is fit for your purposes at the price quoted and you have a clear understanding of what liabilities will crystallise and pass to you on completion, and that there are 'no surprises'.

This may include a building survey, survey of plant and equipment, energy performance certification, landlord Title, licensing and town planning usage, as well as valuation. All of the points in a lease negotiation or property purchase should be recorded in a memorandum of understanding or Heads of Terms that is prepared by your advisors and agreed by you before solicitors are instructed. The better the Heads of Terms are the more you will save in time and legal costs once it is in 'solicitors' hands'.

### Repairing liabilities:

'Disrepair' or your requirement to keep 'full repair' can be dealt with by way of schedules of condition, schedules of work, rent free periods, service charge 'cap' and specific exclusions under the lease. If outstanding repairs are not addressed then they will generally fall to the tenant to put right under a tenant's 'full repairing' lease.

### Service Charges

There may be a service charge that is chargeable in respect of the landlord's responsibility to maintain the common parts, areas and structure of the premises. It may or may not include utilities such as electricity and insurance.

You should ask to see the basis of apportionment and the budget for the current year together with past accounts for previous years. It is prudent to ask whether there is any capital expenditure that will fall due in the foreseeable future and to undertake your own survey of the building and plant as needed.

### Insurance

You need to know responsibility for insurance and to have cover available from contract exchange, including any Tenant's plant, fixtures and fittings and public liability cover.

Normally a landlord will insure and recharge the premium annually as an additional rent.

### Energy Performance

#### Certificates 'EPC':

The landlord should provide an EPC in respect of any property being marketed. That will provide advice on the current energy rating as well as steps to improve the current rating.

## Other Management Information:

In addition to asking the landlord to provide details of service charges, insurance and EPC, you should enquire as to any Asbestos Register, Fire Risk Assessment, Building Surveys and Test certificates

## Alterations and Fitting out:

If you wish to fit out or undertake alterations then these should be 'prior agreed' with the landlord before you agree the other terms. Subsequent approvals will take longer. Part of your due diligence process will assess the need to fit out the property, apply for planning consent or Building Regulation approval. Responsibility for these aspects and the cost need to be recorded in the Heads of Terms with it made clear that legal completion and rent start will rest on these aspects being resolved satisfactorily.

You should bear in mind that a landlord will normally require any alterations to be reinstated at the end of the lease however so determined. These works need to be documented carefully so that they are not included in any assessment of rent at rent review or lease renewal, particularly if they are Tenant's improvements.

## Your Covenant - Lease Security:

For an established business, a landlord will wish to see usually three years audited accounts which pass a usual 'Profits Test' of showing net profits greater than or equal to three times the passing gross rent for three consecutive years; alternatively an Assets Test based on assets of five times the rent for three years plus bank, accountant and possibly solicitor's or trade references. In the absence of this, the landlord may want a business plan or management accounts and additional security to that from the tenant.

The level and duration of any deposit is negotiable but can be for 3, 6 or 12 months depending on the lease, market conditions and the strength of the accounts. Landlords will undertake credit checks and may seek directors' personal, bank or other guarantees. An advised tenant will seek provision for release when acceptable accounts are available.

## Conditional Agreements:

Issues that require prior resolution may be addressed by way of a pre-agreement or conditional contract (Agreement for Lease) that makes your obligations under any Lease effective once those issues or conditions are addressed.

## Costs:

Finally, on the issue of costs, it is normal that both parties pay their own costs in respect of the lease but normal that you pay the landlord's reasonable costs in relation to any Licence for Alterations whether the matter proceeds to completion or not.

*The Code for Leasing Business Premises in England and Wales 2007 strongly recommends seeking professional advice from a qualified surveyor, solicitor or licensed conveyancer before agreeing or signing a Business Tenancy agreement.*

*The code is available through professional institutions and trade associations or through the web site [www.leasingbusinesspremises.co.uk](http://www.leasingbusinesspremises.co.uk)*