LEGAL TIPS FOR OCCUPIERS

BELINDA SOLOMON, A PARTNER AT BRECHER LLP, SHARES HER TOP TIPS FOR A SUCCESSFUL COMMERCIAL REAL ESTATE TRANSACTION.

I have learned a lot from my 25 years plus working as a lawyer. The majority of my clients are occupiers of either offices or retail units and their knowledge of property varies wildly. I have several US occupier clients who have regularly been surprised that UK property law is not identical to that in the States. We do have quite a few unique quirks in the UK but there are a number of rules that can generally be engaged across the board. Here are my top tips to help avoid the legal pitfalls in commercial real estate:

1 CLARITY

I find that the requirements and expectations of occupier clients are very different from those of their landlords, who are more often property-savvy. It is important to be very clear about the liabilities and obligations attaching to an occupier's lease covenants.

In the excitement of the moment when taking on a new premises, occupier clients rarely listen to and remember what you tell them on entering into the lease. Particularly about the clauses telling them what they can't do. A couple of years down the line, many will happily start drilling through structural surfaces and removing landlord's fixtures! One of my retail occupier clients, removed the internal staircase in its listed building and then was surprised at receiving a threatening letter from the planning authority.

2 PRIORITIES

Lawyers sometimes find it easy to forget that tenants and landlords have totally different priorities when negotiating a new lease. In fact, tenants, quite often have different priorities from each other depending on the nature of their business. In general, the landlord's main concern is the bottom line.

Where occupier clients have a requirement which would impact on the landlord's pocket, he will be more resistant to it than where it doesn't. The tenant's concerns are more practical. If restrictions interfere with their ability to conduct business, that is frequently a bigger problem than some of the more financial-based issues. If you can remember this, you can negotiate more effectively for your client.

3 CERTAINTY

I know some lawyers who prefer to leave the language in their documents vague so that there is a chance that they will win an argument based on the uncertainty of the wording in the future. I am very much in the opposite camp. I think I would rather know if there's a problem now than gamble on winning an argument about it in the future. But then I am a risk-averse lawyer.

However, it recently stood a client in good stead when we told the developer that we did not want the uncertainty of force majeure in the delay clause of an agreement. We agreed to give them longer before damages kicked in but that date could not be extended due to force majeure. My clients are now considerably richer due to the combination of the unambiguous clause and the developer's inability to meet even the later deadline.

4 DON'T ASK, DON'T GET

Homer Simpson said "If something's hard to do, then it's not worth doing." Apart from being funny, this is clearly wrong. It is easy to agree terms because they are what everyone else agrees to and what is considered "standard". I do not accept that argument. There are clearly clauses which are designed to be standard such as service charges in multi-let buildings. Most tenants would understand why these need to be uniform. But the majority of the other clauses are up for grabs.

Did you know that the reason we have quarterly rents is because that when landlords used to have huge estates and only horses for transportation, it would take them so long to ride around to collect all the rents, that they needed three months to do it? Try asking for monthly rents. Occupiers hate tying up their funds three months in advance and monthly rents really help with their cashflow. That is just an example. The point is, do not be deterred by the argument put forward by the landlord's lawyer that the clause you don't like is "standard". That in itself is not a good enough reason to agree to it.

5 FLEXIBILITY

Even if an occupier thinks he knows what he wants under any particular circumstance at the start of the lease, it is quite common for a tenant to change their mind by the time it is relevant, so it is useful to try to have as much flexibility as possible. A break clause is a good example of how a tenant may have flexibility for the future, allowing the tenant the comfort of knowing he can leave earlier if he wishes. Unfortunately, there are a number of problems with this.

Firstly, it costs money. Obviously, you will pay more rent for a lease with a break than one without. Secondly, the break clauses in leases are littered with traps attempting to deny the tenant the break they have paid for. The landlord's lawyers will very often include a list of pre-conditions which need to be satisfied before the break may be operated. Unfortunately, it is very easy to fall foul of these and the result can be catastrophic. If you have a good lawyer, the tenant can retain the break and retain the flexibility.

6 LIABILITIES

In my experience, my occupier clients quite often do not remember their lease obligations and liabilities – at least not in any detail. As a result, I have learned over the years to reduce as many of these as possible during negotiations so that when we have the inevitable breach, it is less serious. It is more of a damage limitation exercise than anything else.

So it is important to review every clause carefully and do what you can to limit any exposure the occupier may have.

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