**CPD Seminar for**
**The Royal Faculty of Procurators**
**April 2021**
**Errors and professional negligence in commercial leasing - Handout**

Most errors do not arise through ignorance of the law. They mainly arise from failure to comply with procedures or from incorrect or inappropriate use of style documents, or lack of communication, or lack of personal organisation. Pressure of work and stress also play a part

**What work is expected of you?**
It is important to get the letter of engagement right, and to be clear about the actual work that we are going to do, and equally as important, the work that we are *not* going to do for the client – for example, are we undertaking to remind the client when it is time to serve notice to trigger a rent review or to stop tacit relocation operating? Are we advising on tax implications of the proposed transaction? Are we to remind the client about doing three yearly LBTT returns?

**Due diligence**
No matter how small the premises or the rent, or how short the duration of the lease, when acting for a tenant, we need to do the same due diligence as if your client were buying the property;

**Notices**

If we are to serve a notice under a lease, we should check that the party on whose behalf we are serving the notice is indeed the party who should serve notice. We should check that it is competent for us to serve the notice as agent for the party. We should also check the details of the recipient of the notice i.e. has their name changed or has their address changed or have they been taken over by another entity. We should check the document for any specific directions regarding how and when notices are to be served.

**Blanks in leases**
It is easy, when working form a style to miss filling in a blank. We need to make sure that all blanks in the style lease including permitted use, rent review dates, and option dates are completed before issuing it, and that blanks that are to be completed in terms of the missives have been properly and correctly completed before issuing the engrossment – the other side may not notice the blank and then you can be left with a meaningless or unenforceable clause, or even worse, an unmarketable property. Do not rely on the statutory provision about having errors rectified by the courts – judicial sympathy is in short supply for poor drafting.

**Options in leases**
Make sure that all options that are contained in the missives are carried into the lease. If payments have to be up to date as a condition of exercising the option, try to include wording that the tenant can require the landlord to say whether any payments have not been paid, ant to quantify any outstanding sums, and that landlord's confirmation or non response will taken as confirmation that all payments have been made in full. The tenant should be told to pay the full quarter's rent if the break date is during a quarter. Also, make sure to provide for the landlord to have to refund any rent and other sums that have been pre-paid to a date beyond the break date, otherwise the tenant has no right to any refund.

**The *inter naturalia* trap**
Be aware that only obligations and rights that are normally found in lease are enforceable against successors; some provisions are not *inter naturalia,* and will not be enforceable against successors, such as an option to purchase the landlord's interest.

**Inflation linked rent review**
If you are using a non PSG style lease, the inflation linking rent review wording should provide the parties to agree on a different index to be used if the specified index is unable to be used, with third party determination if they do not reach agreement. It is suggested that there be a fall back provision for what happens if the third party is unable to determine what index to use, so as the rent review clause does not fail due to being unworkable or void form uncertainty; such a fall back provision could be as simple (yet effective) as having a fixed percentage compounded increase.

Be careful to understand the difference between (a) rent increasing by a percentage equal to the increase in the index, and (b) rent increasing by a percentage equal to the percentage increase in the index!

It is quite common to insert a cap and / or a collar; in other words a maximum percentage increase and a minimum percentage increase. There is being provided for, such cap and / or collar applying annually or overall – there is a huge difference between rent being increased by 3% over a 5 year period, and it being increased by 3% per annum compounded over the same period.

Take time to do, and the tenant's solicitor should insist on having, a worked example showing the parties' understanding of what is intended.

**Landlord's warranty of fitness for purpose, and repair at common law**
If acting for the landlord, make sure that the landlord excludes the warranty that is provided by common law in respect of the premises and common parts as being fit for purpose. If acting for the tenant, check with your client whether a schedule of condition is to be prepared (and indeed recommend to the tenant that one should be, unless the lease is of new premises) showing the state of the premises, and with the lease excluding tenant's liability for making good any wants of repair. At common law, a landlord is required to carry out all repairs to the premises; therefore it is important, if acting for the landlord, to insert a provision in the lease that the landlord is not required to carry out any repairs or other works, whether in terms of the lease, the titles, the Tenements (Scotland) Act 2004, or at common law, unless and to the extent the landlord specifically undertakes in the lease to carry out works (such as making good insured risk damage).

**Services and service charge**
If acting for the landlord, make sure that the service charge clause is workable and that the landlord is actually able to provide the services, and that the tenants are required to pay and that the tenants' contributions add up to 100%. If acting for the tenant, explain to him which, if any, of the services are mandatory and which are discretionary, and take clear instructions; make sure to try to have reasonable exclusions form service charge.

**Insurance and Uninsured Risks**
Landlords' solicitors should beware of the tenant's revisal of definition of "uninsured risk" Some tenants' solicitors will try to insert or to amend the definition of "uninsured risk" to mean "any risk that is not insured against". This will make the landlord's interest unmarketable, as few property investors will want to buy into such an onerous liability!

**Pitfalls where the tenant prepares the draft lease**

If the tenant prepares the draft lease, the wording *may appear* to be satisfactory, but it is always much more difficult to consider and react to what is not on a printed page. There may be subtle changes in what would otherwise appear to be normal wording, so as to make the repair clause very soft and to water down many other clauses. The lease can leave the landlord with liability because common law rules are not contracted out of fully or at all; the landlord may also be left with irrecoverable costs.

If you are acting for the landlord when dealing with a lease that has been drafted by the tenant, some of the main pitfalls to watch out for are:-

1) Make sure that rent to be paid without retention, deduction or set-off?

2) Are insurance premium, service charge, common charges, VAT and interest deemed to be rent?

3) Is *rei interitus* excluded?

4) In respect of "uninsured risks":-

    a. are these defined as any of the risks listed in the definition of "insured risks" in respect of which the landlord has not obtained cover or in respect of which cover is not obtainable fully or is it subject to exclusions?

    b. Does the landlord have time to choose whether or not to reinstate?

    c. If the landlord chooses not to reinstate can the landlord terminate the lease?

5) Does the landlord have the right to enter to inspect the premises?

6) Can the landlord serve a schedules of dilapidations during or after the end of the lease– what is the time limit for tenant to comply?

7) Does the tenant have to do "extraordinary repairs"?

8) If there is a Schedule of Condition, does the repair clause remain workable from the landlord's point of view? -if it says the tenant is to keep the premises in no better condition than shown in the Schedule of Condition, that suggests that they can be in worse condition.

9) Does the tenant have to have servicing/maintenance contracts in place and to overhaul relevant items?

10) How open is the user clause? - Is landlord's consent to change of use not to be unreasonably withheld at all, or within a specific planning use class?

11) Can the tenant do internal non structural alterations without requiring the landlord's consent? If so what about reinstatement at termination?

12) Are obligations in Tenements (Scotland) Act passed on to the tenant?

13) For permitted alterations does the tenant have removal and reinstatement obligations at all?-If so is this an "all or nothing" or can the landlord choose whether to keep all, some or none of the tenant's alterations?

14) At rent review:-
    a) Is it assumed that the premises have been fitted out at all, or have been fitted out at the tenant's cost (tenant might seek a reduction in any uplift otherwise achievable)?

    b) If the premises require a licence or permission in order to trade is it assumed for rent review that such licence or permission is in place now and for the remainder of the lease duration and that it will be renewed periodically? If there is no such assumption then the tenant might be able to argue for a reduction of any uplift otherwise achievable.

    c) Is there a disregard of any licence or permission that has been obtained by the tenant (so as to exclude from review any "extras" that the tenant has managed to achieve-this will only work where there is an assumption that the licence or permission exists so that the premises can trade?

    d) Is the duration of the hypothetical lease provided for, and is this clearly drafted so as to achieve what the wording is set out to achieve?

    e) Is there an assumption of vacant possession, a willing landlord and willing tenant, and that there is no payment of a capital sum?

    f) Does the lease contain tenant's consent to registration for execution?

    g) Does the lease reserve appropriate rights to the landlord for inspection, and carrying out works etc?

    h) Does the lease provide for assignation to members of the same group of companies as the tenant, without needing consent? (If so there should be provision for the current tenant to provide a guarantee).

**Professional negligence – standard of care**

The solicitor requires to display the standard to be expected of a reasonably competent and careful practitioner. This standard of care has been described in the well-known Judgement of Lord President Clyde in *Hunter v Hanley* 1955 SC 200 where he set out the three-part test:-

"It must be proved that there is a usual and normal practice, that the [professional person] has not adopted that practice, and that the course the [professional person] adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care."

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