

03

Taking a lease

Signing a lease on premises means that you are probably entering into one of the most significant financial commitments that your business will make. So there is a lot of work that you and your professional advisers need to have done before you reach this point. This way you can make sure that the lease matches your requirements as closely as possible and that you understand all the lease's possible ramifications.



For properties in England and Wales there is a guide to help landlords and tenants to negotiate fairer leases entitled *The Code for Leasing Business Premises in England and Wales* – this is available to download from leasingbusinesspremises.co.uk

There is not currently a Scottish equivalent, but a lot of what is said in this code applies equally although specific legal advice should be taken.

RICS has also produced a standard business lease aimed at retail property and is available from rics.org/smallbusinesslease

Leases are complex documents with different arrangements in England and Wales, Scotland and Northern Ireland. Few people outside the property and legal worlds will necessarily understand all the detail and the implications. This is why it is essential to call on the professionals – your chartered surveyor and solicitor – at the earliest possible stage.

What is a lease?

A lease is a binding contract in law which sets out the terms and conditions of the tenancy agreement between landlord and tenant. It defines the rights and obligations of both parties. It is therefore enforceable – you cannot simply walk away from a lease. However, certain aspects of the relationship between landlords and tenants are also defined by law. A first draft of the lease will usually be drawn up by the landlord's solicitor as a basis for discussion between the parties.

New lease or existing lease?

The pattern of property tenure may be complex and is not always a simple matter of a tenant taking a lease direct from the property owner (the freeholder). Take the following situation:

- an investor owns the freehold of the building
- a tenant takes a lease from the freeholder
- a second tenant later takes an assignment of this lease from the original tenant, thus becoming the assignee and assuming the responsibilities of the original lease
- the assignee later grants a sub-lease over parts of the building that are surplus to requirements to a sub-tenant.

In practice the chain may be considerably more complex than this. Needless to say, nobody down the chain can grant a lease longer than his or her own lease.

If you, as a prospective tenant, are taking a lease on a building you might be negotiating a new lease with the freeholder. On the other hand you might be entering the chain lower down and taking an assignment of an existing lease, or perhaps a sub-lease. With the new lease you should be able to negotiate the terms to match your requirements (though you will not necessarily get everything you want!). With an existing lease you will be bound by the conditions that it already contains and you have to decide before signing whether you can live with these or not.

These complexities emphasise the need for professional advice, as no two situations are identical. What follows is geared

 Find a Surveyor in your area at ricsfirms.com

to a tenant negotiating a new lease, but most of the same considerations apply when assessing the suitability of an existing lease that you are thinking of acquiring.

Is there such a thing as a standard lease?

Subject to overriding legal requirements, it is up to the landlord and tenant to agree the terms. However, there are certain matters that will crop up in almost all leases and you should refer to the industry lease code for more information on these.

In addition RICS has produced a model lease and heads of terms for a retail property. This is available from rics.org/smallbusinesslease

The landlord and his or her advisers will probably have a pretty clear idea of the form of lease they would like and the main conditions. You, as prospective tenant, may want to negotiate for changes on specific points. Your bargaining position with the landlord will depend on a number of factors, including the state of the property market at the time. This is where your chartered surveyor's expertise will be invaluable.

When negotiating a new lease both parties should refer to the principles contained in the industry *Code for Leasing Business Premises* available from leasingbusinesspremises.co.uk

How long should a lease run?

Again, this is up to the parties concerned to negotiate. In the case of longer leases there will often be provisions for the rent to be adjusted at intervals of, say, three to five years. The wording of this rent review clause in the lease is very important.

The lease length is the period during which you may occupy the property, and are liable for rent. It is important to realise you will be liable to the landlord throughout the length of the lease for rent, and to pay outgoing such as rates. This liability will only end if you pass the lease onto someone else, with the landlord's agreement. Even then, if the person to whom the lease is passed on does not pay, it is possible you will remain liable.

Is it vital that you understand this point.

What is security of tenure?

You should understand that, in England and Wales at the end of the lease, unless the lease contains a written agreement to the contrary, a tenant of business property is protected by the Landlord and Tenant Act 1954. The tenant is entitled to a new lease, on terms which the parties agree or which a court will decide if they can't. There are occasions when this will not apply, and it is important to take legal advice.

In Scotland these provisions do not apply. Provided either party gives at least 40 days notice of termination of the lease prior to the expiry date the lease will terminate and you will have no right to remain in the property. There is a limited exception under the Tenancy of Shops (Scotland) Act and you should consult with a Scottish solicitor on this.



Back to contents



The Landlord & Tenant Act 1954 is largely replicated in Northern Ireland via the Business Tenancies (Northern Ireland) Order 1996, however, significant differences pertain and again you should take specific legal advice.

Do I always have security of tenure?

No. Some leases will specifically state that the tenant does not have the protection of the Landlord and Tenant Act 1954, which normally provides for security of tenure.

As a general rule, you should be very wary of giving up the security of tenure that the law normally provides. However, there will be some cases where a landlord will not be prepared to sign a lease except with this exclusion.

Even if your tenancy is protected under the Act, you are not certain of obtaining a new lease when the current one expires. The landlord might legitimately oppose your application on certain limited specific grounds: that he or she needs to occupy the building or wishes to redevelop it, for example. Or the landlord might claim that you had consistently breached the terms of the old lease.

What are the redecoration and repair obligations?

The clauses in the lease relating to redecoration and repairs are very important, particularly when you are leasing an older building. Usually you, as the tenant, will be responsible for internal decoration and repairs and you may be responsible for external ones as well. The requirement to repair a property probably includes an obligation to undertake any repairs necessary at the time you sign the lease. So be very wary if you are planning to lease a building that is already in disrepair. An obligation to keep a property in repair requires the tenant to put it in repair. This is where it is vital to have the premises surveyed by your chartered surveyor at the outset. He or she will be able to advise on the scale of liability that might be involved. Note also that towards the end of the lease the landlord may serve notice on you – known as a ‘schedule of dilapidations’ – to carry out specified repairs. Since there is frequently argument over this point, it is again important to have a record of the state of the premises at the outset and professional advice is essential.

May I carry out alterations to the building?

The lease will probably prohibit you from carrying out structural alterations or building extensions but may allow you to make internal alterations – such as partitioning – with the landlord’s consent. You may, however, be required to remove any changes you have made internally and return the premises

to their original state (**reinstate** them) at the end of the lease.

Who insures the premises?

Broadly, there are two different considerations involved: who arranges the insurance and who pays the premiums. Normally, the tenant will pay the premiums in one form or another, even if the insurance is arranged by the landlord. Most tenants will also want to insure against disruption and loss of profits should the building become unusable following a fire or other accident.

Am I restricted in my use of the building?

You will inevitably be subject to some restrictions under planning legislation. You will not be able to use a high street shop as an engineering works! The lease may also impose further restrictions on use – to maintain a balance of tenants in a shopping centre, for example. A lease with strict conditions of use may be difficult to assign.

How is the rent established at the outset?

It is up to landlord and tenant and their advisers to agree the starting rent before the lease is signed. However, this rent may subsequently be reviewed at intervals. The expertise and market knowledge of your chartered surveyor is vital in agreeing a rent because they will know the level of rents that have been achieved for similar recent lettings in the area and can advise you on what figure is reasonable. Sometimes it may be possible to negotiate some form of rent-free period at the beginning of a lease.

However, the rent cannot be viewed in isolation without considering the other terms of lease. You should, for example, expect to pay more if the landlord takes responsibility for repairs than you would do if you were responsible for them.

The lease will state the payment terms for the rent. This is often quarterly in advance although other alternatives such as monthly payments could be considered. There will be penalties for late payment and the lease probably allows the landlord to repossess the premises if you default completely on the rent.

Will the landlord require a guarantee for the rent?

Particularly if your business is a very young or small one, the landlord may insist on some kind of guarantee for the rent and the other obligations of the lease. If you are asked to provide a personal guarantee, be aware of the implications. If your company goes bust, the landlord could have a claim on your home and other personal assets. You also need to be clear whether any guarantees would cease to apply if the lease was subsequently assigned. Ensure, if you can, that any guarantee lapses on assignment.



Find a Surveyor in your area at [ricsfirms.com](https://www.ricsfirms.com)



[Back to contents](#)



What happens at the rent review point?

Rent reviews are a topic on their own and you should read **section 10 Rent reviews**. It is when you sign a new lease or take an assignment of an existing lease that you agree to a certain pattern of rent reviews in the future, so you need to understand the implications at this stage.

Traditionally, longer leases will provide for the rent to be reviewed every three, four or five years during the life ('term') of the lease, possibly in an 'upward only' direction. *The Code for Leasing Business Premises in England and Wales* has been drawn up to guide landlords and tenants and pays particular attention to the subject of rent reviews. Landlords have been recommended to offer tenants alternatives to upward only reviews. Your chartered surveyor will be able to advise you on the implications of the landlord's proposed rent review clause and whether there may be scope for negotiation.

How are disputes between landlord and tenant resolved?

Ideally, by discussion and negotiation but serious differences of view cannot always be avoided, particularly on matters like market rent levels at the review point. Therefore a lease will normally provide in advance for what is to happen when disagreements occur on certain key points.

In the absence of other provisions, the ultimate recourse for either party is to the courts. This would involve considerable time and expense, so the lease may state that disputes which cannot be resolved amicably between the parties should be referred to an arbitrator or to an independent expert.

RICS offers a small business scheme which helps small businesses with rent reviews. **The Small Business Scheme** offers a way to have an independent expert settle disputed rent reviews on commercial properties.

What are service charges?

In addition to rent, there are certain other regular payments that you as tenant may need to make to the landlord. Particularly where you occupy only part of a larger building, the landlord may charge you a portion of the cost for services that he or she supplies for the building as a whole: maintenance of common parts, decoration and maintenance of the exterior of the building and the like. This will generally be described as a 'service charge'.

It is important to ensure before signing the lease that you understand the basis on which service charges will be calculated and the sums likely to be involved. **See section 09 Service charges** for more detail.

Who is responsible for paying business rates?

Businesses are liable to pay the 'uniform business rate' (UBR), and it is usually the tenant who will be responsible. Occasionally, however, the landlord will pay the UBR and pass on the cost to the tenant, perhaps in the service charge. The lease should make clear where the responsibility lies.

Can I escape from a lease if my property requirements change?

There are two main possibilities if you want to vacate the premises before your lease expires. You may 'assign' the lease to another tenant who takes over responsibility for paying rent to the landlord (but see below). Or you may continue to pay the rent, but sub-let the space to another tenant, from whom you in turn collect rent. However, your lease will probably limit or impose conditions on your ability to follow either course, and you need to understand these limitations fully before you sign the lease.

Some leases will incorporate a 'break clause', which gives the landlord or tenant (or both) the right to walk away from the lease at a specific point.

The clauses in your lease relating to assignment and sub-letting can have a very important effect on your future flexibility. You should make certain that your chartered surveyor or solicitor explains exactly what you are being asked to agree to, and its possible implications.



Find a Surveyor in your area at [ricsfirms.com](https://www.ricsfirms.com)



[Back to contents](#)