

# SEMINAR 19<sup>th</sup> August 2019

- ❖ *WHAT CLAUSES TO LOOK OUT FOR IN COMMERCIAL LEASES* 50 mins
- ❖ *OPEN QUESTION TIME* 10 mins

- ❖ **NEXT SEMINAR 23<sup>rd</sup> September 2019 at  
Cushman & Wakefield, 43-45 Portman Square, London W1H 6LY**

*SEMINAR BY DOUG STEVENS TO 1<sup>st</sup> & 2<sup>nd</sup> YEAR GRADUATES  
DELIVERED AS A POWERPOINT PRESENTATION*

*Previous Seminars on [www.douglasstevens.co.uk](http://www.douglasstevens.co.uk) SEMINARS*

# IMPORTANCE OF READING & UNDERSTANDING COMMERCIAL LEASES

## Q. WHY IS IT IMPORTANT TO UNDERSTAND COMMERCIAL LEASES?

A. THE CLAUSES WITHIN A LEASE DIRECTLY IMPACT ON RENTAL AND CAPITAL VALUE AND HOW A PROPERTY IS OCCUPIED AND ASSET MANAGED.

### ▶ ASSET MANAGEMENT & AGENCY

▶ WHETHER YOU ARE A LANDLORD (L/L) OR TENANT (T) OR AN ADVISER TO EITHER OR A MANAGING AGENT YOU NEED TO UNDERSTAND - WHAT THE LEASE PERMITS OR RESTRICTS?

▶ WHAT CONTROLS DOES THE L/L HAVE? - WHAT RIGHTS HAS THE T GOT?

▶ VALUATION (for investment, rent review or lease renewal)

▶ IF YOU ARE VALUING A PROPERTY (CAPITAL AND RENTAL VALUATIONS) THE TERMS ON WHICH THE LEASE IS HELD DIRECTLY IMPACT ON VALUE

▶ YOU NEED TO IDENTIFY THOSE CLAUSES WHICH WILL IMPACT ON RENTAL AND CAPITAL VALUE

▶ DOES A CLAUSE ADD VALUE OR MIGHT IT CAUSE A LOSS IN VALUE OR IS IT NEUTRAL ie, market norm

▶ THERE IS CASE LAW ON EVERY CLAUSE IN A LEASE

## Q. ARE THERE ANY OTHER DOCUMENTS?

- ▶ A. ASK IF THERE ARE ANY OTHER DOCUMENTS FOR THE PROPERTY BESIDES THE LEASE
- ▶ IS THERE AN AGREEMENT FOR LEASE IN ADDITION TO THE LEASE? (This may apply if it is a large store or supermarket which has been developed or an existing building reconfigured).
- ▶ IS THERE A LICENCE TO ASSIGN (change of tenant - other variations to lease terms?)
- ▶ ARE THERE ANY LICENCES FOR ALTERATION? (tenant's improvements to be disregarded)
- ▶ ARE THERE ANY DEEDS OF VARIATION? (these might vary the rent or use etc, etc)
- ▶ IS IT A REVERSIONARY LEASE? (in which case you may also need the preceding lease)

## Q. IS THE LEASE INSIDE THE LANDLORD & TENANT ACT 1954 OR IS IT CONTRACTED OUT?

- ▶ A. IN OLD LEASES THERE WILL BE A CLAUSE SAYING THAT SECTIONS 24-28 OF L & T ACT 54 IS EXCLUDED BY A COURT ORDER
- ▶ IN MODERN LEASES IT WILL SAY IN THE DEFINITIONS THAT A STATUTORY DECLARATION HAS BEEN SIGNED & THAT THERE IS NO L&T ACT SECURITY OF TENURE,
- ▶ ie, NO RIGHT TO RENEW THE LEASE UPON ITS EXPIRY

# EXAMPLE OF CLAUSE WHICH CONFIRMS A LEASE IS A CONTRACTED OUT LEASE

- ▶ **Exclusion of Sections 24-28 of the Landlord and Tenant Act 1954**
- ▶ In accordance with the provisions of section 38A(1) of the Landlord and Tenant Act 1954, the parties hereby agree that the provisions of sections 24 to 28 of that Act shall be excluded in relation to the tenancy created by this lease:
- ▶ (a) the Landlord has served on the Tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (the "Order");
- ▶ (b) the requirements specified in Schedule 2 to the Order have been met in that the Tenant has made the appropriate declaration in the form, or substantially in the form, set out in Schedule 2 to the Order.
- ▶ **THESE WORDS or similar words MEAN THAT IT IS A CONTRACTED OUT LEASE**
- ▶ **SO 'L/L' HAS CONTROL AT THE END OF THE LEASE**
- ▶ **SO 'T' HAS TO FIND NEW PREMISES AT END OF LEASE (unless L/L is willing to grant a new lease)**

## Q. ARE LEASES IN A STANDARDISED FORM?

A. NO

EVERY LEASE DIFFERENT - EVEN IN A SHOPPING CENTRE OR MULTI-LET OFFICE/INDUSTRIAL

- ❖ ATTEMPTS AT STANDARDISATION HAVE BEEN MADE BY BODIES SUCH AS RICS, BPF, BCO NOTHING HAS BEEN MADE OBLIGATORY - BUT SOME ADOPTION BY WAY OF A CODE
- ❖ EACH `L/L` & `T` AND THEIR SOLICITORS WANT TO ADOPT THEIR OWN FORM OF WORDING FOR EACH CLAUSE
- ❖ DEPENDENT ON THE STRENGTH OF THEIR NEGOTIATING POSITION THEIR FORM OF WORDING WILL BE ADOPTED. HENCE THE VARIATIONS IN LEASES MAKING EACH OF THEM UNIQUE
- ❖ THERE IS NO UNIVERSAL ORDER FOR EACH CLAUSE - BUT MODERN LEASES DO ATTEMPT TO MAKE THE CONTENTS OF THE LEASE CLEARER BY PROVIDING IN THE OPENING PAGES A SUMMARY OF THE CLAUSES & DEFINITIONS OF MATERIAL WORDS
- ❖ OVER THE YEARS LEASES HAVE BECOME LONGER AND LONGER
- ❖ IT IS IMPORTANT TO IDENTIFY THE IMPORTANT CLAUSES IN THE LEASE AND INDEED ANY WHICH ARE **NOT** IN IT
- ❖ YOU SHOULD PREPARE A SUMMARY OF THE LEASE TERMS UNDER A SERIES OF HEADINGS - SO THAT YOU DO NOT MISS ANYTHING OF RELEVANCE

## Q. HOW DO I MAKE SURE I HAVE READ THE LEASE PROPERLY ?

### A. MAKE A SUMMARY OF THE MAJOR CLAUSES UNDER FOLLOWING HEADINGS:

- ▶ **DATE OF LEASE** THIS MAY DICTATE THE LEASE COMMENCEMENT DATE AND MAY DICTATE THE RENT REVIEW DATE(S). ( But may be dated months or years after lease starts ).
- ▶ IS THE LEASE DATED PRE-1<sup>ST</sup> JAN 1996 (LANDLORD & TENANT COVENANTS ACT 1995) - IF SO PRIVACY OF CONTRACT ON ASSIGNMENT WILL APPLY
- ▶ **TERM COMMENCEMENT DATE** - This may be different from date of lease.
- ▶ **PARTIES** - ARE THE LANDLORD (L/L) & TENANT (T) THE SAME AS THE CURRENT `L/L` & `T`?
- ▶ IF NOT THERE HAS BEEN A SALE OF THE L/L INTEREST
- ▶ AND/OR AN ASSIGNMENT OF `T`S INTEREST.
- ▶ THE NEW TENANT WILL BE STATED IN THE LICENCE TO ASSIGN
- ▶ RECORD THE DETAILS OF THE NEW TENANT.
- ▶ DOES THE LICENCE TO ASSIGN CONTAIN ANY VARIATIONS TO THE LEASE?
- ▶ YOU NEED TO ESTABLISH THE ACTUAL CURRENT TENANT – eg, FOR AN INVESTMENT SALE TO CHECK COVENANT STRENGTH
- ▶ IS THERE A GUARANTOR FOR THE `T`
- ▶ See example overleaf

# EXAMPLE OF SUMMARY OF SOME LEASE TERMS

- ▶ LEASE DATED 1<sup>ST</sup> September 2015
- ▶ ORIGINAL PARTIES LANDLORD XXX LIMITED
- ▶ TENANT XXX LIMITED
- ▶ GUARANTOR XXX LIMITED
- ▶ CURRENT PARTIES ??
- ▶ TERM 15 YEARS COMMENCING 24<sup>th</sup> JUNE 2010 EXPIRING 23<sup>rd</sup> JUNE 2025
- ▶ RENT £100,000 per annum
- ▶ RENT COMMENCEMENT 24<sup>th</sup> JUNE 2011
- ▶ RENT REVIEWS EVERY 5 YEARS FROM TERM COMMENCEMENT
- ▶ BASIS TO VALUE ASSUME A NEW LETTING FOR THE UNEXPIRED TERM  
OR FOR A TERM OF 10 YEARS (whichever is longer)
- ▶ SECURITY OF TENURE LEASE IS WITHIN THE L & T ACT 1954 (or contracted out)
- ▶ BREAK CLAUSE TENANT HAS OPTION TO DETERMINE THE TERM ON 24<sup>TH</sup> JUNE 2021  
ON SERVING 6 MONTHS NOTICE IN WRITING
- ▶

# Q. WHAT IS THE DEMISED PREMISES?

## A. THE DEMISED PREMISES WILL BE DESCRIBED WITHIN THE LEASE

- ▶ ie, ALL THAT PROPERTY AT xxxx Street arranged ON BASEMENT GROUND AND PART FIRST FLOOR.
- ▶ BUT WHAT HAS ACTUALLY BEEN DEMISED IN THE LEASE - ie,
- ▶ ARE THERE VOIDED AREAS DEMISED i.e. sealed off upper parts which might not be occupied.
- ▶ COMPARE ACTUAL DEMISE WITH HYPOTHETICAL DEMISE – BECAUSE AT RENT REVIEW THERE MAY BE AN ASSUMPTION THAT YOU VALUE SOMETHING DIFFERENT FROM THE ACTUAL DEMISE

## Q. WHY MIGHT YOU DEFINE A HYPOTHETICAL LEASE DEMISE RATHER THAN THE ACTUAL DEMISE?

A. BECAUSE THERE MAY BE NO COMPARABLES FOR THE ACTUAL DEMISE – SO YOU ASSUME A HYPOTHETICAL DEMISE FOR WHICH THERE ARE COMPARABLES.



## EXAMPLE OF HYPOTHETICAL DEMISE

- ▶ INSTEAD OF THE RENT REVIEW CLAUSE REQUIRING THE ASSESSMENT OF THE OPEN MARKET RENTAL VALUE OF THE ACTUAL SHOP THERE IS AN ASSUMPTION THAT IT IS A HYPOTHETICAL SHOP see example below
- ▶ THE HYPOTHETICAL SHOP
- ▶ shall mean a hypothetical self-contained rectangular modern ground floor shop unit having a net internal area of 2,000 square feet measured in accordance with the RICS Code of Measuring Practice.
- ▶ the shop unit shall be assumed to have an unobstructed shop front fascia and display of twenty feet and a shop depth of one hundred feet (20ft x 100ft)
- ▶ Such hypothetical shop unit possesses a suitable shop front plastered walls and ceilings ready to receive the fitting out works of the hypothetical tenant and has the benefit of all necessary services accesses means of escape and facilities including and immediately adjacent thereto (and with direct access to such shop unit) any stockrooms which may be required by a tenant
- ▶ all necessary toilet and/or sanitary facilities
- ▶ a loading bay of adequate size with unrestricted access thereto from a public highway
- ▶ and for the avoidance of doubt it has been agreed that for the purposes of assessing the open market rental value of the hypothetical shop unit no rental value shall be ascribed to such stockrooms and neither shall the hypothetical tenant be deemed to receive any benefit from a rent free use of the same

## Q. TERM – WHAT IS THE LENGTH OF THE LEASE?

▶ DOES IT START FROM THE DATE OF THE LEASE OR A DIFFERENT DATE (LEASE TERM COMMENCEMENT DATE) - RECORD THE START AND FINISH DATE

Q. **WHAT IS THE ACTUAL UNEXPIRED LEASE TERM?** – RECORD THIS IN YOUR LEASE SUMMARY

R. **FOR ASSET MANAGEMENT AND INVESTMENT VALUATION PURPOSES YOU NEED TO KNOW THE ACTUAL UNEXPIRED TERM** – that is what you are managing or valuing.

S. **HOWEVER FOR RENT REVIEW PURPOSES IT IS THE ASSUMED LEASE TERM WHICH YOU ARE VALUING**

A. **Q. IS IT A LONG TERM, ie, 15 YEARS OR LONGER?**

B. **OR IS IT A SHORT TERM - < 5 YEARS?**

NB: IN THE RENT REVIEW PROVISIONS IN THE LEASE THERE MAY BE AN ASSUMPTION THAT THE LEASE IS LONGER OR SHORTER THAN THE ACTUAL TERM OR THE ACTUAL UNEXPIRED TERM.

In our previous example there will be an unexpired term of 5 yrs at the next rent review - 24/06/2020 **BUT** we are required to assume a 10 yr term (ie, one expiring 2030)

You need to record what the assumed term is because for rent review purposes it is the assumed term that you will be valuing not the actual term or the unexpired term.

## THE UNEXPIRED LEASE TERM MAY BE DIFFERENT FROM THE ASSUMED TERM

- ▶ **ASSUMED LEASE TERM** - WITHIN THE RENT REVIEW CLAUSE IT WILL STATE WHETHER THE LEASE TERM YOU ARE TO ASSUME IS THE UNEXPIRED TERM OR IT MIGHT STATE A MINIMUM TERM , SAY 10 YEARS OR IT MIGHT STATE THAT IT IS FOR THE WHOLE TERM OF THE ORIGINAL LEASE.
- ▶ SEE CASE LAW **CANARY WHARF INVESTMENTS (THREE) V TELEGRAPH GROUP LTD 2003**
- ▶ *(The original lease was for 25 yrs. At rent review the unexpired term was 20 yrs.*
- ▶ *But the specific wording in the review clause required whole term to be assumed)*
- ▶ In most cases the wording is such that it is assumed that the lease starts from the original commencement date and so it is the unexpired term which you consider at the later rent review date.
- ▶ THE LEASE TERM ASSUMPTION HAS VALUATION IMPLICATIONS WHERE THE ASSUMED LEASE TERM IS LONGER THAN THE NORM FOR THAT MARKET SECTOR OR SHORTER THAN THE NORM FOR THAT MARKET SECTOR.
- ▶ 5 YEARS MIGHT BE OK FOR A SINGLE SHOP UNIT - BUT 10 or 15 or 20 or 25 YEARS MAY BE TOO LONG AND MAY RESULT IN A POSSIBLE DISCOUNT FROM OPEN MARKET RENT.
- ▶ HOWEVER, 5 YRS or 10 YRS WOULD BE REGARDED AS TOO SHORT FOR A LARGE STORE (DEPARTMENT STORE OR FOODSTORE) AND A DISCOUNT WOULD APPLY.

# Q. WHAT IS THE TYPE OF RENT PAYABLE? & THE ACTUAL RENT NOW PAYABLE?

- ▶ YOU MAY BE TOLD THIS RENTAL FIGURE - BUT MAY HAVE TO CALCULATE IT
- ▶ NB RENT STATED IN LEASE MAY NOW BE DIFFERENT FOLLOWING A RENT REVIEW (LOOK AT DATES OF LEASE AND REVIEWS)
- ▶ In our previous example rent in 2010 was £100,000 - but this may now have changed at June 2015 rent review
- ▶ IF THE RENT REVIEW BASIS IS NOT TO OPEN MARKET RENT BUT TO RPI INCREASE or A FIXED UPLIFT (COMPOUND INTEREST) YOU NEED THE NEW FIGURE
- ▶ ARE THERE CAPPED UPLIFTS ie, rent can increase at rent review by maximum 15%.
- ▶ IS IT A BASE RENT (80%?) WITH TURNOVER TOP-UP?
- ▶ WHAT IS THE TURNOVER PERCENTAGE?
- ▶ ABOVE WHAT THRESHOLD OF TURNOVER IS T/O RENT PAYABLE?
- ▶ DOES LAST YEAR'S TURNOVER SET A NEW BASE RENT? (THIS IS REFERRED TO AS RATCHETING)

## Q. IS THERE A TENANT ONLY BREAK CLAUSE IN THE LEASE?

- ▶ (NB It may be referred to as an **Tenants Option to Determine**)
- ▶ CAREFULLY RECORD
  - ▶ - THE DATE OF THE BREAK NOTICE
  - ▶ - THE DATE FOR SERVICE OF THE BREAK NOTICE
  - ▶ - THE DATE IS TAKES EFFECT, ie, DATE IT TERMINATES THE LEASE.
- ▶ **TIME IS OF THE ESSENCE FOR THESE DATES.**
- ▶ **IF YOU MISS THE DATE – YOU MISS THE BREAK !!!**
- ▶ IF IT IS A ROLLING BREAK (ie, it can be served at any time after a specified date) WHEN DOES IT APPLY FROM AND ON WHAT NOTICE PERIOD?
- ▶ THE PRESENCE OF A BREAK CLAUSE DOES IMPACT ON VALUE
- ▶ BECAUSE A SHORTER LEASE TERM MAY BE ASSUMED IF BREAK IS EXERCISED.
- ▶ A VALUER WILL VALUE ONLY TO THE NEXT BREAK AND THEN ALLOW FOR A VOID OR RENT FREE
- ▶ IF THE LEASE CONTAINS A L/L`S BREAK CLAUSE (which isn't related to a re-development) THEN IT WILL BE A CONTRACTED OUT LEASE

## EXAMPLE OF A BREAK CLAUSE

- ▶ Tenant's right to determine
- ▶ If the Tenant shall desire to determine the term granted by this deed on the day immediately preceding the eleventh anniversary of the commencement of the term and shall
- ▶ give to the Landlord not less than six months' previous notice in writing of such desire then (but only so long as at the date of such determination the Tenant:
  - ▶ (a) gives up vacant possession of the property to the Landlord;
  - ▶ (b) has paid all rent and other sums payable to the Landlord up to such date; and
  - ▶ (c) has substantially performed and observed the covenants and conditions on the part of the Tenant contained in this deed),
- ▶ immediately on the expiration of any such notice this demise and everything contained in this deed shall determine but without prejudice to the rights and remedies of either party in respect of any antecedent claim or breach of covenant.
- ▶ **IN OUR EXAMPLE THE 11<sup>th</sup> ANNIVERSARY WOULD BE 24<sup>th</sup> JUNE 2021**
- ▶ **SO TENANTS NOTICE TO BREAK TO BE SERVED BY 23<sup>rd</sup> DECEMBER 2020**

# Q. IS THERE IS A L/L BREAK CLAUSE?

Q IS THERE A RE-DEVELOPMENT BREAK CLAUSE -

A. HAS THE L/L RESERVED THE RIGHT TO TERMINATE THE LEASE FOR A RE-DEVELOPMENT?  
IF SO RECORD THE DATE (S) AND NOTICE PERIODS

IF THERE IS A REDEVELOPMENT BREAK CLAUSE IT MEANS THAT THE LEASE IS CONTRACTED INSIDE THE L&T ACT 1954

THE LANDLORD HAS TO PROVE UNDER THE NORMAL GROUNDS OF S.30 THAT HE REQUIRES VACANT POSSESSION IN ORDER TO EXERCISE THE LANDLORDS REDEVELOPMENT BREAK CLAUSE.

IF THERE IS A REDEVELOPMENT BREAK CLAUSE THIS WILL IMPACT ON VALUE

IT WILL NORMALLY RESULT IN A RENT REDUCTION AT RENT REVIEW OR AT LEASE RENEWAL BECAUSE THE TENANT WILL ARGUE THAT THEY ONLY HAVE A SHORT LEASE UNTIL THE LANDLORD COULD POTENTIALLY TAKE IT BACK TO REDEVELOP.

## REDEVELOPMENT BREAK CLAUSE

- ▶ IF L/L IS CONSIDERING REDEVELOPMENT BUT IS NOT YET READY - A REDEVELOPMENT BREAK CLAUSE IS AN OPTION
- ▶ AT LEASE RENEWAL COURT WILL GRANT A REDEVELOPMENT BREAK CLAUSE. `L/L` HAS TO DEMONSTRATE REAL POSSIBILITY THAT REDEVELOPMENT WILL TAKE PLACE DURING THE TERM OF THE RENEWAL LEASE.
- ▶ THE COURTS USUALLY GRANT A CLEAR PERIOD OF TIME BEFORE THE REDEVELOPMENT BREAK CLAUSE CAN BE OPERATED, ALLOWING THE TENANT TO CONTINUE ITS BUSINESS FROM THE PREMISES FOR A GUARANTEED AMOUNT OF TIME.
- ▶ COURTS MAY GRANT A FIXED or ROLLING REDEVELOPMENT BREAK CLAUSES WITH NOTICE PERIODS OF SAY 6 MONTHS.
- ▶ HOW ARE TENANTS' INTERESTS PROTECTED? `T` STILL HAS PROTECTION OF L & T ACT
- ▶ EVEN WITH A REDEVELOPMENT BREAK CLAUSE, ONCE A HOSTILE S.25 NOTICE HAS BEEN SERVED, THE `L/L` STILL HAS TO PROVE INTENTION TO REDEVELOP IN THE USUAL WAY AND, IF SUCCESSFUL, PAY STATUTORY COMPENSATION TO THE TENANT.
- ▶ THE REDEVELOPMENT BREAK CLAUSE INTRODUCES UNCERTAINTY FOR THE TENANT,
- ▶ IT DOES NOT KNOW HOW LONG IT`S LEASE WILL RUN
- ▶ THEREFORE `T` SEEKS REDUCTION IN THE RENT PAYABLE FOR THE PREMISES.
- ▶ IF THERE IS A REDEVELOPMENT BREAK CLAUSE YOU MAY VALUE TO THE BREAK CLAUSE AND ADOPT THE REDUCED RENT.



# REPAIRS

- ▶ **FRI** FULL REPAIRING AND INSURING
- ▶ **OR EFFECTIVE FRI**- L/L RESPONSIBLE FOR STRUCTURE - T LIMITED TO INTERNAL (EXTERIOR SOMETIMES) ie, L/L RECOVERS COST THROUGH SERVICE CHARGE PAYMENTS
- ▶ NOTE THE BASIS OF **SERVICE CHARGE** - STATED AS A %AGE OR CALCULATED PER SQ FT GROSS, WEIGHTED OR UNWEIGHTED (PER SIZE OF UNIT OR PER FLOOR OF THE PROPERTY) - OR CALCULATED BY REFERENCE TO RATEABLE VALUE
- ▶ **IRT** INTERNAL REPAIRING TERMS - ADDITION TO RENTAL VALUE (say 10%?)
- ▶ **SCHEDULE OF CONDITION?** - WAS THE PROPERTY LET IN A POOR CONDITION WITH THE CONDITION RECORDED IN WRITING OR WITH PHOTOGRAPHS - IS THE REQUIREMENT FOR THE T TO KEEP PREMISES IN THE SAME CONDITION AS THE SCHEDULE OF CONDITION ONLY
- ▶ T COVENANTS TO REPAIR - TO KEEP IN GOOD AND SUBSTANTIAL REPAIR/DECORATION & CONDITION. HELD TO MEAN REPAIR AND REPLACEMENT BUT NOT GIVING BACK THAT WHICH WAS NOT GIVEN. DOES IT SAY PUT AND KEEP - THIS IS A MORE ONEROUS REPAIRING OBLIGATION.
- ▶ IS THE T REQUIRED TO RENEW L/L FIXTURES AND FITTINGS
- ▶ IS THE T REQUIRED TO REBUILD THE PROPERTY - THIS IS ONEROUS AND GENERALLY CONFINED TO LONG LEASES
- ▶ INHERENT/LATENT DEFECTS THESE ARISE FROM A DEFECT IN DESIGN, CONSTRUCTION OR MATERIALS USED AND ARE GENERALLY EXCLUDED FROM T`S LIABILITY BUT NOT ALWAYS
- ▶ REMEMBER YOU ARE LOOKING FOR THE ABNORMAL. IF ITS ABNORMAL FOR THAT TYPE OF PROPERTY OR THOSE MARKET CONDITIONS IT MIGHT ADVERSELY AFFECT VALUE.

## EXAMPLES OF REPAIRING CLAUSES

- ▶ To keep and maintain the Premises In good and substantial repair and condition (damage by the Insured Risks excepted save to the extent that insurance moneys are irrecoverable as a result of the act or default of the Tenant);
- ▶ To commence works and thereafter diligently proceed to make good any disrepair for which the Tenant is liable within 2 months after the date of written notice from the Landlord (or sooner If the Landlord reasonably requires):
- ▶ If the Tenant fails to comply with any such notice the Landlord may enter and carry out the work and the reasonable and proper cost shall be reimbursed by the Tenant on demand as a debt;
- ▶ -----
- ▶ To put and keep In good and substantial repair      **THIS IS MORE ONEROUS**
- ▶ To renew & replace L/L`s fixtures & fittings      **THIS IS MORE ONEROUS**
- ▶ To rebuild the demised premises      **EVEN MORE ONEROUS**
- ▶ YIELDING UP
- ▶ At expiration or earlier determination of the Term the Tenant is to ;
- ▶ yield up the Demised Premises AND if so requested by the Landlord to remove from the Demised Premises all the Tenant's trade fixtures and fittings

## Q. IS 'T' PERMITTED TO MAKE ALTERATIONS?

- ▶ A. YES NORMALLY
- ▶ A. BUT POSSIBLY NOT IF IT IS A LISTED BUILDING.
- ▶ A. YES – NON-STRUCTURAL ALTERATIONS – **BUT** SOMETIMES NOT STRUCTURAL ONES
- ▶ Q. WHY WOULD A L/L SEEK TO PROHIBIT STRUCTURAL ALTERATIONS?
- ▶ A. L/L WISHES TO MAINTAIN STRUCTURAL INTEGRITY AND APPEARANCE & VALUE OF HIS BUILDING.
- ▶ IN LEASES WHERE STRUCTURAL ALTERATIONS ARE PROHIBITED THE 'T' MAY ARGUE FOR A DISCOUNT AT RENT REVIEW .-
- ▶ **NON-STRUCTURAL** – GENERALLY PERMITTED WITH LLCNTBUW (OD )
- ▶ LANDLORDS CONSENT NOT TO BE UNREASONABLY WITHHELD OR DELAYED
- ▶ **REINSTATEMENT** – RETURN TO ORIGINAL STATE AT END OF LEASE IF (REASONABLY) REQUIRED BY L/L

## EXAMPLE OF ALTERATIONS CLAUSE

- ▶ Not to make any alterations or additions to or affecting the structure or exterior of the Demised Premises or the appearance of the Demised Premises as seen from the exterior
- ▶ Not to make any alterations or additions which:
  - ▶ (1) affect the structure of the Premises (including without limitation the roofs and foundations and the principal or load-bearing walls, floors, beams and columns)
  - ▶ (ii) divide the Premises or merge the Premises with any adjoining premises;
  - ▶ (iii) affect the external appearance of the Premises;
  - ▶ (iv) diminish the lettable floor area of the Premises;
- ▶ Not to make any other alterations or additions to the Premises without the Landlord's written consent (not to be unreasonably withheld or delayed) LLCNTBUW ( OD)

# ALIENATION

▶ ALIENATION MEANS ASSIGNMENT UNDERLETTING or SHARING POSSESSION

- ▶ **ASSIGNMENT** - WHOLE ONLY - NOT PART ONLY
- ▶ - WHOLE ONLY FOR L/L CONTROL
- ▶ - PROHIBITED - (may apply on short lease or anchor tenant or near lease end)
- ▶ - PRE-EMPTION (l/l wants it back)

▶ **UNDERLETTING** DOES THE LEASE PERMIT THE UNDERLETTING?

▶ WHOLE ONLY

▶ PART OR PARTS (what part - how many parts?)

▶ OR ABSOLUTE PROHIBITION

▶ **SHARING POSSESSION** - CAN THE TENANT HAVE CONCESSIONS IN THE SHOP/STORE

▶ IF SO WHAT PERCENTAGE 20%, 30%, etc

## EXAMPLE OF ASSIGNMENT CLAUSE

- ▶ NOT TO
- ▶ assign, underlet or part with possession of the whole or part only of the Premises nor charge part only of the Premises nor to agree to do so except by an assignment or underletting of the whole or an underletting of a Subletting Unit permitted by this Clause
- ▶ share the possession or occupation of the whole or any part of the Premises;

Not to assign or agree to assign the whole of the Premises without the Landlord's written consent (not to be unreasonably withheld or delayed), provided that:

- ▶ The Landlord may withhold consent in circumstances where:
  - ▶ (a) the proposed assignee is a Group Company of the Tenant;
  - ▶ (b) in the reasonable opinion of the Landlord the proposed assignee is not of sufficient financial standing to enable it to comply with the Tenant's covenants in this Lease;
- ▶ the Landlord's consent shall in every case be subject to conditions that:
  - ▶ (a) the assignee covenants with the Landlord to pay the rents and observe and perform the Tenant's covenants in this Lease during the residue of the Term, or until released pursuant to the 1995 Act;
  - ▶ (b) the Tenant enters into an (AGA) authorised guarantee agreement guaranteeing the performance of the Tenant's covenants in this Lease by the assignee
  - ▶ (c) such other persons as the Landlord reasonably requires act as guarantors for the assignee and enter into direct covenants with the Landlord

# ALIENATION

- ▶ IDENTIFY WHERE RESTRICTIVE ALIENATION WOULD IMPACT ON VALUATION
- ▶ LLCNTBUW S.19 LANDLORD & TENANT ACT 1927 - `L/L` DEEMED NOT TO ACT UNREASONABLY BUT - THIS WILL NOT OVER-RIDE SPECIFIED QUALIFICATIONS/ CONDITIONS
- ▶ **ASSIGNMENT** L/L CONSENT MAY BE SUBJECT TO AN AGA (AUTHORISED GUARANTEE AGREEMENT)
- ▶ IF THE LEASE WAS GRANTED AFTER 1 JANUARY 1996 DUE TO THE IMPOSITION OF THE L&T COVENANTS ACT 1995
- ▶ COVENANT L/L MAY REFUSE CONSENT IS ASSIGNEES COVENANT IS POOR
- ▶ GOOD ESTATE MANAGEMENT TENANT MIX POLICY (L/L may refuse consent if there is a change of use - But only if L/L can prove consistent application of that policy)
- ▶ **UNDERLETTING**
- ▶ RENT RESERVED MUST BE MARKET RENT (NOT < PASSING RENT) -
- ▶ LEASE ON SAME TERMS - SIMILAR REVIEW DATES -
- ▶ CONTRACTED OUT - Any underlease granted must be contracted out
- ▶ GUARANTOR or RENT DEPOSIT required from undertenant

## PRE-EMPTION

- ▶ **PRE-EMPTION** - ON RECEIVING AN APPLICATION FOR ASSIGNMENT (OR UNDERLETTING) L/L RESERVES RIGHT TO EXERCISE A PRE-EMPTION TO TAKE THE LEASE BACK (A SURRENDER) AT SAME PREMIUM AS OFFERED TO `T` IN MARKET
- ▶ **Q. DOES THE EXISTENCE OF THE PRE-EMPTION DEPRESS THE RENTAL VALUE?**
- ▶ **A. PROBABLY NOT.** THE LEVEL OF PREMIUM OFFERS (IF ANY) MIGHT BE LESS AS PROSPECTIVE ASSIGNEES MIGHT BID LESS (OR NOT BID) ASSUMING THAT L/L WILL EXERCISE THE PRE-EMPTION BUT THE `T` BY EFFECTING A SURRENDER ESCAPES ANY DILAPIDATIONS LIABILITY AND ANY FUTURE LIABILITY WHICH MIGHT HAVE ARISEN IF THE ASSIGNEE DEFAULTED



## EXAMPLE OF WORDING OF A PRE-EMPTION CLAUSE

- ▶ "Premium" means the value of the consideration for an assignment or surrender of this Lease and includes any consideration for the goodwill tenant's and trade fixtures and fittings in the property and takes account of any monetary or non-monetary inducement offered by the Tenant to the proposed assignee.
- ▶ If the Tenant wishes to assign the property the Tenant shall give written notice to the Landlord of its intention to assign together with full and accurate particulars of the proposed assignee and the amount of any Premium offer for the assignment
- ▶ and simultaneously shall make a written offer to the Landlord to make an absolute surrender of this Lease with vacant possession free from incumbrances at the same premium as the Premium at which the Tenant proposes to assign plus VAT and **such offer shall remain open for acceptance for 15 days** from the date when the Landlord receives the offer under the provisions of this deed.
- ▶ If the Landlord shall not within 15 days after receipt of such offer give to the Tenant a written acceptance of such offer then the Tenant shall be free during the period of 180 days from the expiration of such 15 day period to assign this Lease
- ▶ If the Landlord shall accept the offer to surrender the following conditions of sale shall apply:
  - ▶ the surrender shall be completed **four weeks from** the date of service by the Landlord of the **written acceptance of the offer**

## USER - PERMITTED USER

**Q. WHAT IS THE PERMITTED USER?**

**A. THIS IS NORMALLY LISTED IN THE DEFINITIONS**

- ▶ IT WILL SPECIFY THE ACTUAL USE AND SOMETIMES THE USE CLASS ,ie A1, A2, A3, B1,D2
- ▶ BUT ACTUAL USER CLAUSE MAY PERMIT OTHER USES AND RENT REVIEW CLAUSE MAY REQUIRE ASSUMPTION OF WIDER RANGE OF USES

THERE ARE THREE TYPES OF USER CLAUSE - OPEN - QUALIFIED AND ABSOLUTE

- ▶ **OPEN USER** ie, LLCNTBUW (OD) WITHIN USE CLASS - OR SEVERAL USE CLASSES
- ▶ **QUALIFIED USER** - L/L CONSENT (NB S.19 L&T Act 1927 does not apply)  
SO L/L DOES NOT NEED TO ACT REASONABLY
- ▶ **ABSOLUTE RESTRICTIVE USER** (10% DISCOUNT) - COMPETITION ACT 1998
- ▶ IS THERE AN **EXCLUSIVITY CLAUSE?**
  
- ▶ NB - AGA TERMS MAY FURTHER RESTRICT WHAT USE IS ACCEPTABLE
- ▶ NB - RENT REVIEW PROVISIONS MAY ASSUME NO USER RESTRICTIONS

## EXAMPLE OF A SLIGHTLY RESTRICTED USER

- ▶ At all times to use the property for the purpose of a retail shop for the sale of high quality and fashionable mens and ladieswear and ancillary accessories including but not limited to sunglasses luggage footwear leatherwear toiletries hats watches jewellery and underwear
- ▶ Provided that the retail sale of such ancillary accessories does not exceed 50% of the total sales area and each ancillary item should not exceed 15% of the total sales area) and ancillary stockroom ancillary showroom ancillary storage area and/or ancillary offices and not to use or permit or suffer the same to be used for any other purpose without the previous written consent of the Landlord which consent shall not be unreasonably withheld where:
  - ▶ (i) the proposed use is as a shop (within the meaning of Class A1(a) of Part A of the Schedule to the Town and Country Planning (Use Classes) Order 1987) for the retail sale of specified fashionable goods or for a specified fashionable retail trade or business; and
  - ▶ (ii) the proposed use is not one which at the date of the Tenant's application for consent would conflict with the principles of good estate management;
  - ▶ (iii) the proposed use would not result in the diminution of the value of any interest in the property or any adjacent premises

# OTHER CLAUSES

- ▶ **RENT REVIEW CLAUSES**
- ▶ This subject was covered in preceding Seminar on 22<sup>nd</sup> JULY by Chris Osmond (Cushman Wakefield).
  
- ▶ **INSURANCE** - REDEVELOPMENT WHERE BUILDING DESTROYED - RENT COVER
- ▶ **SERVICE CHARGE** - ON WHAT BASIS IS IT CALCULATED - WHAT SERVICES PROVIDED?
- ▶ **PLANNING** - HAS `T` RIGHTS TO MAKE A PLANNING APPLICATION
- ▶ **L/L DEVELOPMENT** - WHAT RIGHTS RESERVED IN LEASE FOR L/L TO DEVELOP ADJACENT PROPERTY? - CAN `T` OBJECT
- ▶ **STATUTORY REQUIREMENTS** - `T` TO COMPLY WITH ALL STATUTES
- ▶ **FORFEITURE** - L/L'S RIGHTS TO TAKE BACK FOLLOWING BREACH BY `T` OF PAYMENT OF RENT, FAILURE TO REPAIR, BREACH OF ANY OTHER COVENANTS
- ▶ **LANDLORDS COVENANTS** - QUIET ENJOYMENT, INSURANCE, DEROGATION OF GRANT