



# A concession agreement for you

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## **A CONCESSION AGREEMENT FOR YOU**

### **1. INTRODUCTION**

What to look for when presented with a concession agreement.

Opening a concession inside a department store is often attractive to brand owners. A concession agreement can offer a cheaper alternative to a mono brand store. A concession gives a fashion business a far greater potential footfall, as well as the opportunity to market its goods in an established environment with similar products.

The number of "indies" appear to be in permanent decline. Accordingly concessions may provide an answer to this particular problem. However, care needs to be taken in having a concession in a department store.

The purpose of this technical guide is to summarise the main points to consider when presented with a concession agreement. It reflects our experience in advising licensees with concessions at Harrods, Fenwick, Selfridges, Brown Thomas and House of Fraser. The points in this guide take into account the terms of the agreements used by these stores. However, not every point in this guide will be relevant in all circumstances. As such, this guide is not a substitute for specialist legal advice on a specific concession agreement.

### **2. THE CONCESSION AGREEMENT**

#### **Will I get a written concession agreement?**

There is no obligation for a store to give you a written concession agreement but it is likely that it will. Generally, each department store operates on its own standard terms contained in its standard concession agreement.

#### **What should the written concession agreement cover?**

If you are considering entering into a concession agreement there are a number of issues which you should consider when presented with the agreement. These issues are explored in more detail throughout this guide and include:

1. the duration of the concession
2. concessions space: location and access
3. services
4. responsibility for stock
5. advertising and displays
6. insurance
7. indemnities
8. staffing
9. termination
10. commission payments
11. sales requirements
12. ending the agreement

Most stores have fixed-term concession agreements which can only be terminated on six months' written notice. Terminating the agreement without giving the requisite notice could lead to a claim in damages for loss of commission by the store and, more significantly, damage your reputation amongst other stores. It is also unlikely that you will be able to assign the concession agreement, further tying you to it for its full term.

A proposed concession agreement should be carefully considered therefore before being entered into. Ending the agreement prematurely could be very expensive, if it is at all possible.

### **3. PROPERTY RIGHTS**

#### **Why choose a concession rather than a shop?**

Buying property can be expensive. Not only are there the acquisition costs (legal, surveyor's and agent's fees and fit-out costs) there is also long term revenue expenditure such as rent, service charges, rates, maintenance bills and utility costs. With a concession agreement, the property costs are built into the overall financial deal at the outset.

#### **Does Stamp Duty Land Tax apply to concessions?**

Stamp duty land tax (SDLT) is payable on commercial leases and is calculated by reference to the "Net Present Value" of rent payable over the term of the lease, discounted at a statutory discount rate. This means broadly that the longer the term, the more SDLT is payable.

However, SDLT is not payable on concession agreements.

#### **Is a concession agreement more flexible than a lease?**

A concession agreement is a relatively low risk way to introduce your products into the market. If the launch fails, then the exit costs are much lower than if you have to sell a property (whether freehold or leasehold) and pay for repairs to the property (known as "dilapidations").

#### **Are there any disadvantages to a concession agreement?**

In England and Wales business leases are protected under the Landlord and Tenant Act 1954 which means that the tenant has a statutory right at the end of the lease to remain in occupation and request a new lease. These rights are effectively excluded in concession agreements which may provide that the area allocated to the concession holder may be changed at any time. You may have no choice about the area to which you are asked to move.

Also concession agreements are usually very prescriptive. The building is controlled by the department store owner and you will have very limited control over the use and look of the allocated area.

#### **Anything else I need to know from a property angle?**

You should also consider the following issues:

1. Look at the area being offered to make sure that the product mix on that floor is appropriate to your brand. It is usually open to the store owner to re-designate not only your space but also that of other concession holders.
2. Will you need any space for storage in addition to the concession area?
3. What services will be offered by the store owner, for example heating, electricity, telephones, wifi, till facilities, refuse collection and cleaning?
4. Will you and your staff also be able to use the cloakrooms and staff restaurants?
5. What are your obligations to fit-out the space? For example, obtain consent from the store owners, take out insurance for the works and use approved contractors. Will you be obliged to reinstate the area at the end of the agreement?

### **4. SERVICES**

Who is responsible for fit-out of the space?

There are two likely approaches regarding fit-out:

1. the store may make you responsible for the fit-out; or
2. the store will fit-out the concession and require a contribution from you towards its costs.

Either way, it is unlikely that the store will give you a free-reign when it comes to designing the fit-out. Stores will want to approve all designs as well as the contractors engaged to fit-out the concession. A store may also require you to ensure that third parties carrying out the shop fitting maintain public liability insurance during the construction process. In addition, you may be required to carry out maintenance or refurbishment work.

#### **Will I be required to pay for utilities in respect of the concession space?**

Most concession agreements provide that the concession holder (i.e. the licensee) must pay for some or all heating, lighting, water, cleaning and electricity costs in respect of the concession space.

#### **What am I allowed to display?**

Most concession agreements contain similar provisions regarding displays: only products of the particular licensee can be displayed and sold in the concession.

#### **Are there restrictions on advertising?**

If you should wish to advertise your concession, the store's approval is most likely to be required where its name is included in the advertisement. The concession agreement may stipulate that a particular house style must be adhered to in relation to advertising materials and you may be required to contribute to relevant advertising produced by the store with or without your approval. Further, the store may place restrictions on you promoting your other retail channels from within the store.

### **5. EMPLOYEES AND STAFFING**

#### **Who staffs the concession?**

Concession agreements usually provide for the incoming licensee to staff the concession.

#### **Who will employ the staff?**

The staff will usually have employment contracts with the concession holder and not the store. Such contracts should provide that the staff will comply with the policies and procedures of the store. The members of staff should be provided with copies of such policies and procedures. The store may play an active role in recruitment. For example, it may specify the selection criteria and have the final say as to who is actually recruited.

The store may also require all of the licensee's staff to attend its own training programmes. Many stores also reserve the right to object to the continuing employment of staff employed by the licensee, and state in their concession agreements that they have the right to require termination of that person's employment.

#### **Who is primarily liable for any employment claims brought by staff?**

As the employer, the concession holder (i.e. you) will primarily be liable for any employment claims brought by its staff.

#### **Are there any circumstances in which the store may be liable for employee claims instead of or in addition to me?**

Concession agreements often provide that the store can at any time object to the presence of a member of your staff in the concession and require him or her to be dismissed. If the store requires the dismissal of employee for a discriminatory reason (for example, relating to the employee's gender,

race, religion or belief, disability or sexual orientation), then the employee could bring a claim against the store, as well as against you as employer.

### **Can the store require the concession holder to indemnify it in respect of any claims brought against it by employees?**

It is standard practice for concession agreements to provide for the licensee to indemnify the store for any claims arising out of the employment or the termination of employment of any of the licensee's employees for any reason. Such an indemnity would cover typically any compensation which the store may be required to pay to the licensee's staff, as well as the legal costs which the store incurs in defending proceedings (depending on the precise terms of the concession agreement).

### **Does the store have any exposure?**

Although staff are employed by the concession holder and not by the store, the store can be liable to staff on the basis that they are contract workers for the store. Although contract workers cannot claim unfair dismissal, they are protected against unlawful discrimination (that is discrimination on the grounds of gender, race, religion or belief, disability and sexual orientation). Compensation for discrimination is unlimited and there is also a separate category of award known as injury to feelings.

In a case involving Harrods, the Court of Appeal held that the work carried out by employees of Harrods' licensees was work for both the licensees and Harrods. This meant that the employees of the licensees were also contract workers of Harrods. Harrods withdrew approval of three employees of different concessions for various reasons, and all three claimed that this amounted to race discrimination.

Under most concession agreements, in this scenario, the store would be able to look to you to indemnify it for any compensation awarded, and possibly also legal costs, both of which could be substantial in a discrimination case. Although you may have done nothing wrong, and in this particular case would not even have been a party to the claims, you would still have to pay the price!

### **What steps can I take to limit my potential exposure?**

You should try to negotiate any indemnities with great care, insofar as these are negotiable. Ideally, the indemnity will not apply in relation to certain claims, such as claims arising from any unlawful act (for example, discrimination) or omission by the store. It will also be preferable for you if there is no requirement under the indemnity to pay the store's legal costs in defending proceedings. Obviously, the extent to which an indemnity can be negotiated depends on the strength of your bargaining position.

You should also insist that the store provides you with sufficient notice of the withdrawal of an employee to enable the licensee to go through any required statutory dismissal procedures, to avoid a potential increased liability.

### **What would happen to staff if I decide to assign my concession?**

An assignment involves a change of the licensee of the concession. This could amount to a business transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006. This might mean that your employees would be inherited by the new licensee on their existing terms of employment.

## **6. COMMISSION, RESTRICTIONS AND OBLIGATIONS**

A store will be looking at what your brand can bring to the store in terms of:

1. the brand's appeal
2. brand adjacencies
3. the brand's ability to generate minimum sales per square metre of space occupied.

This means that most concession agreements contain minimum sales requirements which you should attempt to negotiate with the store.

### **Are my sales monitored?**

It is likely that you will be under an obligation to use best endeavours to promote the sale of your goods in the concession. Stores generally require you to have regular meetings with them in order to analyse and review sales figures and performance.

### **Do I pay rent?**

Although you will have to make regular payments to the store, this will be in the form of commission rather than rent.

### **How is commission calculated?**

The store will take a percentage of the retail sales value of all merchandise sold by you. The amount required under the concession agreement varies for every store, but is generally around 25% of net receipts.

You should consider carefully the definition of net receipts in the concession agreement. When calculating net receipts, the store may not exclude certain deductions. For example, the concession agreement may oblige you to provide discounts to store staff, or to make a contribution towards a reward scheme. If these deductions are not taken into account when calculating net receipts, the amount of commission payable to you by the store will be reduced.

The store may also require payment of a service charge to cover such costs as stationery, packaging, telephones, postage and credit card handling fees.

### **Do I need to get insurance?**

Generally, you will be responsible for a percentage of the store's insurance premiums. Furthermore, most stores will require you to give an indemnity against all actions, costs, proceedings, losses, damage or injury arising from your products or actions of your employees. The value of this indemnity can vary from a set maximum figure, for example £5m, to an unlimited sum.

### **Can I operate more than one concession?**

Some stores will provide that you cannot open or operate a concession or a shop with a certain distance from the store during the agreement. Any such restriction however would be subject to a test of reasonableness. In addition there may be competition law implications.

### **Will I be responsible for bad debts?**

Generally there will be a provision in the concession agreement to the effect that a store will bear bad debt provided that you observe control procedures. However, you may be asked to indemnify stores from any bad debts incurred as a result of noncompliance with such control procedures.

Will I own any goodwill which accrues as a result of my operation of the concession?

Some stores expressly state that any goodwill that accrues as a result of your operation of the concession will belong to the department store. However, if this is not stated in the concession agreement, then it is likely that you will own any goodwill that you accrue.

## **7. TROUBLE IN STORE OR TOP 5 PRACTICAL TIPS WHEN THINGS START TO GO WRONG**

### **Tip 1 - How do I identify the danger signs?**

The best way to identify danger points is to know both your obligations and your rights under the concession agreement.

If you have a written concession agreement, you should make sure you understand all the terms in it and exactly how the agreement works. The agreement may also make reference to the store's manuals, handbooks, or certain terms and conditions. These documents should be read to ensure that you understand the obligations they impose on you. Good legal advice when negotiating an agreement is one of the best investments a store or licensee can make.

A court will not usually be interested to hear that you thought that a particular clause meant something different than it plainly states, or that you had actually agreed something other than was written in the contract.

Serious or persistent breaches by either the licensee or the store of any of its obligations could lead either to termination of the concession by the store (without payment of damages to the licensee) or the licensee (with a claim for damages).

### **Tip 2 - What records should I keep?**

You should keep good, up-to-date records of sales, and make a special note of complaints, including the reasons why. Claims for damages will depend on the licensee being able to show how much commission was earned during the term of the concession agreement based on sales achieved. Apart from the obvious benefits, if you keep your records in a well laid out and logical order this will reinforce the impression that your business (whether as licensee or store) is well run and ordered.

Make a note (to keep in your file) of significant matters relating to the concession, such as agreed changes to commission rates, introduction of new lines, footfall, marketing efforts and events and so on. Most people have difficulty remembering things that happened last week, let alone things which occurred six months or two years ago. Good notes will prove invaluable if you get into a dispute later. As a licensee, you should tell the store of your efforts in marketing and promoting your products, and accentuate your successes (sales increases, brand development, increased footfall, publicity). Once you start keeping a file (see Tip 3) it will be easy to recount and report these matters. Regular reporting to your store not only sends a message that you care about the success of both the concession and the store, but will also be valuable in countering any suggestions in the future—such as when a dispute arises—that you have not been performing properly.

If there is a complaint about your performance under the agreement, work quickly to resolve it. Acting ostrich-like and ignoring letters, faxes, emails and 'phone calls, may result in the complaint being forgotten—but the chances are it won't be forgotten, and will only erupt at a later point. Not only that, but you will almost certainly be accused of failing to address the other store's concerns and communications, which will only reflect badly on you. You need to put yourself in the best position to be able, if necessary, to argue each point raised against you, making it much more difficult for the store to succeed if the matter goes further.

Investigate and record complaints by customers. Remember, if they disappear, so does your business. Notify the store of the matter and seek its side of the story. There might simply be a misunderstanding, or the complaint may be a symptom of a much greater problem. Point out the difficulties the problems cause you, and that you are now working even harder (if you are) to keep the customer happy or to prevent losing them altogether.

### **Tip 3 - What should I do if a dispute starts?**

Once a dispute starts, make up a separate paper file and call it something like, "Concession Dispute (re [etc])". Keep all notes, correspondence and agreements about the dispute on this file. This allows you to keep an accurate record of events and will help you manage the dispute in a more controlled way. Begin by making a note setting out the facts of the dispute (the allegation, your position, and who said what to whom), including the dates and times, and amounts involved. Make each note on a separate piece of paper.

Next you need to lay a paper trail so that, if the dispute becomes serious, you will have a record of the events presented in the way which is most favourable to your case. Make a note of all telephone conversations with the store, as well as meetings. Follow up calls and meetings with a letter, fax or email, setting out (in a way which supports your case, but does not overstate it) your understanding of the discussion, and any agreements reached as to the way the matter should go forward.

Remember that the aim is to reinforce your own account while showing how the store's version of events is incorrect. This will make it much more difficult for the store to succeed against you later.

Be courteous in all communications with the store. State the effects of the store's actions (disappointed customers, lost business), but do not lose your temper or become abusive. You will only cause the dispute to escalate and such behaviour will reflect badly on you in the cold light of the courtroom. As a general rule, never put in anything in writing that you wouldn't want a judge to see!

If you receive an abusive call or letter, record it in writing and respond pointing out that you do not regard such behaviour as being either appropriate or constructive in resolving matters.

If your 'phone calls and letters are not answered, record this as well and send further letters, faxes or emails pointing out (for example) that you have left "5 'phone messages on 12 January, 16 January, 21 January, 27 January and 1 February 2016, all of which remain unreturned." Emphasise that you are working to resolve matters, but that is being made difficult through the store's lack of communication.

#### **Tip 4 - Are my records confidential?**

Under the English court rules, either party in court proceedings may inspect documents which are in the other side's possession relating to the case—including private notes— except for documents which are "privileged". Those which are privileged do not need to be disclosed either to the other side or the Court.

Documents will be privileged if they were made "after proceedings were in contemplation" and the dominant purpose of which was to help progress the case. If you keep a separate file for each dispute then you are more likely to succeed in claiming that your own notes will be "privileged" from disclosure. You should still be very careful about what you write: remember the rule that you should not write anything that you don't want a judge to see!

#### **Tip 5 - When should I seek legal advice?**

This will depend on the type of dispute, and whether it is likely to escalate into something which will cause harm to your business. It is very much a question of judgment. Something which starts out small can soon turn into a serious dispute. Don't provide the store with an excuse to terminate the concession agreement.

If you have any concerns then a phone call to a commercial lawyer should tell you whether you have cause to be concerned or not. A good commercial lawyer will be able to guide you through the processes for best dealing with disputes or terminations, and give you practical advice and guidance.