



# How to set up a new outlet for a fashion business

This booklet has been prepared for general information and does not constitute legal advice. It is not an exhaustive statement of the law. For advice in applying this general information to your specific circumstances please contact Stephen Sidkin at Fox Williams LLP.

## **How to set up a new outlet for a fashion business**

There are two main types of land ownership in England and Wales: freehold (i.e. you own the land and the property) and leasehold (i.e. you lease the land and property). Business premises, such as retail outlets, particularly those in shopping centres, are usually leasehold rather than freehold.

### **Leasehold**

With leasehold property the owner (the landlord) retains an interest in the land and grants you a "lease" of the land for a defined period at a rent either fixed or subject to review. The landlord has control over how the property is used.

The relationship with a landlord is governed by a written agreement called a lease. The landlord will produce a draft and the terms will then be negotiated. The parties' respective bargaining power and current market trends will have an impact on the agreed terms but there are certain acceptable conventions. The lease will be for a fixed period of time but it may be possible to negotiate "break clauses" which give either party or sometimes both the right to end the lease earlier. It can take time to agree an acceptable form and until the lease has been completed, you would not generally be allowed into the property.

Where the lease is for a reasonable period of time it is normal for a tenant to be able to "assign" or sublet either the whole or part of the leasehold property. However, the landlord has a degree of control over who is a suitable assignee or sub-tenant.

### **Freehold**

Freehold property is land or buildings which are owned outright. Subject to planning laws and covenants imposed on the title to the land, there would be no restrictions on your use, disposal or development of this type of land.

### **Serviced units**

A serviced unit is usually a temporary arrangement which is generally more suitable to new businesses and overseas occupiers testing the British market before deciding to set up permanently. It is accommodation with shared services and equipment, for which a licence fee is paid. The agreement for such occupation is generally not as structured as a lease but will contain obligations some of which may be significant.

### **Freehold or leasehold?**

Leases provide much more flexibility. This can enable you to grow your business quickly and is a means of cutting costs in tougher times. In addition rent can be set off against taxable income (unlike freehold property). This means there are cash flow advantages to a lease.

A freehold provides more certainty against future rent rises and gives you a capital asset.

### **What is the role of agents and will I need one?**

Agents known as surveyors or estate agents are usually appointed by the seller of a property or a landlord where it is being let. Their prime duty will be to their client who pays their fees to negotiate the best sale price and lease terms possible. A purchaser or tenant may also employ its own agent to find suitable properties and negotiate terms. This is worth considering especially if you are new to the area or to property negotiations.

### **What happens once I have chosen a property?**

When you have chosen a property and agreed the terms of your tenancy or purchase, "Heads of Terms" or "Particulars of Sale" will be prepared. These are not intended to be binding but will record the details of the parties, the price or rent to be paid, fixtures and fittings to be sold and other relevant

facts such as timetable. The more detailed these are the better and legal input at this stage can often eliminate protracted negotiations once lawyers have been instructed.

You will need to consider the following issues (ideally before instructing lawyers):

**Survey:** A survey (structural appraisal) of the property should be carried out. It is generally also appropriate to obtain environmental reports. Surveys are important to leaseholds and will help establish potential liability for repair. Even if only taking a lease of part of a building, it is very likely that there will be an obligation to contribute towards the cost of repair of the whole building and its plant and services via a service charge levied on all occupiers.

**New Buildings:** Warranties and guarantees are often available from the developers of new buildings. You should make preliminary enquiries as to whether these will be available.

**Planning:** It is obviously important that a property can be used for your intended use as a retail outlet and whether your particular retail use is restricted or prohibited.

**Consents:** In leasehold transactions it is likely that the landlord's consent will be needed for assignment or subletting to your business, and any necessary change of use to suit your business and any alterations and fit out and also your new signage.

The landlord will require full details of your business including financial information and references and this should be gathered so as to be available as soon as possible and to avoid delays later. If your/your company's financial strength is not of a level acceptable to the landlord, the landlord may require you to provide a guarantor or a deposit of funds equivalent to the rent payable for anything up to a year, although 3-6 months is more normal.

**Tax:** Stamp Duty Land Tax ("**SDLT**") is payable on all property transactions subject to certain exceptions relating to value.

For freehold property SDLT is payable at rates between 0% and 5% depending on the value of the property.

For leasehold property the amount of SDLT that is payable will depend on whether you are purchasing an existing lease (taking an assignment), in which case SDLT is only payable on the purchase price, or entering into a brand new lease, where SDLT is calculated according to the "net present value" of the lease. This is determined based on the premium, rent, and any Value Added Tax (20% as at January 2017) payable on those sums. The tax ranges from 0% to 2% of the value. Penalties and interest are payable on late payments.

**Service charges:** These charges are usually payable on leasehold properties. It is important that you find out the current amount, the historic increases, proposed increases, and whether any extraordinary expenditure is contemplated in the coming year which could significantly increase liability.

### **Why appoint a lawyer?**

A lawyer will handle the negotiation of the legal documentation and obtain as much information as possible about the property via searches and enquiries. In addition, many prospective tenants/purchasers appoint lawyers to assist with Heads of Terms.

### **Searches and Enquiries**

Certain searches and enquiries undertaken are common to both freehold and leasehold property:

**Local Searches:** These questions about the property are sent to the local authority. They include detailed questions about planning, highways, drainage and compliance with statutes.

**Pre-contract Enquiries:** These questions about the property are sent to the solicitors acting for the seller or landlord requesting information about title disputes with third parties, use of the property, services and environmental matters. Generally speaking none of the information which you will have received to date via the seller/landlord will be legally binding. It is only at this stage which it may become so.

**Title:** The right of the seller or landlord to sell or lease the property will be checked.

**Special searches:** In respect of certain types of property or where a property is located in a certain region, it may be necessary to make particular enquiries, for example, enquiries about special licences or permits, coal mining searches, railway or underground lines.

**Surveys:** A survey (structural appraisal) of the property should be carried out if this has not already been undertaken, together with environmental reports.

**The Disability Discrimination Act 1995:** Occupiers of premises who provide services, such as shops, are under a duty to make reasonable adjustments if any features of the premises make it more difficult for a disabled person to make use of the services being provided. A survey of the potential premises should include a disabled access audit to ensure compliance where this may be relevant.

**Control of Asbestos Regulations 2012:** Regulation 4 imposes a duty to manage asbestos risk on a wide range of occupiers of commercial premises. These include landlords, tenants, property owners and employers. The duty is an onerous one, requiring the duty holder to conduct a thorough investigation of the premises in order to ascertain the risk of asbestos with the view to producing a written assessment and the implementation of a system to manage such risk. It is likely that a seller or landlord may have already done so.

### **Exchanging contracts and completing the deal**

On a freehold transaction, this is usually a two stage process. Once all search results have been checked and all terms agreed the parties will exchange contracts. The contract is the formal agreement to complete the purchase of the property on a fixed date. Usually a deposit of 10% (plus Value Added Tax, if applicable) is payable to the seller. Completion usually takes place between 2-4 weeks later, although this can often be subject to various "conditions precedent".

On a leasehold transaction, the parties may choose to proceed direct to the lease itself although in some circumstances, e.g. where landlord's consent is still awaited or where there are conditions precedent, a contract called an "agreement for lease" may be appropriate.

If the lease provides that landlord's consent is required for any alterations, change of use or signage this should also be agreed at this stage to avoid delays later.

After completion

1. Depending on the value/circumstances, you may be required to submit a Stamp Duty Land Tax Return and where relevant pay any duty to HMRC within a fixed period.
2. Most interests in land need to be registered at the Land Registry within a fixed period.
3. For new leases, formal notice of the new lease needs to be given to the landlord within a fixed period.
4. Rent and, to a lesser extent, service charges on leasehold properties are usually due and payable whether or not a formal demand is received from the landlord.
5. On medium term leases it is usual for rents to be re-calculated ("reviewed") every five years to take account of any change in the market value of the lease. In most cases, rent will be reviewed on an upwards only basis, which means that if the rental value of property is falling, this will not be passed on to a tenant in occupation. It is recommended that you take professional advice on a review.
6. You will be liable for business rates payable to the Local Authority.
7. A lease will contain a number of ongoing obligations you will be bound by in addition to paying the rent, for example to maintain the property in good repair, pay service charges, decorate at the agreed intervals and comply with the fire regulations.

8. A landlord can require you to carry out work to bring the property up to a standard required by the lease both during and at the end of the term of the lease. If you fail to carry out the works, the landlord may complete them itself and recover the costs of doing so and often damages from you. This may be substantial particularly at the end of the term. Depending upon the condition of the property and the outlet it may be possible to agree a schedule of condition by which your repairing obligation both during and at the end of the lease are limited.
9. In leases internal alterations are often permitted subject to written consent from the landlord. Structural alterations are generally prohibited. Any change of the use of the premises will have to be considered very carefully. Most leases have fairly wide user descriptions but some may be limited. Where any consent is sought and given a Landlord will charge a fee and require a formal Licence Deed to be entered into.

### **Renewal**

Specialist legal advice is recommended when your business lease come to an end. As a business tenant you will generally have the right to renew your lease pursuant to the Landlord and Tenant Act 1954. However, many short term leases are excluded from this Act in order that the landlord can be certain of recovering possession at the expiry of the lease term. If there is a right to renew, strict time limits need to be adhered to and progress advice sought.

### **Planning**

In any district the local council is the planning authority which has a duty to prepare overall plans for land uses within the district. It also has responsibility for the control of development within its council area. If you intended to carry out certain activities or alterations to the premises, planning permission will be required.

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