



Signing an Agreement to Lease? Then this article is a 'must read!'

The traditional New Zealand 'do it yourself' (DIY) attitude is alive and well when it comes to commercial leasing. There are plenty of people, both landlords and tenants, who are prepared to sign an agreement to lease premises for, say, a six year term at \$50,000 plus a year rent without consulting a lawyer.

This article is intended to alert people to the potentially disastrous consequences which can result from a DIY approach to leasing and expose some fallacies behind people's reluctance to consult with a lawyer first.

A typical leasing scenario is as follows:

The landlord has an empty space and instructs an agent to find a tenant. The tenant sees the agent's advertising, inspects the premises and negotiates on what appears to be the most important aspect - the annual rental. This is agreed between the landlord and tenant, at which stage, the agent produces a two page agreement to which both parties give a cursory glance and then sign.

The first stage at which problems appear is when the landlord decides that the arrangement needs to be formally documented and instructs its lawyer to prepare a formal deed of lease. The result is a 20 plus page document, delivered to the tenant for signing. At this stage, a tenant usually decides that they do not understand most of the document and had better seek legal advice.

The tenant's lawyer then points out a few innocent looking sentences in the signed agreement which state that the parties agree to enter into a deed of lease in the Auckland District Law Society (ADLS) 4 th edition form, or on the landlord's standard form. A tenant, when signing the agreement, will not usually know what terms are included in an ADLS or landlord standard form.

The result is that, by signing an agreement containing the above sentence, the tenant is bound to accept 40 plus clauses in the deed of lease. This includes extensive maintenance and repair obligations that the tenant either did not think about or assumed was the landlord's responsibility. Under the ADLS 4 th edition form, the tenant is obliged to repaint and redecorate when reasonably necessary, regardless of the state of the premises at commencement of the lease or of fair wear and tear. In addition there are various outgoings which the tenant has to pay for.

The tenant is also obliged to pay the landlord's solicitor's costs of preparing the deed of lease. These can range from \$450 upwards to \$1,500, plus GST, depending on the complexity of the lease.

Nasty surprises aren't the sole domain of the tenant either. It is not unusual for agreements to be signed when the landlord doesn't actually have any legal interest in the property (ie has forgotten that the property is owned by a family trust not the landlord personally), or where the landlord has granted a sublease for a longer term than its own lease. Also, in cases where the landlord is subletting, it is important any agreement is made conditional on the head landlord granting its approval. Sometimes, when subleasing, a landlord agrees to renew the head lease if the subtenant requests it, even though the landlord's real intentions was to exit the property rather than to renew. These issues are often not

considered in the midst of negotiations, but result in the landlord being in breach of contract when it cannot lease to the tenant what was promised

Another problem with DIY agreements is lack of certainty. Items such as penalty interest rates and rent improvements percentages are not considered by parties when signing an agreement, yet, when it comes to finalising the deed, the landlord naturally wants rates as high as possible, while the tenant wants them low. A lawyer specialising in commercial property leasing is trained to notice such omissions and uncertainties and bring them to the parties' attention.

Given the significant problems outlined above, why do landlords and tenants regularly not seek legal advice prior to signing an agreement?

One reason is, of course, the perceived cost. Neither the landlord or tenant want to incur legal fees. However, this is unavoidable. It is cheaper to involve a lawyer at an early stage and have an agreement that reflects both parties' intentions and understanding and prevents disputes, rather than get a lawyer involved once problems arise. By then problems are usually time consuming to fix. Even bigger cost savings are available for a tenant. A lawyer can assist in negotiating the deletion of the obligation to pay the landlord's legal fees and some of the more onerous maintenance and outgoings requirements. These savings to the tenant will usually far exceed the cost of legal fees.

Another reason is timeliness. Parties are eager for " the deal to be done " and there is often additional pressure created by the agent. A tenant, in particular, can often be discouraged from taking time to seek legal advice due to perceived competition from other potential tenants, whether real or not. This argument is no longer valid with today's technology. A draft agreement can be emailed or faxed directly from the agent to the lawyer and, provided it is a usual leasing situation based on standard forms, the lawyer can usually advise the same day. In the long run, it is easier to take more time at the beginning to accurately record the parties' agreement than waste time later resolving disputes.

The final reason is probably due to ingrained DIY mentality. People regularly sign agreements to purchase residential property without consulting their lawyer first, often for amounts of more than \$400,000. Compared with that, a short-term lease for considerably less money seems simple and imparts a false sense of confidence. Leasing property is considerably more complicated than buying. When you own a property, you can treat it however you wish (subject, of course, to the Council and your bank) and you know exactly what costs you are responsible for. When leasing a property, you are subject to extensive restrictions which vary according to the terms of the lease, along with an extensive list of outgoings which are often contracted for by the landlord but which the tenant has to pay.

Drafting agreements to lease commercial property is a specialised area that relies on training, experience and continual updating of current law. Each leasing situation is invariably different and will require an agreement drafted to fit the situation and the parties' intentions. A specialist lawyer can quickly review a proposed agreement and alert parties to any potential problems or recommend amendments for the benefit of his/her client thus saving the client considerable costs in both time and money at a later stage.

Consult your commercial leasing lawyer before you sign an agreement, NOT after.

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