

Assignment and subletting

Assignment and subletting

When you are looking at agreeing a lease on a commercial property, one thing you will want to be clear of from the start is who is your landlord. This should be straightforward. However, it may be the case that the freehold of the building is owned by one person, while you are in fact renting your property from their existing tenant: this is called “subletting”. If you do, you need to be sure that they are allowed to sublet to you!

Alternatively, you might be taking an “assignment” of an existing lease from a tenant, so that their landlord becomes your landlord and you become the new tenant. Basically, that means that you are buying the lease off them. If you do, you need to be sure that they are allowed to sell (or ‘assign’) it to you!

Make sure you check all this before you sign on the dotted line. You should do this with your professional advisors and in particular a solicitor should be able to do this for you.

When you take on a lease, you will want to see what provisions there are, if any, for you to assign your lease or sub-let to another tenant. This kind of situation sometimes comes up if you find you have surplus space and want to rent it out, but you will need to see what your contract says or be prepared to negotiate a solution.

These provisions about assignment and sub-letting are called the “alienation” clauses. Landlords often want assurances that their interest isn’t harmed by having a lease assigned or sub-let to another party who they don’t know anything about, or who could present them with problems (this is particularly true in cases where the existing tenant is reliable).

Remember that:

If the lease does not prohibit assignment or sub-letting, then you can do it without any permission from the landlord.

If the lease says that you are not allowed to assign or sub-let, then you will not be allowed to do so, at all. The landlord might agree that you can do this at a price, but that is entirely up to them.

Most leases however do allow the tenant to assign or sub-let with the landlord’s consent. The law implies a duty on the landlord not to withhold consent unreasonably.

The circumstances in which a landlord may choose not to give consent are usually set out in a lease agreement’s section on alienation. The lease should specify the requirements that a tenant needs to satisfy before they can assign or sub-let a commercial property. Most leases require that the tenant provides references or other information about the new tenant or sub-tenant. Sometimes the new tenant or sub-tenant will be required to agree in writing with the landlord that they will abide by the terms of the lease. These terms are called “covenants”. The lease will also usually say that the tenant must pay the landlord’s reasonable legal and surveyors’ costs involved in the assignment or subletting.

If the landlord refuses to give consent unreasonably, the tenant can apply to Court to force them to give consent. The Court can also award damages. However, it is up to the Court to decide what is “reasonable”. If the tenant has not provided anything that the lease says has to be provided (for example the references, other information, or agreement to pay costs), then the Court will find that the landlord acted reasonably.

In the majority of cases, a landlord will need to give consent to any sale or transfer of the lease through a “licence to assign” document. As above, they can legally insist on their reasonable costs of this consent, as long as the lease says so.

In an assignment, a direct relationship will exist between the new tenant and the landlord, with the latter collecting rent directly. On an assignment of a commercial lease it is usual for a landlord to insist on the tenant entering into an Authorised Guarantee Agreement (AGA). This means that if the new tenant does not pay the rent the Landlord can come back to the prior tenant (which might be you!) for the rent and to fulfil any other obligations under the lease.

In a subletting arrangement, the original tenant will retain responsibility for the various conditions set out in the lease agreement, even if the rent is now being paid by a third party.

What happens if the tenant breaches the clauses on assignment and subletting?

If that happens, then the landlord may be able to terminate the lease. In law this is called “forfeiture”. If the lease is forfeited, then the tenant will have to leave without any compensation – and probably with a bill for legal costs and damages!

Be very careful that you don't buy a lease (or take an “assignment”) in breach of these clauses. If you do, even if it was the old tenant's fault, you may find yourself evicted with no compensation.

We strongly recommend that you seek independent professional legal advice before agreeing to any assignment or sub-letting arrangement.

Further support

The London Growth Hub has published this series of 'how-to' guides to help commercial tenants understand their legal responsibilities. [This flowchart](#) will help you identify the most relevant 'how-to' guides for your business.

