

WE KNOW

BUSINESS

COMMERCIAL PROPERTY

QUICK GUIDE

BUYING OR LEASING PREMISES

There are a lot of legal issues around owning or leasing premises. This guide is aimed at helping you identify some of those legal issues and helping you to deal with them. However this is no substitute for good advice. Whether you buy or lease you should have a lawyer, with good experience in buying or leasing commercial premises, look at the legal aspects of the deal.

As part of this, you should make sure the lawyer reviews the agreement for sale and purchase or the agreement to lease **before** you sign it. This is probably the most important piece of advice we can give you. Once you have signed the agreement it may be too late or too hard to make changes to it – even if the agreement is conditional on something like approval of finance or zoning. If you talk to your lawyer and establish what you need before you sign the agreement – or better still, before you start serious negotiations - you will have a much better chance of getting what you want from a legal point of view.

Your accountant can also give you valuable advice. Your accountant will be able to help model the financial aspects of the deal on your business and can also advise on its tax implications.

THE PREMISES THEMSELVES

One of the most important business decisions you will make is deciding on your business premises.

- **Location is a key factor.** This brings with it considerations around visibility and access, proximity to customers and suppliers, availability of infrastructure, and availability of employees. It can also bring with it issues around zoning, parking, and transport.
- **Premises type and size** are also obvious things to look for. And if your business is expanding you may need room to grow.
- **Overall cost** is also very important. If you are buying you will want to know you are not initially paying too much, you can handle the financing costs, and that you will not suffer a significant loss on resale - and hopefully you will achieve a gain!
- If you are leasing you will want to know your overall **occupancy costs** are reasonable and not out of step with similar businesses.
- **Security of tenure** is also very important, and is a real factor if you are leasing. As a tenant you will want a stable lease period in which you can build and operate your business. You will also want to be reasonably sure you will have a stable lease period left when it comes time to sell the business.

Buying or leasing premises have some similarities. They both involve identifying the right premises, signing up an agreement to take them, checking out the premises, getting good advice, acquiring an interest in the premises, and paying for the premises by way of purchase price or rent plus outgoings. However, it is important not to lose sight of the most important part – the premises themselves.

You need to make sure the premises not only suit your business location-wise but that the building and its services are suitable for what you want to use the building for. So you will want to have an expert building surveyor look at these things for you.

The surveyor can look at the physical condition of the premises and its services and also maintenance records. If there is a risk that the premises contain, or have around them hazardous materials such as asbestos, lead, or other contaminants, the surveyor will be able to advise on how to go about testing for those things as well.

This is very important, not only for the health of you, your staff and customers, but because an owner or occupier of a building can be legally responsible for clean-up costs under the Resource Management Act. Where premises are contaminated with hazardous materials clean-up costs can in extreme cases exceed the value of the premises. It is important to know something about the history of the premises to make an initial assessment of those risks and whether further investigation is required.

Compliance with the Building Act is also critical and some potential traps around this this have been highlighted by the Canterbury earthquakes. In broad terms a buyer or a tenant needs to be very careful to ensure premises are properly assessed by a suitably qualified professional engineer before the buyer or tenant becomes legally obligated to take the premises.

Older premises may be earthquake prone (in general terms 33% or less of the current building standards for new buildings). If this is the case the premises will eventually need to be upgraded and this can be expensive.

However, in some circumstances, newer buildings may need upgrading as well to make them stronger and make them comply with other requirements such as those for fire and egress or disabled access. This can occur where the building is used or is intended to be used for a different use to that which the premises were designed for. In those circumstances the building may need to be upgraded to the current building standards for new buildings (or something close to it). Again this can be expensive and can cause severe interruption.

Alterations can trigger upgrade requirements as well. Where alterations are carried out to premises, certain things such as fire and egress or disabled access may also need upgrading.

You will also need to check the premises and your use of them complies with the Resource Management Act. Business use, parking, and access are common issues here. Therefore you will need to discuss these issues with your lawyer to ensure the premises comply or you will need to plan to obtain a resource consent.

Your lawyer will also check the title to the premises for you. This may involve reporting on legal easements governing rights of way and the supply of services over the premises or neighbouring properties. If the premises are part of a unit title development it will involve reporting on the body corporate and the rules that will apply to you as an occupier of a unit in the development.

If you are buying premises or leasing premises you do not want to get caught with any of these issues. Therefore, it is very important to thoroughly check them out before you are committed.

However, you will not want to run the risk of spending time and money checking these things and then losing the premises to another buyer or tenant. Because of this, it is common for agreements for sale and purchase and agreements to lease to have due diligence conditions included in them. These conditions allow a buyer or a tenant to secure the premises and then check the premises meet their requirements.

It is important to remember that not all due diligence conditions are created equal. It is very important to ensure the condition is wide enough to allow you to check the issues you want. Therefore, you should discuss these things with your lawyer before you negotiate and sign the agreement.

INSURANCE

Currently a special issue you need to take into account in Christchurch is the availability and cost of insurance. This can be difficult, particularly if the premises are not modern and have not been repaired.

If you are buying premises you need to make sure the agreement for sale and purchase contains a condition allowing you to pull out if you cannot get suitable insurance.

If you are leasing premises, the landlord will be responsible for getting insurance over the premises themselves. How much insurance the landlord gets and what it costs will be real issues for you as tenant. Excess sums have increased dramatically which has ramped up the amount a landlord must "self-insure" for.

Some landlords look to secure a lower excess sums from an insurer to reduce risk but the costs of the additional premiums are substantial and these can be passed on to you as tenant. So it is important to agree, up front with the landlord, what will happen with insurance and how the risk and cost will be allocated.

LEASES

Typically you will be concerned about a number of things as tenant. First you will want to make sure the exact premises you expect will be leased to you and you will get access to the car parks you expect.

Second you will be concerned about the condition of the premises and the landlord's obligation and your obligation to maintain or repair them. There can be grey areas here but typically a landlord will maintain the exterior and the tenant the interior. You need to be careful to allocate responsibility for maintenance and repair of services.

Third, overall occupancy cost is an important issue. This includes both rent and outgoings. You will need to negotiate rent reviews and rent review periods. Sometimes you can negotiate rent review caps or outgoing caps for certain periods but this will depend on the market and your negotiating position with the landlord.

Fourth, the term of the lease and rights of renewal are very important. This will probably be driven by the type of premises. For example a retail specialty store lease is typically 6 years but an adjacent supermarket may be 15 years. As tenant you will be looking for short term leases with lots of rights of renewal. A landlord on the other hand will generally be looking for longer terms.

Fifth, a range of provisions around issues such as assignment, termination if the premises are damaged or can't be used, guarantees, and so forth will be important.

You need to be careful to involve your lawyer in the leasing process to make sure the deal meets your requirements.

There are some standard form leases which have been used in New Zealand. Unfortunately, they have been shown to be inadequate in Christchurch so it is very important to keep in mind that you need to get good advice early in the process and put a deal that suits you to the landlord.

Information provide by Wynn Williams.

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