Fleming Foster Solicitors

NEWSLETTER

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Commercial leases – what to look out for

A commercial lease (Lease) can be a complicated agreement with binding implications for both the landlord and tenant. Before you enter into a Lease, it is vital that you understand the rights and responsibilities of each party. The following are some of the more notable points of a Lease for your consideration when negotiating and/or reviewing your Lease.

One of the most basic but important considerations of a Lease is the renewal dates. A common wording for a renewal clause is "three (3) rights of five (5) years each". This means that once the initial term of the Lease (which is defined in a separate clause) comes to an end, the tenant has the right to renew the Lease for a further five years, three times. After the third term of five years comes to an end, the Lease term must be re-negotiated by the parties. Quick Tip: Make sure you know how to formally renew your Lease and always do it in writing.

Whether you are a landlord or a tenant, it is important to note whether a 'ratchet clause' is present in a Lease. This clause states that the rent shall not fall below the rent paid in the previous year. This may mean that despite a reduction in the property value, the rental amount will either remain what you paid previously, or potentially rise. This clause is for the sole benefit of the landlord.

Where you may be sharing a commercial space with other tenants, it is important to check that there are no restrictions on the type of tenancy you intend to operate. It is also important that the portion of the outgoings to be paid by each tenant is reflective of each tenant's proportional use of the building and its services.

If you intend to make minor alterations to the premises to prepare it for your tenancy, then it is important to pay attention to any "fit-out" clauses in the Lease. These dictate the extent of alterations or works that can be carried out, in conjunction with any further terms noted by the landlord. In the circumstances where you have put up signage or fixtures during your tenancy, which aren't referred to in the fit-out clause, you may be required to return the premise to its original state when you moved in, at your cost, when you

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leave. This could be problematic if the tenant has made structural changes during their Lease term.

Most Leases should specify what the tenant/landlord are responsible for with regard to maintenance and repair if damage occurs to the premises or fixtures. Being aware of the details of this clause is important to ensure you are not hit with unexpected costs for maintenance or repairs. It is also beneficial to understand what is expected of you before you begin your tenancy. Quick tip: We strongly suggest that you take detailed notes of any items/areas that are damaged or look worn when you move into the premise.

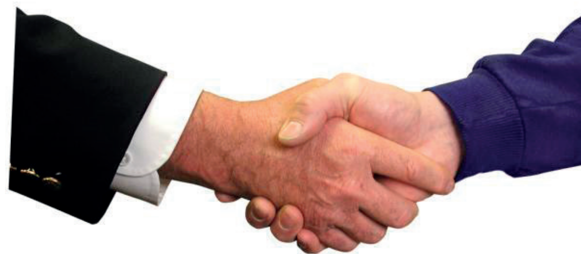
Finally, whether you are a tenant or landlord, you may want to check whether your Lease can be assigned to another party. Having the ability to assign a Lease means that you can have another party take over your responsibilities and liabilities under the existing Lease. This is beneficial if for any reason you decide you no longer want to continue with the Lease. Note: Check the requirements for landlord approval regarding the potential assignment of the Lease before signing the Lease.

What we have highlighted above are some of the more notable points of a Lease. If you are considering entering into a Lease, we strongly suggest you meet with a legal professional to ensure you are getting the most out of your Lease and understand your responsibilities under the Lease.

Employment agreements from an employer perspective – make sure your employment agreements, and their clauses, stand up against the law

An individual employment agreement (Agreement) is a written agreement that contains the terms and conditions of the employment as negotiated by an employer and employee. An Agreement is a useful tool with which the employer can set clear performance expectations, standards, processes and responsibilities for an employee before they start work. It is also used as a reference point in employment disputes.

It is a requirement of the Employment Relations Act 2000 (the Act) that the employer holds a copy of each employee's Agreement or they risk being fined or prosecuted under the Act by a Labour Inspector or the Employment Relations Authority (ERA).



An Agreement is required to include the following:

1. The names of the employee and employer;
2. A description of the work to be performed;
3. Where the employee is to perform the work;
4. The agreed hours or an indication of the employee's work schedule;
5. The wages or salary payable to the employee; and
6. A plain language explanation of the services available to the employee for the resolution of employment relationship problems, including a reference to the period of 90 days within which a personal grievance must be raised.

An Agreement cannot contradict any New Zealand legislation or record less than the employee's minimum rights under New Zealand law. Employers can find it useful to include manuals, a job description and workplace policies, procedures, rules and regulations in the Agreement to give the employee a clearer view of the standards of practice that are expected in the workplace.

A 90-day trial (Trial Period) was introduced under section 67A of the Act by the National Party in March 2009. It allows an employer to dismiss an employee without reason during the Trial Period. Dismissal during the Trial Period is still subject to the notice requirements under the Act.

The Labour Government is in the process of amending the Act so that only small businesses with less than 19 employees can use the Trial Period. An employer may only use the Trial Period if the clause is included in the written Agreement. The clause must include the following terms:

- The employee will serve a Trial Period for a specified time (generally 90 days);
- During the Trial Period the employer may dismiss the employee without reason;
- The employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

After the employer has finalised the Agreement with their prospective employee, and the employee has possession of the Agreement, the employer must give them sufficient time to read the Agreement and take legal advice if they choose. Generally, 24-48 hours is an acceptable timeframe. However, we note that the more complex the Agreement, the more time the employer will need to give the prospective employee to consider it.

Before the employee starts work, the employer should encourage the employee to sign and return the Agreement to the employer. If the employee does not return the Agreement before commencing work, the employer must have a comprehensive record of what was agreed before the employee started work and a record of them attempting to retrieve the signed Agreement.

We note that an employee cannot be on a Trial Period if they have worked for the employer before. This also means that if a new employee begins working without handing in their signed Agreement, by the time they give the Agreement to the employer, they may not be considered a new employee under the Act. If this is the case, the Trial Period, if contained in the Agreement, will no longer apply.

In a case before the ERA, prior to a new employee giving her signed Agreement to her new employer, she commenced work. She worked a total of one day at her new workplace before being dismissed. The employer relied on the Trial Period stipulated in her Agreement to dismiss her without reason. The new employee successfully argued that as she had commenced work before giving her Agreement to the employer, she was no longer a new employee and therefore the Trial Period did not apply. A personal grievance was successfully raised for unjustified dismissal.

The Agreement will guide you through the employer/employee relationship. Therefore, it is always recommended that you seek advice from an Employment specialist when drafting the document.

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Personal Grievances – What needs to be considered when raising a PG

A personal grievance (PG) is a formal process in which an employee may raise a complaint against their employer if they have been dealt with unfairly or illegally. The grounds available to raise a PG are outlined in the Employment Relations Act 2000 (ERA), together with the process for raising a PG.

The grounds

A PG means any grievance that you may have as an employee against your employer or former employer, including but not limited to the following reasons:

- Unjustifiable dismissal (unless the dismissal was during a valid 90-day trial period);
- Unjustifiable action which disadvantages the employee;
- Discrimination;
- Sexual harassment;
- Racial harassment; or
- Duress in relation to membership of a union or other employee organisation.

Whether a dismissal or action is justifiable depends on whether your employer acted in a way that a fair and reasonable employer would have done under the circumstances prevailing at the time the dismissal or action occurred. In the context of an unjustified dismissal, this includes assessing whether your employer followed a fair process in dismissing you and whether your employer had good reason to dismiss you. For example, was there an action serious enough to warrant immediate dismissal under the employment agreement? If not, did your employer provide you with warnings or conduct performance review meetings?

Informal avenues

In the event of conflict in the workplace, informal discussions with your employer or mediation are more pragmatic ways forward to find a solution and maintain a positive employee-employer relationship before instigating a PG. Raising a PG can be costly, time-consuming and stressful.

The process

A PG must be raised with your employer within 90 days of the date that the conflict or issue occurred. For example, if you are dismissed from your job, you have 90 days from that date to make a claim for unfair dismissal. However, your employer may allow you to raise a claim if you exceed the 90 days. If your employer does not consent to you raising a PG after the 90-day threshold, you can request the Employment Relations Authority (the Authority) or court to allow your claim, due to exceptional circumstances. These circumstances may include where:

- You were so traumatised by the conflict that you could not raise the claim within 90 days;
- You made reasonable arrangements with an agent to raise the claim but your agent failed to meet the deadline;
- Your employment agreement did not stipulate the services available for resolving employment disputes including the 90-day time period to raise a PG; or
- Your employer did not state reasons for dismissal when required.

You should write to your employer detailing the conflicting event and the reasons why you are raising a PG. This keeps a record of your claim and is also beneficial in the event that a dispute arises. You can find a sample letter for raising a PG on the Employment New Zealand website, to use as a starting point.

As an employee, you have three years to begin proceedings with the Authority after raising a PG. If you exceed this time period, you can seek permission from the Authority to continue with your claim; however, this is rarely granted.

Remedies

If the court or the Authority settles a PG, it may provide any one or more of the following remedies to you as an employee, including but not limited to:

- Reinstatement of your job or similar role;
- Reimbursement of a sum equal to the whole or any part of the wages or other money lost by you as a result of the grievance;
- Compensation paid to you by the employer for humiliation, loss of dignity, and injury to your feelings; or
- Recommendations to your employer on what to do if a colleague was harassing you; for example, transferring that colleague or taking disciplinary or rehabilitative action against that colleague.

It is important for employees and employers to deal with each other in good faith and have a clear understanding of their rights and obligations under an employment agreement to avoid any PG claims. If you are in a position where raising a PG is necessary, it is recommended to seek legal advice.

Terms of trade

Time and time again, we are approached by disgruntled business owners and dissatisfied customers to help resolve disputes arising from deals made on the basis of informal arrangements. The law certainly assists in defining and clarifying certain aspects of the contractual relationship between parties. The starting point is usually a consideration of what the parties intended and agreed on at the time the goods and/or services were purchased. The intention of the parties is undoubtedly easier to determine with clear written evidence.

In our experience, one of the most useful tools for businesses is having effective processes and procedures for engaging a client or customer. This is achieved through Terms of Trade, which are sometimes known as conditions of sale or simply terms and conditions.

"Terms of Trade" in a nutshell are the terms of the contract between a seller of goods and/or services and the buyer of those goods and/or services. Entry into the Terms of Trade agreement creates a relationship that is legally binding.

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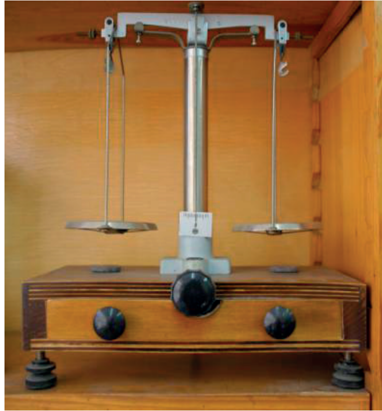
Effective Terms of Trade

Effective Terms of Trade protect all parties' interests by limiting any potential risks.

Terms of Trade outline key rights, duties, obligations and available remedies if the Terms of Trade are breached. This information must be simply reflected in the Terms of Trade in a way that both parties understand.

Businesses should find a balance between protection from risk and being user-friendly in order for third parties to understand and feel confident about engaging in a business relationship with them.



A dispute resolution clause is an important part of Terms of Trade that should not be excluded. This acts as a safeguard when the Terms of Trade have been breached. Having specified avenues or methods that determine how disputes will be dealt with may avoid costly and time-consuming resolutions such as litigation.

The standard Terms of Trade can include (but are not limited to):

- Who the parties to the contract are;
- Expectations regarding the nature of the goods or service;
- The cost of the goods or service, including relevant factors such as fixed or varied payments, quotes or estimates and the inclusion of taxes or GST;
- The payment method, whether guarantors are required, and whether interest rates will be imposed;
- The recovery process when payments have not been made and debt has accumulated;
- The procedure that will be followed if goods or services have not been adequately provided;
- Limited liability; and
- Dispute Resolutions clauses.

Terms of Trade can also include terms relating to termination of the agreement, delivery, installation, transfer of ownership, requirements for insurance, copyright, intellectual property, returns and warranties.

One size does not fit all

As not all businesses are the same, it is essential that Terms of Trade are individually customised to fit a business's needs. When Terms of Trade are incomplete or do not have sufficient information, a business risks being unprotected in an unfavourable situation.

Terms of Trade should regularly be updated and given 'health checks': firstly, to ensure your Terms of Trade are up to date with the law; and secondly, to ensure consistent assessments of risks are being maintained.

Good Terms of Trade

It is ideal for any business to have Terms of Trade that are simple, informative and complete. They will help to maximise cash flow by reducing risks, limiting liability and offering avenues for resolution if a dispute occurs.

Conclusion

If your business does not currently have Terms of Trade, or if it has been some time since they were reviewed, we recommend a review be undertaken without delay. The preparation of Terms of Trade requires a significant degree of legal expertise. Where this expertise is not used, there are real risks that the business may fall into one of the many pitfalls in this area. As such, we recommend you seek advice from a lawyer when drafting and/or reviewing this document.

Terms of Trade are, in the long run, cost-effective and simple risk management tools, which promote effective interactions and positive experiences between a business and its customers.

Major Transactions – Your obligations as a Director and Trustee

A general principle of the Companies Act 1993 (the Act) is that the board of directors is appointed to manage and control the day-to-day operations of a company without having direct interference or oversight by shareholders (the owners of a company). However, some decisions may substantially change the nature or direction of a company and accordingly, the shareholders are required to approve these decisions. These substantial decisions are known as major transactions.

Major transaction defined

A major transaction is where a company purchases or sells assets or incurs an obligation that has a value of greater than half of the company's existing assets. For example, if a company was created to own a dairy farm and it subsequently sells the farm, this would constitute a major transaction as the farm was a significant company asset.

Requirements of major transactions

A major transaction must be approved by special resolution, which requires a majority of 75% of the shareholders of a company to approve the transaction.

A company cannot avoid the major transaction provisions set out in the Act; however, it can add requirements for passing a major transaction under its company constitution. For example, a company constitution could state that 80% of shareholder votes are required for a special resolution in relation to major transactions rather than 75% as provided for in the Act.

Breach of major transaction provision

Directors of a company may be personally liable if a major transaction is not approved by a shareholder special resolution.

Where a company has entered into a major transaction without passing a special resolution and the transaction is not yet complete, shareholders can apply for an injunction to stop the directors from completing the transaction.

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If a major transaction is not approved by the required majority of shareholders, this is deemed to be unfair and damaging conduct by the directors and accordingly shareholders may seek remedies. Remedies may include:

1. Requiring the company to buy the shareholders' shares (this is discussed further below);
2. Requiring the company or any other person to pay compensation;
3. Regulating the future conduct of the company's affairs;
4. Altering or adding to the company's constitution;
5. Appointing a receiver of the company; or
6. Putting the company into liquidation.

Notwithstanding the list above, it may be difficult for shareholders to seek remedies if they cannot show they incurred a financial loss as a result of the major transaction.

If the major transaction is entered into without a special resolution, this breach does not mean that the transaction is automatically invalid. It is possible for shareholders to later approve the major transaction if it was not entered into via a special resolution. This can be beneficial for the company and its directors as it would be more difficult for shareholders to later challenge the board of directors' decisions.

Minority shareholders

If you are a shareholder who voted against the major transaction but the transaction was approved by the majority of the shareholders, you have the right to exercise minority buy-out rights i.e. require the company to buy your shares at a fair and reasonable price. The minority buy-out rights provisions provide an avenue for minority shareholders who do not agree with the majority shareholding and also allow for the majority shareholding to validly make changes to the company.

The company may apply to court for an exemption from the obligation to buy the minority shares on the following basis:

1. The purchase would be disproportionately damaging to the company;
2. The company cannot finance the purchase; or
3. It would not be fair to require the company to purchase the shares.

The major transactions requirements under the Act are vital for keeping directors accountable and allowing shareholders, as the underlying owners, to make decisions in the best interests of the company.

Snippets

Changes to the Food Act

The Food Act 2014 (the Act) has been amended recently.

The key change to the Act is the introduction of a scale assessing the level of food health and safety risk for each business dealing with food. This scale includes all food-related businesses, from multinational food processing companies to street-corner coffee carts.

All food businesses must adhere to different levels of control depending on their risk. The Ministry of Primary Industries monitors this through:

Food control plans – written plans for managing food safety on a day-to-day basis. These are used by higher-risk businesses; and

National programmes – "a set of food safety rules for medium- and low-risk businesses. You must register, meet food safety standards under the Act, keep some records, and get checked."

If you have a food business, you must adhere to one of these two controls, together with the general principles under the Act.

https://www.mpi.govt.nz/food-safety/food-act-2014/overview/

What the fence?

Under the Fencing Act 1978, if a property owner chooses to build a new fence or refurbish an existing fence, the neighbouring property is expected to contribute 50% of the total price. The proposed fence must be "adequate" to reasonably satisfy its purpose. The neighbour is not expected to contribute 50% of the cost if the current or proposed fence is more than adequate to serve its purpose.

A fencing notice must be served on the neighbour 21 days before starting the build, and must include specific information. Neighbours can object to the proposed fence altogether, or to the type of fence being built. If an objection is raised, the neighbour must serve a cross-notice on the owner building the fence within 21 days of receiving the fencing notice.

If an objection is raised and the parties cannot agree, options include mediation, arbitration, the Disputes Tribunal or the District Court.

For more information, contact a lawyer who will be able to guide you through the process.

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