

Commercial Factsheet

Commercial Sale

Scope of work

A broad outline of the work which we will carry out on your behalf is:-

- Obtaining your title deeds and preparing the sale Agreement
- Dealing with any enquiries from your buyer's solicitors and supplying information as requested
- Obtaining references from your buyer and applying to the Landlord for consent to transfer your lease
- Liaising with your Accountants and other professional advisors where necessary
- Agreeing the terms of the Contract for the sale
- When your buyers are ready and a hand-over date has been agreed making matters legally binding. At this point you will be legally committed to the sale
- Obtaining the Landlords consent to the transfer of the lease and approving the formal document which gives that consent
- Making all the pre-completion legal arrangements
- On the completion date receiving the money from the sale; paying off any mortgages and sending any surplus to you.

Consent to transfer your lease

You should note that the consent of your Landlord is normally required before your lease can be transferred to another person or company. The procedure is usually as follows:

A written request will be made to the Landlord or his agents for consent to the transfer of the lease

The Landlord will require references from the intended transferee. Normally this will be a bank reference and two trade references but the Landlord may specify other types of reference, for example an accountants reference.

The Lease may sometimes specify what sort of references are required.

Depending upon the terms of the Lease the Landlord can ask for written guarantees from the incoming Tenant about future payments of rent. There are many ways in which a guarantee can be sought but they may include asking for the incoming Tenant to find a third party to give a guarantee and/or asking the outgoing Tenant to sign a document known as an Authorised Guarantee Agreement stating that the outgoing Tenant will be responsible for future payments of rent if the incoming tenant fails to pay them and/or in the case of a Company incoming Tenant asking for one or more Directors of the Company to give a guarantee.

The Landlord will usually have the right under the terms of the Lease to ask that his costs in dealing with the application for consent to the transfer be met by the outgoing Tenant. These costs will include both legal and surveyors fees. As part of the application process the Landlord's solicitor will ask for an undertaking from us on your behalf to meet those costs whether or not the matter proceeds to completion. Since an undertaking from us is a binding promise we will require you to pay us the estimated amount of the costs before we can give the required undertaking. Any delay in payment will result in a delay in the application process.

Once the landlord has given consent to the transfer of the Lease he will ask his solicitors to draw up a formal document evidencing that consent. That document will be sent to us for approval and we will send it to the incoming tenant's solicitors for approval. It is required because the Landlord needs a direct covenant from the incoming Tenant to observe the terms of the Lease and to pay the rent. Without that covenant he could not enforce the terms of the Lease against the incoming Tenant. Once approved by all parties the Landlord's solicitors send out an original of the document to us for signature and after the outgoing Tenant has signed it we send it to the incoming Tenant's solicitor for signature.

Continues

If you need help with this or any other Commercial Law issue please email matthew.walsh@emsleys.co.uk Matthew can be contacted by phone on 0844 939 0068



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The steps required to transfer a lease are a frequent source of frustration to the outgoing and incoming Tenants. Landlords invariably will not be hurried in these matters because the payment of rent to him continues whilst the application process is dealt with. In addition a source of further delay is the time it takes to deal with the documents required – the formal Licence to Assign must be signed by all the parties and finalised before the Lease can be finally transferred.

If possession of the property is handed to the incoming tenant before the Licence to Assign has been completed the Landlord may take steps to end the Lease.

Please note that legal proceedings can be issued against the Landlord if he unreasonably withholds or delays his consent to an application to transfer the Lease.

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Transfer of Undertakings (Protection of Employment) Regulations 2006 ‘TUPE’: Guidance Note

The general purpose of TUPE is to safeguard employees’ rights on the sale of a business.

(1) When does TUPE apply?

TUPE applies when there is a “relevant transfer”. This includes a transfer of a business or undertaking (or part of one) that retains its identity. This means that TUPE should be considered in most business sales.

A “relevant transfer” also includes services provision changes such as outsourcing and in-sourcing, for example where the work of a contractor is re-assigned or brought “in-house”.

(2) What is the effect of TUPE?

(2.1) Automatic transfer principle

The “automatic transfer principle” means that certain employees may automatically transfer to the buyer on their existing terms of employment (with exceptions). As such a buyer effectively steps into a seller’s shoes.

The employment contracts of transferring employees (along with most of the rights, powers, duties and liabilities of the seller (i.e. the old employer) under or in connection with those contracts) pass automatically to the buyer (i.e. the new employer).

This applies to employees who were employed immediately before the transfer and those who would have been employed had they not been dismissed because of the transfer or for a reason connected with it which is not an “economic, technical or organisational” reason entailing a change in the workforce.

(2.2) Changing terms of employment

It is only possible to make changes to transferring

employees existing terms and conditions either before or after a transfer where the principal reason for the change is either:

- (a)** a reason unconnected with the transfer; or
- (b)** a reason connected with the transfer which is an “economic, technical or organisational reason”.

If the principle reason for the change is not as set out above, any change to the terms may be void.

(2.3) Protection against dismissal

TUPE provides enhanced protection against unfair dismissal. Provided an employee has 1 years continuous service, a dismissal will be automatically unfair if the principal reason for the dismissal is either:

- (a)** the transfer itself; or
- (b)** a reason connected with the transfer that is not an “economic, technical or organisational” reason entailing a change in the workforce.

(2.4) Obligations to inform and consult

Both sellers and buyers have an obligation to inform and, if appropriate, consult with employees’ representatives if their employees may be affected by the transfer or any related measure. Information must be provided in sufficient time to allow genuine consultation. Failure to comply with these obligations may expose the buyer and seller, jointly and severally, to a claim for up to 13 week’s uncapped pay.

(2.5) Obligations to provide “employee liability information”

The seller must provide the buyer with “employee liability information” not less than 14 days before the transfer takes places.

The law relating to TUPE is complex and this guidance note is not intended to be a comprehensive overview of the law in this area. Any sale or purchase of a business should always be subject to obtaining legal advice on your particular circumstances.

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