

# The Fundamentals of Commercial Leasing in Dubai

by Jeremy Scott - j.scott@tamimi.com - Dubai International Financial Centre  
Ian Arnott - i.arnott@tamimi.com - Dubai International Financial Centre  
Andrew Balfe - a.balfe@tamimi.com - Dubai International Financial Centre

May 2017

Most residents in Dubai will be familiar with a basic residential lease arrangement.

Whilst legal complexities can arise under residential leases, they are generally uniform in that the demise or premises is the entire real estate unit and the care and maintenance of the premises is shared in a common sense fashion. However, forms of commercial lease arrangements can vary significantly depending on the nature of the property, the relevant tenant's business and the commercial objectives of the parties.

Below we outline some of the fundamental aspects to any commercial lease arrangement as well as possible variants having regard to the circumstances. We also explore some of the key risks that arise due to incomplete or unclear documentation.

## **The Demise**

The first issue to be determined in any lease is what is being demised. The demise is the area of the building or facility designated for the exclusive use of the tenant. Often it is referred to as the "premises". Whilst this may seem, on the surface, a fairly simple exercise, there can be a number of possibilities each of which has consequences on the obligations of the landlord or the tenant in relation to repairing, maintaining, servicing and insuring the premises or building. We set out some examples of different demises below.

### *Building Demise*

The simplest form of demise would be a demise of the entire building or facility to the tenant. Such arrangements are more likely to apply in purpose built facilities such as factories, warehouses, schools or hospitals where the tenant requires the use of the entire building or facility.

### *Unit Demise*

The other form of demise is where only part of the building or facility is leased to the tenant. In this circumstance, the tenant would only be entitled to exclusively use and occupy the relevant part demised. Often the landlord will lease other parts of the building or facility to other tenants and reserve to itself and all tenants the right to use the common parts of the building or facility.

### *Licensed Areas*

From a common law perspective, a license is a right over an area but one where the licensee does not have exclusive possession (i.e. the area may be shared with others or the landlord, or others may have rights of access to the area). Licenses may also be used for temporary facilities such as kiosks or promotional stands. From a common law perspective, a license would not be a lease. This distinction between a license and lease is, however, less clear in Dubai. Licensed areas may also be included in the lease alongside the demised areas. Common examples are:

- rights to terraces for restaurant seating;
- rights of access to and exit from the premises;
- car parking rights; and
- signage rights.

## **Landlord Reservations**

Whilst “demising” the whole or part of a building or facility gives the tenant exclusive possession of such premises, landlords usually reserve the right to enter into the demised premises for various purposes including:

- conducting repairs that the landlord accepts responsibility for;
- inspecting the premises to ensure that the tenant is meeting its repairing, maintenance and other obligations;
- ensuring that any services running through the premises (and serving the common parts or other premises let to other tenants) are not interrupted;
- for the provision of services that the landlord has agreed to provide; and
- in the case of emergencies.

It is common for the landlord to have to give the tenant some notice as to when they may access the premises except in cases of emergency.

## **Fit-Out & Reinstatement Obligations**

Once the demise is determined, a common issue would be whether the demised premises are fitted out and ready for use or are provided as “shell and core”. Shell and core means that the premises comprise just the utility service connections, premises shell and structure and no suspended ceilings, wall or floor coverings.

If the premises are shell and core or if the existing fit out is not sufficient, the tenant would usually assume the obligation to fit out the premises to meet its requirements. This can be a substantial obligation for a tenant and, in addition, the tenant will not have the benefit of the use of the premises for the period whilst the fit out occurs. In recognition of this, landlords may agree to a “rent free period”. Often a tenant may be required to remove its fit-out at the end of the term of the lease and reinstate the premises to its prior condition, excluding fair wear and tear.

## **Repairing and Maintaining Rights and Obligations**

A key part to any commercial lease is determining the rights and obligations of the landlord and tenant with respect to repairs and maintenance. As a general rule, the tenant would assume the majority of obligations to repair and maintain the demised area. However, there are exceptions to this general rule as often either the landlord or the tenant may want certain infrastructure to be taken care of by the landlord.

Good examples would be civil defence systems like sprinklers or integrated IT or telecommunications systems. Often a landlord may accept repair responsibility for mechanical, electrical and plumbing systems within the premises. Where only part of a building or facility is demised, the landlord would also assume responsibility for the maintenance and repair of the common parts.

## **Services & Service Charges**

Although related to repairing and maintenance obligations, the rights and obligations for the provision of services is best considered separately. Services may comprise utilities, security, cleaning, mechanical, electrical and plumbing maintenance and repairs and many other aspects of the maintenance and operation of the premises or the building. The tenant would usually accept responsibility for many services in relation to the premises including utilities (where separately metered), and cleaning. In line with the obligations for repairing and maintaining, the landlord may accept responsibility for certain services within the premises. A key aspect of any commercial lease is whether the cost of such services (and insurance and other landlord costs) are payable by the tenant as “service charges” in addition to the rent or whether such charges are included in the rent.

## **Insurance & Risk**

As the owner of the relevant building or facility, a landlord will invariably insure it against the usual property risks. A key aspect for discussion between landlord’s and tenants is whether the tenant gets the benefit of the landlords insurance in this regard as, if they do not, and the tenant causes damage to the building, the insurer may look to recover directly from the tenant. Where the tenant does not get the benefit of the landlord’s property all risk insurance, the tenant should arrange its own insurance for such risks.

A landlord will not insure the tenant’s fixtures, fittings, and contents and, accordingly, the tenant will need to insure for the same. In addition, a landlord may want a tenant to hold other insurances such as builders’ risks (during the fit-out), and third party risks, with such insurance to also benefit the landlord.

The allocation of the various risks as between the landlord and the tenant will usually be set out in the lease as a corollary of the insurance matrix (i.e. each of the landlord and tenant may accept certain risks and be required to insure them, sometimes with the other party also getting the benefit of this insurance). Landlords may also take out “loss of rent” insurance to cover any period during which the building or facility may be damaged and rent abatements may apply.

## **Mall Leases**

Malls are distinctive properties and accordingly commercial leases in malls often have distinct clauses. Common examples include:

- turnover rents (the mechanics of which vary but are calculated by reference to revenue generated by the tenant from the premises);
- obligations on tenants to contribute towards the costs of marketing the mall;
- “keep open” obligations (whereby the tenant is obliged to keep the premises open during the opening hours of the mall); and
- relocation clauses (where the tenant agrees to accept alternative premises if the landlord wishes to reconfigure the tenant mix).

## **Key Risk Issues**

The above sections constitute an overview of the fundamental aspects of commercial leases. It is important to recognise however that these fundamentals are matters set out in the contractual terms of the lease. If a lease does not express a clear position in relation to the above issues a tenant should not assume that it is covered under the general law. Below are some of the key risk issues when agreeing commercial leases.

Key problems that we are familiar with as lawyers include:

- The failure to adequately define the demise. As you will note from the above, defining the demise is critical to determining the extent of the maintaining, repairing, services, service charges and other rights and obligations of the landlord and the tenant.
- The failure to clearly define ancillary rights such as the right to certain licensed areas. Such areas can be critical to the success of a tenants operations and therefore should be secured and collateral to the rights of the tenant under the lease.
- Complications around the execution and finalisation of fit-outs. Fit-outs can be relatively complex construction arrangements with obligations on both tenants and landlords. Clearly if fit-out completion is delayed disputes between the landlord and the tenant with regard to the responsibility for the delays can arise. It is therefore important for the rights and responsibilities in relation to the fit-out to be clearly defined and for the tenant to ensure its contractors and consultants are experienced and any contractual documentation with them adequately protects the tenant.
- Failing to clearly define the “permitted use” of the premises. What the premises can be used for and even the brand name associated with the tenant can be very important considerations for both landlords and tenants.
- The tenant failing to secure fair and reasonable rights to assign the lease or subleasing rights. Assignments of lease and subletting in Dubai are restricted unless the parties agree otherwise. Certain regulatory issues may also arise with subleasing.
- A lack of clarity as to who is responsible for completing or paying for repairing or maintaining the premises or building or providing services. The cost of services can be significant as can resultant damage if the necessary repairs or maintenance are not undertaken accordingly. It is time well spent to clearly document such rights and obligations.
- Failing to clearly document the standard and conditions upon which the premises are handed over to the tenant (and therefore the condition upon which they must be handed back to the landlord).
- Unclear allocations of risk and insufficient insurance cover. Thankfully accidents are relatively rare. However given the extent of liability possible, the allocation of risk and insurance are key issues to be considered in every commercial lease.
- Break options, rent reviews and renewals. To a large extent such issues are regulated in Dubai. Landlords and tenants may however want to plan ahead as a means of creating greater certainty as to rents, the potential need to break a lease, and additional renewal terms.

## **Conclusion**

This article is intended to give the reader an overview of the fundamentals of commercial leasing and highlight the key issues for consideration. Tenants should always seek appropriate legal and surveying advice before entering into lease arrangements.

*This article was first published online by Property Weekly on 10 .*