

Alterations

what to consider

The serviced office sector has grown hugely over the past 10 years, in part due to the need for short-term lettings but also due to the benefits of known upfront costs and not being responsible for the premises management. However, such lettings can be restrictive and there are many advantages to renting your own business premises by way of a traditional lease arrangement. One of the main advantages is the ability for a tenant to fit out and decorate the premises in accordance with its own practical requirements and branding. Many employers are also looking to the office layout and design to entice employees back into the office following the homeworking days of Covid. Designing your office space to include collaborative working areas, quiet space areas and with modern design are some of the features that businesses are now looking to incorporate in their premises.

When a tenant moves into business premises for the first time, it will usually have some works that it wants to carry out to ensure that the layout of the premises is suitable for its business operations. These are known as fitting out or fitout works. Sometimes a tenant may also wish to undertake alteration works during the term of the lease.

If a lease is silent on the question of alterations, then the tenant is free to carry out any works it chooses, subject to an implied obligation do not to commit waste and to ensure that the tenant's works do not extend beyond the premises boundary.

However, most landlords will want to restrict the carrying out of works and accordingly, a lease of business premises will set out various restrictions on what the tenant can and can't do. This will usually include limitations on carrying out alterations to the premises and even on erecting signage. Certain alterations may be completely prohibited, for example, external or structural alterations and additions to the premises whilst other alterations may be allowed, subject to obtaining the landlord's consent. Minor alterations such as internal demountable partitioning may be permitted without consent.

Why does a landlord want to restrict or prohibit alterations?

The main reason a landlord will want to control alterations is to protect its reversionary interest in the property. The Landlord will want to ensure that the property is not altered in a way that has an adverse effect on a building's structure or its or market value or future lettings.

A landlord may also want to control the installation of internet apparatus as a telecoms operator may have protected rights under The Electronic Communications Code. These rights can prevent a landlord from altering or removing any electronic communications apparatus which has been installed (paragraph 37 and Part 6, Schedule 3A, Communications Act 2003).

A Landlord should also be mindful of the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 2015/962). A landlord is not able to let or continue to let non-domestic property, if the property has a valid Energy Performance Certificate (EPC) with an energy performance asset rating of F or G. Therefore, a landlord will want to make sure that any alterations carried out do not reduce the energy performance asset rating of the property below E. It is also anticipated that the government will increase the basic rating of E to C and ultimately B, but the time frames for this are still awaited.

If you require more information in relation to this, please see the factsheet on our website MEES - are you ready for the changes from 1st April 2023?

What should a tenant consider if it wants to carry out works to redesign the layout before the grant of a lease?

Ideally, approval to any initial fitout works should form part of the initial lease negotiation as in many cases the Landlord will want the approval to be formally documented in a Deed – see application for consent section below. A tenant should ensure that the landlord remains responsible for its own costs for approving the initial fitout works and/or documenting its consent. The tenant may also be able to negotiate a rent-free period to reflect the time it will take to undertake the works, so that it is not paying rent on premises which are not generating any income.

It may also be possible to carry out works that would not otherwise be permitted under the terms of the lease, subject to the landlord approving them. If the landlord sees value or improvements in the some of the fitout works, such as installing a mezzanine floor, the landlord may be willing to accept that the works will not have to be removed at the end of the lease term.

We would always advise a tenant to ensure that any initial fitout works are approved upfront at the same time as the lease is completed, since any alterations which the tenant wishes to carry out once the lease has been completed, will be limited by the terms of the lease. In addition, the tenant will have to pick up the landlord's costs (both legal and surveyor) in respect of any works it seeks consent for during the term of the lease.

What should a tenant consider if it wants to carry out works to redesign the layout of the premises during the term of the lease?

The Lease Provisions

The first thing a tenant should do is look to the terms of the lease itself. The alterations clause will set out what works the tenant can and cannot do; whether landlord's consent is required for such works and whether the Landlord needs to consider the works in a reasonable manner. If a landlord is not required to act reasonably, it can simply say no to or impose any conditions it wishes to any alterations requested without having to justify its decision.

The standard position is that external structural alterations and additions or any new boundary opening will not be permitted. This is the case even where the tenant takes a lease of the whole of a standalone building but in particular where the tenant is taking a lease of part of a property, for example an office on one floor in a multi-let building.

It is however usual for internal non-structural alterations to be permitted, subject to obtaining the landlord's prior written consent (please see details below). In addition, the lease may allow minor alterations or perforations and consequential alterations to service media as a result of internal non-structural alterations to which the landlord's consent has already been obtained. The installation and removal of internal demountable partitioning is sometime permitted without consent or approval but may be subject to prior notification. The landlord may also want the tenant to provide plans as such information is useful for management and insurance purpose.

The tenant should also consider whether there are other provisions in the lease, which may have an impact on its ability to carry out works, for example:

- any statutory obligations clause;
- any restrictions on the ability to apply for planning consent;
- any restrictions on signage;
- any restriction in the user clause;
- any energy performance or green lease provisions;
- the landlord's costs clause;
- the rent review clause;
- insurance obligations;
- third party rights or restrictions; and/or
- the yield up/ reinstating provisions.

Application for Consent

Once a tenant has decided what alterations are permitted, it will need to seek the landlord's consent to such works, in accordance with the lease terms.

The tenant should make a formal written application to the landlord seeking the landlord's consent to undertake the works. This application should be made by way of letter and should be posted to the landlord in accordance with the notice provisions in the lease. As well as detailing the works, the lease may require the tenant to include copies of the specifications and plans for the works. An application by email may be considered but the time for the landlord to consider such an application does not start to run, unless and until a formal written application is made.

Subject to what the terms of the alterations clause say, the standard position is that the landlord cannot unreasonably withhold or delay its consent to permitted alterations. Where the works relate to "improvements" however, the landlord cannot unreasonably withhold hold its consent regardless of the terms of the lease (section 19(2) of Landlord and Tenant Act 1927). Not all alterations will qualify as improvements and a tenant should seek the advice of a surveyor as to whether an alteration is an improvement within the provision of the Landlord and Tenant Act 1927, or just an alteration.

In considering the application, the landlord may wish to involve its surveyors depending upon the scope of the works. The landlord will normally have to consent to works to the premises demised to the tenant (subject to there not being an absolute prohibition) if the works are reasonable and do not affect the structural integrity of the premises or the building or any other occupiers. If any works need to be carried out externally e.g. the installation of air-conditioning condenser units which need to be installed on the roof or the side of the building, the landlord may be able to withhold its consent in its absolute discretion, unless the lease states otherwise.

It is standard for the tenant to be required to cover the landlord's legal and surveyor's costs in relation to any application for consent. Once the landlord has agreed to the works in principle, it will in most cases instruct

a solicitor to prepare a licence for alterations to document such consent and set out at any specific obligations the landlord has in relation to carrying out of the works. The landlord's solicitor will request payment of its fees upfront. It should be noted that the requirement to pay the landlord's cost will apply whether or not formal consent is actually granted, and whether or not the works are carried out, as the landlord will be incurring costs/fees for no benefit to itself. If the works are substantial, a landlord may request funds to be set aside by way of a bond or deposit for any reinstatement cost at the end of the lease term. The parties will then negotiate the licence for alterations. This will set out obligations and requirements on the tenant in relation to how the works are carried out and when they carried out. It will also clarify that it is for the tenant to ensure that it complies with any other statutory requirements in relation to carry out the works. Depending on the level of works, this obligation can be wide ranging from obtaining planning consents, complying with the Construction (Design and Management) Regulations 2015, health and safety legislation, fire safety legislation and obtaining any other consents from third parties. For example, consent of an adjoining owner may be required under the Party Wall Act 1996.

Rights for tenants to alter notwithstanding the lease terms

A commercial tenant can, in certain circumstances, carry out improvements to their premises even if alterations are forbidden by the lease (section 3, Landlord and Tenant Act 1927). Furthermore, a commercial tenant can obtain compensation at the end of the term for improvements that have been carried out (section 1, Landlord and Tenant Act 1927). As noted above, a tenant should seek the advice of a surveyor as to whether an alteration is an improvement within the provision of the Landlord and Tenant Act 1927, or just an alteration.

Certain legal obligations will override or modify any relevant restrictions in the lease and require an owner or occupier (sometimes in its capacity as an employer) to carry out works to their premises. For example, the Health and Safety at Work etc. Act 1974 which contains general duties for maintaining health and safety within most workplaces, the Equality Act 2010 and the Environmental Protection Act 1990. Advice should be sought as to how these statutory obligations fit with the lease obligations.

Moorcrofts commercial property team is experienced in dealing with applications for consent to alterations on behalf of tenants and requests for consent on behalf of landlords. We will review the lease provisions to determine what alterations are permitted and where we are acting for the landlord, we can determine whether an application for consent has been made properly. We are also able to check whether the landlord is under an obligation to consent to such works and if there is absolute discretion or if the landlord must act reasonably. We can then negotiate and complete the required licence for alterations enabling the tenant to carry out its works. Through our connections with other property professionals, we are also able to refer tenants to surveyors, planning consultants and fit out contractors, should expert advice be required.

Moorcrofts' commercial property team provides legal advice to owners and occupiers of commercial property. We specialise in tenant representation and have extensive experience advising corporate occupiers on all aspects of leasehold acquisitions and disposals. If you would like legal assistance with your commercial property needs, please contact our Partner and Head of Commercial Property – Julia Ferguson.



Julia Ferguson
Partner and Head of Commercial Property
Julia.Ferguson@moorcrofts.com
+44 1628 470009 (DDI)