

5 essays on commercial property law



Five 600 word essays on business (Property) skills.

1. A Short essay (600 words) on commercial property leases explaining: “ The most important points to note in a commercial lease”. (this is designed to develop your understanding of commercial property leases).

The first quality which should be present in any commercial property lease is synergy between the purposes permitted under the terms of the lease, (or that for which it has been used for ten years), and the planning permission which pertains to the property. The landlord should be able to prove the appropriate planning permission exists, whilst the tenant will be liable for bringing the premises into a state compliant with any contingent planning requirements, i. e. those introduced during the lifetime of the lease.

(Freedman and Steele 1998: p. 119) Considering the contemporary trends towards environmental control and improvement, this is no small consideration. The differences between a new lease and an existing lease should also be considered: generally speaking, a completely new lease is likely to generate less costs, fewer complications, and be contingent upon a shorter timeframe than an existing one. Further to this, the issues arising out of Security of Tenure must be carefully weighed: basically, this will determine whether or not the tenant will have the automatic right to a new lease when the existing one expires. The 1954 Landlord and Tenant Act prescribes protection for the tenant on satisfaction of the relevant conditions, i. e.,

- There must be a tenancy in the legally defined sense of that status – not a licence.
- The tenant must occupy at least part of the leased premises.
- Any such occupation must be, at least in part, for the purposes of the tenant’s business, as prescribed by the lease. However, if such occupation is only

partial, the effect of this will be to limit the tenant's new tenancy rights to those specific parts of the premises. (Lamont et al. 2005: p. 4).

The tenant also has to consider the intensity, i. e. the continuity of their use of the premises: if the latter is not constant, they may be obliged to prove unbroken use through a prescribed legal test. (Lamont et al., 2005: p. 14).

The conventional commercial issues will also need to be considered, i. e. the length of the lease, the rent, whether or not a rent bond or guarantor is required, and whether or not Value Added Tax is chargeable on it. This will depend upon whether or not the landlord has elected to waive VAT exemption, in agreement with HMRC. (Freedman and Steele 1998: p. 33)

Other key issues include responsibility for insurance(s), the presence of a 'break' clause allowing the landlord an early cessation of the lease, whether or not the premises may be underlet, and the intervals of any integral rent reviews. All of these sub-considerations need to be weighed carefully against the tenant's future plans: for example, a clause permitting the user the assignation or subletting the premises does not completely absolve them from reference to the landlord. They may still be entitled to withhold their consent, even if the core purpose of the sub-lessee is in keeping with the original terms of the lease. (Freedman and Steele 1998: p. 116)

The prospective tenant may need to pursue incorporation of the appropriate Schedule of Condition, taking into consideration any existing issues with the maintenance of the property: this is the means of avoiding the responsibilities contingent upon a 'full repairing' lease. This is, in itself, insufficient to ensure that all future maintenance liabilities are avoided, as

they may also be incorporate into service charge clauses. It should also be borne in mind that, as long as they have complied with the regulations on the preconditions of liability, a landlord may be able to commute service charges into additional rent, and pursue recovery in the usual manner, i. e. through the courts. (Freedman and Steele 1998: p. 50) As a tenant, you must also establish if the property provides you with everything you require in its unaltered state, or allow you the facility of making such changes as you may consider necessary, i. e. through variations or ‘ licenses to alter’ within the lease? Yielding Up covenants may require that anything added to the premises during the lease is either left in place, or removed: either contingency may involve additional losses for the tenant. (Freedman and Steele 1998: p. 103).

2. A Short essay (600 words) outlining the various approaches to Alternative Dispute Resolution and a reflection on its advantages in today’s UK market. (This is designed to assess your understanding of the range of methods available for resolving property disputes).

In discussing the various approaches possible within Alternative Dispute Resolution in the UK, it is first necessary to recognise the framework and developments which have informed the contemporary arrangements. The market for ADR services was prompted by the desire for – or necessity of – avoiding formal litigation. As such, the associated frameworks were given additional definition by the Civil Procedure Rules of 1998, as a result of which, ‘...ADR was specifically recognised for the first time at the heart of civil justice procedure, as a tool of active case management...’ (Mackie et al 2007: p. 4). Through this means, ADR accrued much of its value to end users, in terms of cost reduction, flexibility, and timescale of operation. However, it should also be borne in mind that this same flexibility is reflected

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in the diffuse, protean, and comparatively informal or unstructured nature of many of the available ADR options: as Mackie et al. express it, there are ‘... many ways of defining ADR’. (2007: p. 8). The more prominent may be identified as...

- Mediation, or a structured dispute resolution procedure, incorporating third parties, without a legally binding resolution, i. e. (Mackie et al. 2007: p. 8).
- Evaluative Processes, such as Early Neutral Evaluation (ENE), Judicial Appraisal, or Expert Opinion: all of these are designed to clarify the issues involved at an early stage, and, if they cannot provide resolution, offer initial indication(s) of the likely outcome(s) of any further processes. (Mackie et al. 2007: p. 13).
- Adjudicative Processes, ranging from the non-binding judgments of third parties, the use of applicable Ombudsman schemes, (to which both parties in the dispute agree), through to actual litigation.
- Hybrid Processes, i. e., Executive Tribunals, Mini-Trials, and Med-Arb. As Mackie et al. explain, ‘...Arb-Med may also be attempted, where the third party makes an arbitral decision but keeps it in a sealed envelope while switching to mediation, only revealing the decision if the mediation does not result in settlement.’ (Mackie 2007: p. 14).

The nature of ADR with specific regard to property continues to evolve in proportion to the demands of the market, and the established precedents. For example, the repetition of similar kinds of disputes under Mobile Homes Act 1983 has led to their transfer to the Residential Property Tribunals as of

April 2010. The intermediate status of the latter is illustrated by the fact that its decisions imply no enforcement powers: instead, possible contingent actions through the County Courts are at the discretion of the plaintiff party. As the convening Tribunal Service itself explains regarding its sub-committees, ‘...they are quasi-judicial bodies, which means that housing legislation has given them the powers to settle some disputes which would otherwise have to be dealt with by the Courts. They provide an easier and generally cheaper alternative to the Court system. (Residential Property Tribunal Service 2009).

In conclusion then, the advantages of ADR in the contemporary market may be regarded as those of...

- Cost: considerably lower, in comparative terms, than those of litigation.
- Timeframe: shorter and considerably more flexible than those implied by involvement with the courts. This may be a major issue for parties involved in commercial, i. e. income-contingent outcomes.
- Control: in ADR, both parties have the facility of involvement and intervention in the process, rather than being locked into the pre-defined procedures – and outcomes – of formal court proceedings.
- Damage Limitation: the adversarial nature of litigation may permanently destroy relationships between parties which might otherwise been of commercial value in the future.
- Self-Determination: both parties have the possibility of helping to construct creative and flexible solutions.
- Confidentiality: the proceedings of a court hearing are a matter of public record, so sensitive commercial details cannot be protected.

3. A Short essay (600 words) identifying the nature of professional ethics together with examples of instances where these might be compromised. Include comment on problems outlined by speaker. Include a reflection as to how standards and attitudes have changed over the past 50 years. (This is designed to test your IT skills and to develop a sense of ethical standards and consumer protection).

Any reflection upon professional ethics undertaken at present, it is fair to argue, has to take account of two intersecting and conflicting pressures. In the first instance, there are the growing pressures for commercial organisations to act within the boundaries of corporate social responsibility and sustainability. In the second instance, there are the more recent developments to consider, i. e. the pressure for organisations and individuals to return to older protocols of profit maximization in the face of a recessionary downturn. When these two factors are combined, it becomes apparent that there are no simple answers as to what constitutes an appropriate system of professional ethics; in fact, it is likely that the definition would vary widely, depending on who was asked to provide it.

There can be no question about the fact that the bar has been raised immeasurably in terms of ethical expectations over the last fifty years. The number of FTSE 100 companies who publish their own standalone corporate responsibility reports continues to rise, indicating that professional ethics must not only be exercised – but be seen to be exercised. (Brewster 2007). In addition, organisations in sectors tinged by ethical lapses have begun to appoint ‘ethics officers’, both as a source of in-house expertise, and stakeholder reassurance. (Arnold 2007). Unfortunately, it is also the case that catastrophic ethical failures remain a feature of the corporate landscape, and in fact have become even more damaging. As Rosenthal

indicates, these frequently extend to agencies who are responsible for the maintenance of standards. (Rosenthal 2007). However, if the history of ethical attitudes tells us anything of which we may be certain, it is that such attitudes are subject to constant change. As Conroy and Emerson point out, ethical attitudes have followed cyclical patterns, varying slightly from longer term trends, in a manner similar to the economy itself. Within this, attitudes are alternately decreasing, increasing, or changing in terms of their tolerance of un-ethical behaviour. (Conroy and Emerson 2008: p. 907). In the present environment, it remains to be seen which side of the ethical equation dominant attitudes will support, i. e., the continual raising of standards, or a return to earlier protocols, such as caveat emptor. As Vickers has argued, it is likely that any new thesis will be followed, inevitably, by an antithesis, in ethical terms. (Vickers 2005).

It remains the case that professionals themselves, operating within real organisations and real business pressures, must themselves deliberate between all of the theoretical ethical models available to them. Altman, for example, is clear on the fact that, in terms of Kantian ethics, a corporation, or its officers, should have no other responsibilities than the raising of shareholder value. (Altman 2007: p. 261). Fisher and Lovell meanwhile remind us that there are two basic categories of ethics: the ‘Consequentialist’, and the ‘Non-Consequentialist’. In the former, the ethical quality of any action is judged through its outcome; in the latter, the action is judged on its own virtues or merits. (Fisher and Lovell, 2006: p. 101). If a ‘Consequentialist’ position is taken, then the individual must decide whether to pursue the general good, such as the best median outcome for the whole

of society, or simply a good, such as the best business outcome for their organisation, regardless of the wider societal repercussions. (Fisher and Lovell 2006: p. 131) However, if a ‘ Non-Consequentialist’ position is adopted, then the professional must act according to whatever ‘ Virtue’ ethics demands, i. e., judge what is right or wrong from ‘...predetermined principles and standards...’, regardless of the outcome. (Fisher and Lovell 2006: p. 101). Ultimately, each professional practitioner and organisation must balance their own priorities and perspectives somewhere within this nexus of possibilities, judging what is right for their businesses and society as a whole.

4. A short essay (600 words) titled “ The Current Property Market in the UK and Europe”.

Although it can justly claim to be the victim of forces beyond its control, the property industry in the UK and Europe is not entirely blameless with regard to the current malaise of the market. Before the collapse of the US sub-prime market, the European market for mortgage backed securities – dominated by the UK, was starting to see issues with securitisations amongst non-prime creditors, for example in the buy-to-let sector. (Davies 2006). Halifax Bank of Scotland alone successfully marketed £500 million worth of mortgage-backed bonds during 2008. (Davies and Croft 2008).

More realistic lending practices and revenue expectations now appear prevalent: as Johnson reports, the average gross loan-to-value ratio was 24. 1 per cent during 2009, down from 29. 8 per cent in the previous year. (Johnson 2010). It remains debatable, however, whether property values or industry practices yet reflect a more sustainable outlook across the sector.

As many analysts have indicated, current property prices are being maintained by two intersecting factors: a low rate of supply, and commensurately low interest rates. However, upward adjustments of the latter will, in all probability, place downward pressure on overall prices. (Leunig et al. 2010). Predicting the final trajectory of asking prices in the immediate future will also depend upon what happens to real disposable incomes, and in this respect, the portents are less than healthy. Although asking prices may begin to rise, it may also be the case that, with less money in general circulation, there will be a flattening out of historical trends in price-earnings ratios, and the cost of property will actually fall in real terms. The lenders' preferred solution to this kind of impasse, i. e. the offering of ever higher loan to earnings ratios, may no longer be available: even though some banks are again offering six times salary advances, a return to the days of eight-multiple products appears unlikely. (Leunig et al. 2010).

Meanwhile, large property companies, such as Great Portland Estates, are seeing the effects of a UK recovery gradually appearing on their balance sheets: the latter's £1.2 billion portfolio saw an 8.7 per cent rise during the final three months of 2009, the best quarterly return for the company in three years. This has facilitated an 11.6 per cent growth in net asset value per share to 251 pence, whilst new purchases in the final quarter of 2009 have already accrued a 14.4 per cent increase in value, or 9.5 per cent net of costs. (Thomas 2010).

Despite such successes – notably in the capital and other select, higher value enclaves, the overall picture is a more complex one, with divergent trends

and contrasting future prospects. For example, according to the IPD monthly property index, the UK commercial property market realized total returns of 22.2 per cent during 2009. (Thomas 2010) However, this encouraging statistic masks significant regional and sectoral differences in fortunes, of which the situation in retail property furnishes but one example. According to DTZ, one fifth of all UK shopping developments, with a combined tag of £10.1 billion, is currently at risk of defaulting on credit agreements, due to a combination of falling earnings and values. (Thomas 2010). In fact, DTZ's Mark Williams asserts that a mere one hundred of the UK's eight hundred and forty retail developments could currently be regarded as 'prime' in real estate terms: he attributes this to a 'huge overhang' of poorer quality centres – a legacy of the 1980's boom in development. With their twenty year leases nearing expiry, and outdated facilities becoming less attractive to hard-pressed retailers, their prospects are diminishing. (Thomas 2010) This situation exemplifies a number of similar situations in sub-sectors of the property market, where value and demand differ wildly: as Thomas expresses it in the Financial Times. '...There is a large and growing gap between the so-called secondary or tertiary real estate that fills the towns and urban areas of the UK, and the prime stock of well-located modern property producing income on a long lease that is the exception, rather than the norm.' (Thomas 2010).

5. A short essay (600 words) explaining the basic principles of negotiation – “getting to yes”. (IT skills again – otherwise hopefully self-explanatory).

The idea that there are 'principles' which may be aggregated together to form a 'best practice' within negotiation is one forwarded by commentators such as Fisher, Ury, and Patton in *Getting to Yes: Negotiating Agreement*

without Giving in, (1983). This in turn is predicated upon the ideas of ‘principled negotiation’ as developed by the Harvard Negotiation Project. (Fisher et al. 1983: p. xii). The collective trope which draws the principles together lays in the idea that purely positional negotiation, i. e. that conducted through the definition and defence of one’s own ‘position’, is ultimately a poor negotiating technique, and one likely to be counterproductive: ‘...As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties...’, and consequently, ‘...Any agreement reached may reflect a mechanical splitting of the difference between final positions rather than a solution carefully crafted to meet the legitimate interests of the parties.’ ((Fisher et al. 1983: p. 5). The subsequent principles set out the means to avoid such a scenario through...

- Separating the people from the problem.
- Focusing on interests rather than positions.
- The invention of options for mutual gain.
- The establishment of objective criteria.

The separation of the people from the problem does not quite equate to the ‘depersonalizing’ of the negotiating process: rather, it implies application of the appropriate relationship management skills. In simple terms, ‘...If negotiators view themselves as adversaries in a personal face-to-face confrontation, it is difficult to separate their relationship from the substantive problem.’ (Fisher et al. 1983: p. 39). However, the exclusion of personal animosity is only part of this principle. The rest is composed of consciously maintaining the appropriate emotional responses, of understanding all of the related perceptions, the development of a relationship, and above all, the

establishment of some degree of trust. As J. S. Mill proposed, somebody who knows only their own side of any debate or negotiation, knows little enough of that. (Mill 1843 Ch. 2) In other words, achieving a negotiated solution relies upon the understanding of why and how the others' position was established.

This leads into the next principle of negotiation, i. e. the need to focus on interests, rather than positions. Once the elements which are constructive of the other party's position are understood and disaggregated, it is far more feasible to reach point of mutual agreement. As Fisher et al. point out, '... Fighting hard on the substantive issues increases the pressure for an effective solution; giving support to the human beings on the other side tends to improve your relationship and to increase the likelihood of reaching agreement.' (Fisher et al. 1983: p. 57). It is also the case that the clarification of issues is supportive of the next stage in the process, i. e. the invention of options for mutual gain. This involves considering the issues holistically and creatively, assembling all of the objective third party perspectives which might have some bearing, and, where expedient, involving a detached intermediary to assist in the facilitation of the negotiating process.

The fruition of these cumulative stages lays in the establishment of objective criteria through which agreement can be reached. By this stage, any emotional stand-off should have been neutralized, so that the participants know they are discussing issues, rather than their respective personalities: moreover, the real issues have been identified, and unhelpful or generalized positions have been deconstructed. Any unnecessary pressure or compulsion

should also have been qualified out of the scenario, leaving only the most desirable and achievable solutions to suggest themselves. As Fisher et al. conclude, ‘...Shifting discussion in a negotiation from the question of what the other side is willing to do to the question of how the matter ought to be decided does not end the argument, nor does it guarantee a favourable result. It does, however, provide a strategy you can vigorously pursue without the high costs of positional bargaining.’ (Fisher et al. 1983: p. 96).

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