

# THINKING OF PURCHASING?

**Robert Botkai and Fiona Hallinan, of Winckworth Sherwood, advise on ways to prevent delays in taking on a new site, in the latest of a series of exclusive articles for *Petrol Heads-Up*.**



Once you have made the decision to purchase a site or take a lease, it is natural that you would want the deal completed as soon as possible. Delays in transactions can be frustrating and unexpected circumstances can cause complications. If potential delays can be identified at heads of terms stage, the transaction is more likely to be smooth sailing.

This article focuses on acquisition by way of grant of a new lease.

One delaying factor that we see often on the grant of a new lease is the need for landlord's consent. Here, we highlight some pointers to watch out for to avoid unnecessary delays.

## Ownership

This may seem obvious, but it is essential at the outset to know if the landlord actually owns the freehold or if he owns a leasehold interest. It may well be a long lease but that's still a lease.

## Grant of a head lease

If the landlord owns the freehold, it can grant a lease on whatever terms it wishes and is not bound by the requirements of any third party (other than perhaps a lender). This lease is called a head lease or superior lease.

## Grant of an under lease

If the landlord's interest is leasehold, your transaction is likely to be more complex as there is an extra party to proceedings. Your landlord can only grant you an under lease, sometimes called a sub-lease.

Worse, your landlord may hold by way of an

under lease in, which case you can only receive a sub-sub lease.

The landlord's own lease (the superior lease) will dictate the terms on which a lease can be granted to you and whether consent from a superior landlord is required. Unless the superior lease is for a very long term (e.g. 100 years) it is likely that the superior landlord's consent will be required. Consent will usually take the form of a formal licence to underlet, setting out the basis on which the superior landlord consents to the under lease being granted.

Why would this cause delay? A superior landlord will want to see a lease in an agreed form in order to consider the application for consent. So, the lease will need to be negotiated in the usual way before an application is made to a superior landlord. Application is then made to the superior landlord for consent. The superior landlord will instruct solicitors who will not lift their quill until they have received an undertaking for costs. This can range from £500 to £2,500 (plus VAT and disbursements of course).

When negotiating the heads of terms, the terms of the superior lease should be considered carefully. A landlord cannot grant something they do not have themselves. The terms of the under lease should follow the terms of the superior lease. The superior lease may have a whole section dedicated to the grant of under leases. For example, it may stipulate that the under lease must be excluded from the security provisions of the Landlord and Tenant Act 1954. More on this in a later article.

The further the two leases deviate, the more potential there is for ambiguity as to what has been agreed and what terms are enforceable and by whom. Also bear in mind that if you are the tenant of an under lease you essentially have two (or more) landlords. So every time consent is required under your lease (for instance for alterations, or to grant a further



lease) consent is needed from two parties, which adds to the administrative burden.

Beware also that a superior lease may contain a right of pre-emption. This means that before a tenant can complete an under lease it must first offer back the premises to the landlord. The superior lease will set out the timetable for this.

## Key points to note

- In what capacity does the landlord own the land? Freehold or leasehold? Ask this question at the outset.
- The lease is king! Always check the superior lease to see whether the landlord has the right to grant the under lease with or without consent.
- The more parties to a transaction there are, the more likely there are to be delays. Mitigate this by getting the superior landlord involved in the process as soon as possible. Put them on notice that the application for consent is on its way.
- Seek advice as early in the transaction as possible!

In conclusion, make sure the ownership of your landlord is investigated right at the outset. This could save a lot of time and money.

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