

The Changing High Street

This summer, as shops become busier during the sales, it is hard to shake the feeling of uncertainty after announcements that high street retailers such as Habitat, Jane Norman and Thorntons, have been put into administration.

Habitat was the first to announce its fate on 24 June, when the company declared that it was making a loss and a return to profitability was looking unlikely. Habitat stated that "trading conditions have remained challenging for retailers of big ticket items such as furniture". On 27 June women's clothing retailer Jane Norman closed 33 of its 89 UK stores after failing to find a buyer. Its Jersey branch, a concession in department store Voisins, remains open at present.

Thorntons then announced that, following a strategic review of its business, it will close up to 180 stores over the next three years. However, the chocolatier announced that it aimed to increase supermarket and internet sales. Plans to 'refocus the business' released by Chief Executive Jonathan Hart gave a glimmer of hope not only to chocolate lovers but to other retailers faced with falling profits and an uncertain future.

Music giant HMV have announced plans to close 60 of its 285 UK stores, however similarly to Thornton's it is not all doom and gloom, as HMV are also to refit a number of stores and refocus its business on new technology sales.

It seems that the companies edging forward are the ones with the ability, and luxury, to be able to diversify and refocus their business.

One of the largest overheads for any high street retailer is premises. Retailers with prime locations pay considerable premiums, but even retailers on streets with lower footfall find rent, or in a small proportion of cases mortgage facilities, burns the largest hole in monthly balance books.

So whilst retailers are currently facing stressful times, many landlords are finding that they are faced with the unattractive prospect of an empty building. Most commercial leases are drafted for a minimum term of nine years, with many being twenty years or more. Depending on when the lease was negotiated, it is likely that rental levels reflect the more positive economic climate of some years ago.

The majority of commercial landlords do not own their properties outright, but are tied to banks and other creditors. This makes the prospect of decreasing rent impossible, and that of losing their tenant equally unpalatable.

With all parties facing the squeeze, is there anything that can be done? And is there anything that can be learned moving forward?

The answer is yes! The key to drafting any lease, particularly high value commercial ones, is covering all eventualities. Whilst no-one may have envisaged the financial difficulties we now face, lawyers must build in provisions reflecting a change in the position of the parties, particularly financially.

'Break Clauses' operate to terminate the lease early upon giving a certain amount of notice. Leases may contain set dates upon which either party may give notice or 'rolling breaks' which mean that after a certain point either party may give notice at any time. It is important to ensure that the 'break points' are at sensible junctures and that the notice period is

sufficient to allow each party to make alternative arrangements, however when drafted well, these can provide much needed flexibility.

An unrestrictive 'Use' clause can also prove essential for businesses looking to diversify such as Thorntons and HMV. When drafting a lease it is essential to ensure that the Use clause broadly covers everything that a tenant may wish to do at the property. For example, a Use clause allowing the sale of chocolate would be much more restrictive than a general 'retail' clause. It is therefore important to look at the business of the tenant in broad terms as well as focussing on the specifics.

If the business of the tenant is really failing and recovery seems unlikely, 'alienation clauses', which refer to assigning and sub-letting the lease, can be an effective way for parties to end the landlord-tenant relationship amicably. The alienation clauses refer to assigning and sub-letting the lease. It is important that the drafting provides flexibility for the tenant together with a certain level of control for the landlord. Generally, these clauses state that the landlord must approve any assignment or sub-lease. Landlords usually request references from the potential assignee or sub-tenant and may require them to adhere to the terms of the original tenant's lease.

If the tenant is able to find a suitable assignee or sub-tenant, and if the tenant is not in breach of the head lease (for example being in arrears of rent), following the execution of a contract of assignment or sub-lease, the tenant may walk away from the lease prior to the end of the term. The landlord should also not suffer any loss of rent and the property shall remain occupied.

There are many other clauses that come into play in difficult times, such as Guarantor provisions. The key is to consider issues that may arise in the future and to build flexibility and protection into the lease, for both parties. The ability to be flexible in uncertain financial times is one of the most valuable tools a landlord or tenant may have to weather the economic storms.

Voisin Commercial Property department has expertise in the retail sector, dealing with commercial leases for a number of well-known shops, restaurants and public houses in Jersey, acting for landlords, tenants and guarantors. To discuss any property related matter, please contact the Voisin Property team (property@voisinlaw.com) on 01534 500351.