



REAL ESTATE

Potential Pitfalls When Varying a Lease

by **Clair Cassidy**

Potential Pitfalls When Varying a Lease

26th July 2021 | by Clair Cassidy

During the term of a commercial lease, it may become necessary to revise the original terms that were agreed in order to respond to the changing requirements of a business.

The parties to the lease might, for example, agree to expand or reduce the leased area, to amend specific provisions of the lease or to vary the length of the lease term.

In some situations, the parties may choose to amend the lease by means of a deed of variation, rather than negotiating an entirely new lease.

When drafted correctly, a deed of variation is a practical and cost-effective way to record the intentions of a landlord and tenant. However, the parties should always exercise caution and seek legal advice before varying an existing lease.

The Law Society of Ireland recently drew attention to the potential for unintended consequences when entering into a deed of variation. See [here](#).

Unintended consequences

The primary risk is that the deed of variation could be determined to have triggered a surrender and re-grant of the leased premises, which would result in the termination of the existing lease and the simultaneous granting of a new lease. While this may not initially appear to be problematic, the accidental triggering of a surrender and re-grant can result in unintended consequences for the landlord and the tenant.

In particular:

1. If the lease contains an enforceable upwards only rent review provision (i.e. the lease predates February 2010), a deemed surrender and re-grant may result in the automatic replacement of the upwards only rent review mechanism with an open market rent review provision allowing for upward or downward movement of the rent on review for the future.
2. Where the tenant has signed a Deed of Renunciation waiving their statutory renewal rights, a surrender and re-grant may undermine the validity of that Deed of Renunciation. If a new Deed of Renunciation is not obtained at the time the deed of variation is executed, the tenant may acquire statutory renewal rights (subject to the provisions of the Landlord and Tenant (Amendment) Act 1980).
3. As the deemed surrender and re-grant essentially means that a new lease has effectively been granted, stamp duty may well be payable on the deed of variation.
4. There may also be unintended VAT consequences for the parties arising out of a surrender and re-grant that could create problems for them.

The view from the courts

In considering whether a deed of variation resulted in the surrender and re-grant on the variation of a lease, the Irish courts have traditionally taken account of the intentions of the parties. On that basis, the deed of

variation may not necessarily result in the surrender of the original lease. In contrast, the English courts have taken a more rigid approach and are inclined to hold that most variations trigger a surrender and re-grant of the lease.

However, establishing the intentions of the parties is by no means definitive in this jurisdiction. Depending on the content and wording of a deed of variation, it may not be possible to definitively conclude that the variation is anything other than a surrender and re-grant.

Consent

Aside from the pitfalls associated with triggering a surrender and re-grant, the parties to the lease should also remember that the execution of a deed of variation may also be conditional on obtaining the prior consent of a lender, superior landlord, guarantor or other party with an interest in the property. While these consents would generally be sought as part of a new lease negotiation process, it is easy to foresee how the requirement could be overlooked where the parties are concerned with a deed of variation, which is a more simplified process.

Seek advice

In summary, a deed of variation may seem to offer an attractive and cost effective method for landlords and tenants to negotiate amendments to an existing lease, but it is an area of law that is far from settled in this jurisdiction. To avoid unintended consequences, landlords and tenants are encouraged to seek legal and tax advice before varying the terms of their lease.

For further information or for advice in relation to commercial leases in general, please contact a member of our Commercial Property team.

About the Author



Clair Cassidy
Partner

Clair is Head of Real Estate at LK Shields.
T: + 353 1 637 1543 E: ccassidy@lkshields.ie