



A Basic Leasing Guide for New Business Owners (Retail)



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Table of Contents

Chapter 1	3
Who We Are	3
Chapter 2	7
Introduction	7
Chapter 3	10
What is a Lease?	10
Chapter 4	13
Lease Terms	13
Names of the Parties	14
Term of the Lease	14
Options	15
Base Rent	17
Tenant Inducement Package	18
Operating Costs or Additional Rent	20
Electricity	22
Taxes	23
Percentage Rent	25
Use Clause	26
Lease Assignment Provisions	27
Causes for Termination, Lease Defaults, provisions, cures and penalties.	30
Insurance	31
Other General Provisions	32
Covenant	32
Personal Guarantee	32
Chapter Five	34
Special Conditions Franchising	34

Introduction	35
Landlord to Franchisor	35
Franchisor to Franchisee	35
Landlord to Franchisee	37
General Issues across all three of the above	38
Right to Transfer	38
Refurbishment	38
Tenant Inducement Package	39
Signage and Marketing	41
Use Clause	41
Insurance	42
Radius Clause	42
Conclusion	44
Glossary of Commercial Real Estate Terms	46

CHAPTER 1

WHO WE ARE



Scott and Associates is a consulting group comprised primarily of W. Stewart Scott as the owner and Senior Consultant and W James (Jim) Dixon, as Senior Associate

Consultant. We also have a group of ancillary associates with expertise in varying subject areas that we can draw upon when required to provide the best service to our clients. The group works closely as a team to ensure that our clients receive the best possible expertise available.

We are a full service consulting group ¹providing consultation in a number of areas, but are known for our approach to business start-ups and assisting owners through those very important initial steps. Over the years, we have developed a specialty in providing consulting services to Aboriginal entrepreneurs and are approved consultants for [SaskMétis Economic Development Corporation](#) and its Métis Assistance Program, and the [Clarence Campeau Development Fund](#).

We are also approved consultants for the [Farm Business Development Initiative](#) through the Government of Saskatchewan.

¹ www.scottandassociatesconsulting.com

Biographies of our Senior Consultants are appended below.



W. Stewart Scott B.A., B.Ed., M.Phil.

Stewart has an extensive and successful background in Corporate Management, Entrepreneurial Business, Franchising and in Economic Development.

His 45+ years of professional experience and consulting assignments include Teaching, Bank Management, Senior Management (C.O.O and C.E.O) positions in Retail and Manufacturing, Franchise Operations and Franchisee Relations, Financial Planning, Business Consulting and owning his own start-up companies.

Easy to talk to and with a sense of humour, he is adept at understanding a business start-up and the issues his clients are dealing with.

His financial background enhances his ability to translate operations into financial statements.



W. James Dixon B.G.S., M.B.A., Ec.D (F)

Jim is a results-oriented business professional with 20+ years of experience in business ownership and management in both independent and franchised operations.

He has a strong understanding of business start-up and preparing and analysing financial statements. He has an extensive background in Entrepreneurial, Business and Economic Development.

Through the management of the contracts of two Enterprise Regions, he has contributed his expertise in helping grow and transform communities and regional economies through various tools and programs.

CHAPTER 2

INTRODUCTION



So, you want to get into business? You've completed your preliminary business and financing plan, and it seems to make sense. The plan told you that you need a certain type of premises within a certain demographic and you can only pay

so much rent. You've identified the ideal spot and now want to sit down with the landlord's agent to talk turkey.

But what questions do you need to ask? And what do you watch for?

This is one of our Success: Failure series of **FREE** booklets addressing various topics of concern to new business owners, or those interested in starting their own business and are doing their due diligence for their business and financing plan.

It is our intention that, through these quick treatises, you, as a new business owner, can avoid some of the standard pitfalls that jeopardize so many neophyte ventures.

Leasing premises seems simple on the face of it, but is probably one of the potentially most expensive decisions that a new business owner has to make. Sometimes we are so happy to be able to get the premises we want that we go ahead and sign the landlord's standard lease, often without realizing that ***we are making a business decision that has significant effects on our finances for at least the next five years (initial term) and in some cases, the rest of our lives (personal guarantees).***

You may wish to take it to your lawyer but often the leasing agent will tell you that the owner does not change any of the

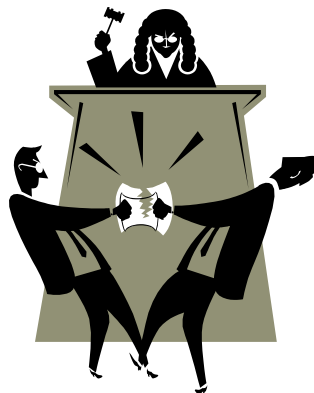
clauses in the lease document presented. In some cases this is true, ***but in many cases you can make some changes or additions to your benefit.***

This book is not a definitive treatise on lease negotiations, but attempts to provide you, the new business entrepreneur, with a simple but effective guide to what to look for in your premises search and what types of pitfalls to watch for.

In our chapter on Franchise Leasing, we also explore specific areas of the lease and lease negotiations that you, as the franchisee, must look for, and be aware of how the Franchisor's actions can affect you.

We have also included a glossary of standard leasing terms you will see in a lease. These are just the basics and provide you with enough information to have a preliminary understanding of what these terms mean.

To fully understand the impact of any of these terms and how they affect your own particular lease, we strongly recommend that you ***discuss your lease with a lawyer before you sign anything.***



CHAPTER 3

WHAT IS A LEASE?

In a nutshell, a lease is a legal document that governs the business and legal relationship between you, the Lessee, and the landlord, the Lessor.

Sometimes, the Landlord will hire a management company and your lease may be directly with this agency rather than with the landlord direct.

The lease typically addresses the following items:

- Names of the parties
- Term of the lease
- Options
- Base Rent
- Tenant Inducement package (TI).
- Operating Costs or additional rent
- Percentage Rent
- Use Clause
- Lease Assignment Provisions
- Causes for Termination, Lease Defaults, provisions, cures and penalties.
- Insurance



In addition, there are lots of items in the fine print that you should have your lawyer review for you.

Some of these are included in an **“Offer to Lease”** from the landlord, if your negotiation skills get you that far.

In most business and financing plans, a **lease summary** outlining these points is a **must** for inclusion, particularly if you are leasing a retail space. A lender needs to know these details to determine the extent of risk, and in some cases to match the

lending terms with your lease terms. We'll talk more about this later.

CHAPTER 4

LEASE TERMS

Some Signing Do's and Don'ts

DO

- Read the lease in total yourself.
- Try to make your own lease summary to cover the major points.
- Give this summary to your lawyer to make sure you have correctly understood the basic lease terms.

DON'T

- Don't sign personally for a lease that should be in your company name. If you haven't incorporated your company yet, then sign "on behalf of a company to be incorporated", and get the landlord to agree "up front" to an assignment to that company once incorporated, without penalty

NAMES OF THE PARTIES

This may appear to be self-evident, but it is critical that you get this part correct. You can no longer rely on a misspelled name to void a legal document, but ***make sure that you are signing the lease as an officer of your company and not personally.***

TERM OF THE LEASE

As the name implies, this represents the length of the lease. It is usually for a term of five years in a retail setting, but can be shorter or longer. The five year term will often coincide with a term loan from your

bank for capital purchases for example.

Some other conditions that may impact on the term are as follows:

- **Fixturing Period.** You can often negotiate a period of months where the landlord allows you to build out your premises **without having to pay basic rent**. This may be from one to three months. The landlord may require you to pay “operating costs” during this period, particularly in a mall setting. Their argument is that even though you haven’t yet opened for business, the mall still has to pay for general mall expenses such as communal electricity, janitorial, snow clearing etc. If possible, try and finish your build out before the end of your fixturing period and open your store to take advantage of any rent free time left.



- **Lease Commencement Date.** This is the first day of the official commencement of your lease and usually starts after the fixturing period. If you haven’t finished your build out by this date, you are **contractually obligated to start paying basic rent whether you are open or not.**

OPTIONS

This represents the ability for you to exercise an option to extend the term of your lease beyond the initial term period. It is usually provided in five year increments and **must be exercised by you, in writing, within a certain time before the expiry of your existing term, usually 4 to 6 months.**

If you forget this timing, you may forfeit the lease option.

This is a valuable condition of your lease and may allow your bank to extend its term financing to include the term plus

options. It is also significant if you hold a franchise agreement for a 10 year period.

The option clause usually has an additional clause concerning the rent to be paid during the option period. It is usually based upon

- a) your current term plus a COLA (Cost of Living Adjustment) factor, OR
- b) Your percentage rent if greater than your basic rent plus a COLA factor.
- c) A then market rent not to be less than a) or b) above
- d) The above rents subject to arbitration

BE AWARE THAT OPTIONS THAT CONTAIN VAGUE TERMS SUCH AS “TO BE NEGOTIATED BY THE PARTIES”, THAT DO NOT CONTAIN SOMETHING SIMILAR TO A) TO D) ABOVE MAY, IN SOME JURISDICTIONS, BE CONSIDERED TO BE A NON-OPTION. CONSULT WITH YOUR LAWYER TO MAKE SURE YOU HAVE A VALID OPTION!

Sometimes the landlord will attach other conditions to the option such as you must attain a certain sales volume before the option can be exercised. This is often tied into percentage rent clauses and is more to be found in a high profile, class “A” mall.



On occasion, where a landlord does not want to renew a lease, or wants a potential “out”, they may institute a clause that basically states that the option is non-renewable if the tenant **has been in default under the lease**. This is a general statement that some landlord’s use to deny the

option, **even if you were late paying your rent only once.**

Your lawyer will probably add something to the effect that the landlord cannot deny the option if the tenant has **not** been in **continuing** default under the terms of the lease.

Bear in mind that, particularly with new tenants in an unproven concept, a landlord may keep a file on your operation noting violations of the lease that may be considered a default. This can be something as simple as selling products out of the scope of your use clause where another tenant in the mall has complained. Also beware of a mall manager that says it is OK for you to pay your rent late on occasion..... **It is still a default under the lease and may be added to your file.**

BASE RENT

This is the agreed upon basic rent for the premises based upon your square footage. The landlord has a certain aggregate dollar figure per square foot that he needs to receive in rent that reflects his costs to build the building or mall, plus a defined rate of return.



It should also be within the normal range for market rents in the area for that type of building depending on location. (A commercial real estate broker should be able to give you market rents, but you can ascertain these yourself by calling the various leasing agents of similar properties.) This rent is subject to GST which you can use as an input on your GST return.

The rent is usually identified as \$ per square foot, as in the example below:

(Note that, especially in strip malls, the landlord may calculate the square footage based on the **outer wall dimensions**, even though you only have use of the interior space. Whether you agree with this or not, it is often the industry standard to compensate the landlord for construction costs)

Size of Premises	1,000 square feet
Basic Rent	\$22.00 per square foot
Annual Basic Rent	\$22,000.00
Monthly Basic Rent	\$1,833.33
GST at 5%	\$91.67
Total Monthly basic Rent	\$1,925.00

TENANT INDUCEMENT PACKAGE

If the landlord sees you as a desirable tenant, they may offer what is known as a Tenant Inducement Package in the form of a cash contribution towards your build out. This is often quoted on a per square foot basis or a flat dollar amount. This may be in addition to the rent free fixturing period.



What you should know is that this dollar amount will be factored into your basic rent. The landlord is basically lending you money and recoups it over your basic rent for the first five year term.

For many new owners who may be struggling to source start-up funding, this may be worthwhile discussing with your landlord

before you sign the lease. Again, **get it in your lease summary or Offer to Lease document from the landlord.**



Where this can have a potentially negative effect is if it prejudices your option rent. For example;

- Basic Rent for five year term \$22.00 per sq ft
- Option Rent based upon basic rent
 plus 15% \$25.30 per sq ft

Based on our earlier example, your annual rent package for the 1,000 sq ft premises would increase from \$22,000 to \$25,300 per annum for your option term.

However, if the TI package had increased your initial basic rent to \$25.00 per sq ft, your option rent based upon a 15% increase over your first five year basic rent will now be \$28.75 per square foot or \$28,750 per annum.

This represents an increase of \$3,450 per annum over what you would have paid without the TI Package. Over a five year option, you would be paying an additional \$17,250. If you have several options, this is compounded. In other words, you are basically continuing to pay a premium over the balance of the lease for your TI package.

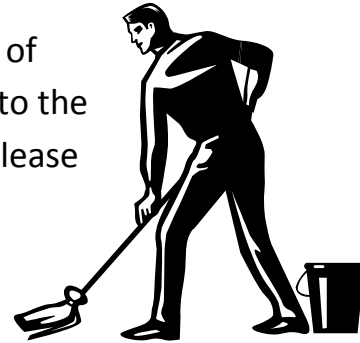
Your lawyer can make sure that this doesn't happen by reviewing the option lease rent terms and how they are calculated **before you sign the lease.**

Depending on how the TI package agreement is written, the landlord may have the right to sue you for the value (or a present value of the balance of the TI amortized over the initial term), of the TI package if you default on the lease. If you have

to pay an accelerated outstanding rent for the basic term under the default provisions, one could argue that this includes the TI portion.

OPERATING COSTS OR ADDITIONAL RENT

The landlord is entitled to recover the costs of operating a mall (strip or other) in addition to the Basic Rent. This is usually spelled out in the lease and often covers but is not limited to the following:



- Utilities for common spaces (A/C and Heating)
- Management Fees
- Janitorial
- Snow Clearing or Parking Lot Maintenance
- Merchant Association Fee (Ostensibly for General not store specific Advertising).
- Business or Retail Taxes

These costs are usually added together and expressed as \$ per square foot similar to basic rent. Your proportionate amount is usually calculated by multiplying the total costs by your proportion of the Gross Leasable Area of the mall, or total square footage.

Example:

The mall is 1,000,000 square feet overall

Your premises are 1,000 square feet

The total mall general operating costs are \$10,000,000

You would pay $(1,000/1,000,000) \times \$10,000,000$

This is \$10,000 per annum or \$833.33 per month

The total of the basic plus CAM gives you a more realistic figure for your monthly and annual rent. Basic of \$1,833.33 plus \$833.33 for a total of \$2,666.66 (plus GST) per month. This is \$32 per square foot total rent or \$32,000 per annum plus GST.

CAUTION

In some malls, the lease calls for a 15% upcharge on these actual costs, in addition to management fees.

CAUTION

In a mall where there are a number of empty spaces or where an anchor or major tenant closes down, the landlord may try to apportion the common operating costs amongst the balance of the tenants. Your lease should restrict you to paying only your proportionate share based upon your leasable area as a percentage of the GLA; however, I have seen this attempted by some landlords.

CAUTION

Energy costs and taxes, are subject to some major cost increases to the landlord and you may find a surprising increase in your additional rent. Sometimes this can double your basic rent, so be aware that this can become a significant factor when

preparing your five year income forecasts in your business and financial plan.

ELECTRICITY



You may have the option of installing your own electrical meter and pay this separately. This would benefit you if you are a retailer that uses very little electricity. Otherwise, you may

be paying for electricity used by the fast food operation in the food court itemized as common area costs.

Food Court leases often have an additional factor of 1.5x to 2x these common area costs to offset the extra costs required for utilities and janitorial services in this area, but not always.

The landlord has a contractual obligation to provide you with an accounting of these costs within a specific time period. At that time, they may indicate an increase to next year's CAM costs to factor in anticipated utility costs etc.



Depending on the terms of the lease, the landlord may have the rights to demand that each tenant pay its proportionate share of a shortfall in operating costs for the previous year **in a single payment**. Sometimes, this can be quite onerous if the landlord in a new mall has seriously miscalculated costs. ***Bear in mind that this is considered to be rent and if not paid within the appropriate time period can be considered a default under the lease.***

TAXES



Business or retail taxes may be levied on the landlord by various municipalities which they are entitled to recover.

Be aware that in many municipalities, enticements are made to developers to provide a moratorium on municipal taxes for a period of time. This is especially true

where a community is focussed on an aggressive economic development platform. This may be in total, or more likely staggered over a period of time. An example of an inducement package is seen below:

Year 1	100% abatement of taxes
Year 2	75% abatement of taxes
Year 3	50% abatement of taxes
Year 4	25% abatement of taxes
Year 5	Full payment of taxes

Most jurisdictions do **NOT** have the ability to **waive school taxes** but **can** offer inducements on the **municipal taxes**.

Keep in mind that the landlord may NOT always pass on these inducements to you, but may charge full taxes into your CAM and operating costs from day one.

You can always check with the local municipal council office to ascertain whether they generally give abatements to attract new business.

Anchor Tenants

This is a species of tenant that we often aspire to be. Whether it be a large department store, a supermarket, or other major retailer that attracts customers to the mall, they are critical to the success of any mall.

These tenants negotiate an attractive lease package that factors in the strength of their brand image, closeness to the demographics that the mall wishes to attract, and strength of their covenant.

The landlord will have to offset the revenue lost by providing the inducement package (TI, Basic Rent etc). This revenue has to be made up from somewhere, and it is usually apportioned amongst the other tenants. That is, you may be paying a higher rent package as a result of this.

Some anchors have been able to negotiate a negative performance clause such that, if they don't meet their goals, the lease may be abandoned and in some cases rents returned, or the value of the TI package need not be returned to the landlord.

When an anchor becomes part of a buyout from another chain, and the new chain does not want to take over certain malls, the anchor's covenants require it to continue to pay certain rents until the premises are leased again. However, in some cases there may be no requirement to contribute to CAM.

The bottom line is that other tenants may find it more expensive to continue in the mall.

However, the municipality may have given the landlord additional abatements **over and above their standard package.**

Some jurisdictions will also give additional tax abatements depending on how many jobs the new business brings to the community.

Check this out and question the landlord if you find that there were likely abatements provided!

New Mall Premises

In a new mall, the landlord does not have a history of costs and will have to make a judgement call on operating costs for the upcoming year. In this case, he will set a

preliminary figure on a per square foot basis based upon his reasonable expectation of the costs.

At the end of the year, or earlier if the operating costs are much higher than anticipated, and subject to the terms of the lease, the landlord may increase the CAM to include a percentage increase anticipated to ensure that the mall is operating under more realistic costs. (See above).

PERCENTAGE RENT



One additional item that a landlord may include is the concept of **percentage rent**. This is often found in larger malls and the number of tenants into percentage rent is sometimes considered by landlords to be an indication of the success of a mall. (Or more likely too low an initial basic rent provision)

The clause is often used to determine whether an option is granted.

For example, an option will be granted only if the tenant has been paying percentage rent within a specific period of time.

Percentage rent may be set at a certain percentage of sales and that percentage should be greater than the basic rent. **(CAM etc are NOT included in this calculation).**

Example:

In order to exercise an option, the tenant's percentage rent must be higher than the aggregate basic rent over the term.

Basic Rent is \$22,000 per annum

Percentage rent is 7% of sales

Annual sales are \$300,000

7% of \$300,000 = \$21,000

Result: **NO OPTION** since percentage rent is lower than your basic rent. You need to have at least \$315,000 in sales to secure the option. **Keep this goal in mind as you are getting closer to your option exercise period** (4 to 6 months before the option date, remember)

USE CLAUSE

The Use Clause determines what you can sell and sometimes what you cannot sell. The legality of restrictive use clauses has changed considerably over the past few years.

For example, at one time, a muffin shop in a mall could have a clause that restricts any other tenant from selling muffins. You will now more likely see a restriction in another tenant's use clause that states that the tenant cannot sell more than x% of its sales mix in muffins.



Some landlords do not restrict uses of any kind on the premise that they wish to encourage competition with theoretically, the best product winning out. Where this clause is particularly important is in a franchise setting which will be discussed on the chapter on franchises. If a landlord tries to restrict your use clause at all, you should try and negotiate as **general a clause as possible**. For example if you are opening a bakery, try to state

“baked goods in general” rather than a listing of specific classes of pastries.

In some jurisdictions, if you list specific items and try to add something else as another product line becomes popular in the marketplace, the courts could hold you to your specific list. They sometimes take the position that if you had wanted to sell this other item it would have been on the listing, and that the landlord only wanted you to sell items on that list and granted you the lease under those conditions.

Another instance of the importance of the use clause occurs in defaults under the lease. If you have a restriction on selling only 10% of your sales in muffins and it is obvious that you have display cases full of muffins, you may be in default of your lease which could affect your options, particularly if the muffin shop² complained to the landlord.

LEASE ASSIGNMENT PROVISIONS

This clause basically addresses the terms under which you, or the landlord, may assign your lease to another party.

You may not think that this is an important provision, after all, you are a sole proprietor, merely opening a bakery and you will be running it yourself.

However, consider the following situations:

- A. Your business is **very successful and you now want to sell it.**

² The Muffin Shop is used merely as an example only and does not refer to any specific tradename or operation. It could easily be widgets, but we all know what muffins are and are easy to relate to. Has anyone ever seen a widget other than on your cell phone?



In order to sell the business, the landlord normally has to agree to let you assign your lease to the new owner, after all, didn't he like your muffins and you as an operator and that's why he leased the premises to you in the first place?

- The assignment provision may **prohibit** you from assigning your lease, and you are **STUCK**. Or
- You may be able to assign the lease to the new owner, but you are **still responsible for the lease if the new owner defaults**.
- The Landlord may consent to the transfer, but in order to let you off the lease and your covenant, he may require that the new owners meet the current standards of the landlord for a lessee, and sign a new lease that **may have completely different terms and conditions than yours**. Let's face it, these new terms may not be palatable to the new owners and **may void the sale**.
- Sometimes, the assignment clause may include a list of conditions under which the landlord will grant an assignment.
- Sometimes, the assignment clause contains a statement that the landlord may withhold consent "unreasonably", although these restrictive terms are getting much rarer in today's environment.
- Some older leases may have a "**shotgun**" clause that basically states that if you request an assignment of your lease, the landlord has the right to terminate your lease.

B Your business is **not doing so well and you want to sell it**.

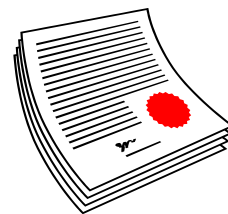
- Most of the provisions above apply, but the landlord is more likely to want you to stay on the lease and to review the covenants of the new owners very carefully. If your covenant has to stay with the lease, be aware that, if the new owner defaults on the lease, you may have to step back in to the business (if possible legally), or at least, be responsible for ongoing rents and possibly damages.

C You wish to **bring in a partner** who will provide some additional working capital and share the management duties with you.

- In most cases, the change in ownership of the company by issuing shares to the partner, particularly if you are diluting your ownership or control provision, may be considered as a change (**parting with possession**) under the assignment or a related clause and may trigger some or all of the issues above.

C You are just starting out and you want to secure a lease but your company has not yet been incorporated.

- At this point, your lawyer will advise you to indicate in your acceptance, that you are signing “on behalf of a company yet to be incorporated”. The lawyer should also get an **acknowledgement from the landlord that assigning the lease to the company once incorporated is acceptable and doesn’t trigger any issues under the assignment clause in the lease.**



- If the corporation will issue shares to other individuals, that indicates a change in control. This issue should be dealt with up front.

D Assignment of the lease by the Landlord.

This clause is usually found in the lease and it is there to protect the landlord should the building be sold or subject to a financing arrangement. The last thing a landlord wants is for tenants to be able to block a potential sale. There is usually no negotiating on this clause.

CAUSES FOR TERMINATION, LEASE DEFAULTS, PROVISIONS, CURES AND PENALTIES.

This section is usually in favour of the landlord and outlines the conditions under which a landlord can terminate your lease. We have addressed many of these items above, but this section of the lease is more specific.



Typically, a lease may be terminated by the landlord, where various actions by the tenant cause a default under the lease, and the tenant has failed to cure the default within the prescribed time period.

These defaults usually have a provision that allows the tenant to **cure the default** before a landlord can terminate a lease. For example, a lease may be in default if the tenant does not pay the rent (any rent and any deemed rent) when due. However, the lease may allow the tenant a certain number of days in which to pay outstanding rent. In this case the tenant has cured the default.

Notwithstanding this, the landlord may consider that tenant has been in default under the lease and usually keeps a file of the defaults for reference when lease option time rolls around.

The section may also include penalties for certain defaults, even if they have been cured. For example, interest on a per diem basis may be charged on overdue rent. In some cases, this interest is “deemed” to be rent and can exacerbate a default if not paid.

You should take particular note of this section as it can result in an ugly shock when you receive a lease default notice, a lease termination notice from the landlord, or a refusal to grant an option.

INSURANCE



The lease will contain specific regulations regarding the type and amount of insurance required. It usually covers liability, fire etc and requires the landlord to be a named insured.

This ensures that if your premises burn down and cause issues within the mall, the landlord will also be insured subject to the terms of your insurance agreement. The landlord also usually gets a copy of the policy from the insurer, or you may have to give them one.

Any financial institution will also require you to have it as an additional named insured as a condition of granting you a loan.

Speak with a qualified commercial broker to shop the type of insurance you require and give them a copy of the lease insurance clause.

This may appear to be expensive. It is not only well worth it, but if you don't do it, you will be in violation of the lease and perhaps your financial arrangements.

OTHER GENERAL PROVISIONS

COVENANT

A Covenant is a legal term that refers to an agreement, usually formal, between two or more persons or entities, **to do or not do something specified.**



In leasing, it usually refers to a covenant by the parties to **perform all obligations under the lease.** It is often used by a landlord to describe a tenant's financial strength to perform the covenants to pay rents etc. You may hear a landlord talk about the strength of a covenant. For example, the covenant of a major corporation is usually considered to be much stronger than a small businessman when trying to secure a lease. Typically, the stronger the covenant, the better the terms that the tenant can negotiate.

Where the covenant of your newly incorporated company is not deemed to be strong because it is a new entity, the landlord may ask you to provide a **personal guarantee** for the lease.

PERSONAL GUARANTEE

You may already be aware of the need for a guarantee. Most banks, when lending to a corporation, will require personal

guarantees from the owners of the corporation, as security for the loan.

With respect to the lease, this document basically states that you will ensure that the corporation duly performs all terms of the lease, and should the corporation not fulfill its duties, the landlord will look to you to step in.

That often means that if the lease is terminated for cause, **the landlord has the legal right to sue you for at least the financial aspects of unpaid rent plus any other costs under the lease including any penalties under the termination clauses of the lease plus whatever else he can fit under “deemed rent”.**



This is **NOT** something that you should enter into lightly. Depending on the terms of the lease, you may be liable for all outstanding rents for the balance of the term ***accelerated*** to today's date.

For Example

- 36 months left to go on the lease
- Basic Rent at \$5,000 per month = **\$180,000**

Your guarantee would be supported by your assets and you may have to mortgage your home to pay this.

Your lawyer may be able to be of some assistance at this time, but if you can get away from personal guarantees **DO SO**.

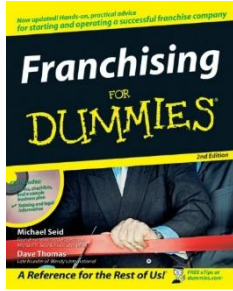
Never offer Personal Guarantees..... If you have to, you may have to, but never OFFER.

CHAPTER FIVE

SPECIAL CONDITIONS

FRANCHISING

INTRODUCTION



Franchising is a special case because there is a third party involved – The Franchisor.

There are three primary lease considerations, although the first two are usually found in combination.

- Landlord to Franchisor
- Franchisor to Franchisee
- Landlord to Franchisee.

Landlord to Franchisor

Because of the typical financial strength of the Franchisor, a landlord's first option is to lease directly to the Franchisor.

This lease would have the following sections automatically included:

- Pre-Approval to allow Franchisor to sublease to an approved Franchisee
- Use Clause that allows for the Franchisor's menu. Often a copy of the franchisor's current menu is attached to the lease. However, the Franchisor would usually add a clause that allows them to add items as a menu is developed on a regional basis.
- Since the Franchisor is the tenant, the Franchisor pays the rent and performs all the due terms of the lease

Franchisor to Franchisee

Since the franchisor doesn't actually operate the Franchise, the lease is then Sub Leased to the Franchisee.

- The Franchisee duly performs all terms of the sublease and **pays the rent to the Franchisor.**
- The Franchisor is usually under no obligation to show the terms of the Head Lease between itself and the Landlord, to the franchisee and the ***Sub Lease may contain significant differences than the Head Lease including rental provisions.***
- The Sub lease may contain provisions that tie the Franchise Agreement to the Sublease such that a default under the terms of the franchise agreement is considered a default under the sublease. This gives the franchisor a greater amount of legal teeth than just the franchise agreement alone.

CAUTION

Make sure that your lawyer reads very carefully the terms of the sublease. Because you don't have access to the head lease your lawyer should try and have the landlord allow **any franchisor default under the head lease be cured by the sublessee** (you the franchisee).

There have been recent cases where a franchisor collected rents from franchisees and used the funds for general operating costs and did not pay the Landlord.

See if your lawyer can include provisions with the Landlord to allow you to take over the lease.

Landlord to Franchisee

Under certain circumstances, a **landlord will lease directly to a franchisee**. This can be found in regional areas where the potential franchisee is well known to the landlord and has an excellent covenant.

The Franchisor or the Landlord, may ask for a clause in the lease that states that should the lease be terminated, the **franchisor, has the right but NOT the obligation to cure the defaults and take over the lease**. This gives some measure of comfort to the landlord.

The Franchisor, in a growth area, may wish to take over a defaulted franchise and the lease and subsequently sell the franchise.

It can be seen that within a franchise, there are many complicated issues that need to be determined so that the earlier discussion of leases in general take into account the special needs of the Franchise business model.

In these respects, please use the services of a lawyer, particularly one who specializes in Franchising and how the various agreements interrelate.

THE COST MAY SEEM HIGH, BUT IT IS NOMINAL WHEN COMPARED TO THE LARGE SUMS YOU WILL BE INVESTING IN THE FRANCHISE AS A WHOLE.

GENERAL ISSUES ACROSS ALL THREE OF THE ABOVE

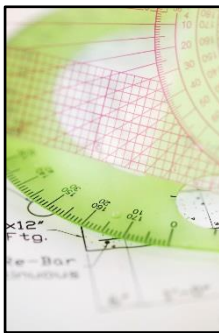
RIGHT TO TRANSFER

Since many operating franchises are sold for various reasons, it is **critical that the ability of the franchisee to sell to another potential franchisee is not hampered in any way under the lease.**

A landlord usually has the rights to vet a new tenant under a transfer, but you don't want to get into a situation where the landlord refuses any assignment because they don't feel that the potential new owner "has enough retail experience" to operate the store.

This can be handled in a clause that basically states that the lease can be **transferred to any approved franchisee of the same franchise system without needing landlord consent, or at least the landlord should not be able to withhold consent.**

REFURBISHMENT



You should be aware that most franchise agreements have a requirement that the **franchised premises must be refurbished every so often to keep pace with changing face of the franchise system.** This is designed so that older franchise locations do not detract from the current image of the franchise branding.

In many cases, a landlord will also have a similar clause for similar reasons. **It is critical that you ensure that these clauses coincide.**

The last thing you want to do is to go through an expensive refurbishment to bring your premises up to your franchise agreement, only to find out that the landlord, two years later, wants you to change to meet the landlord's current look in its mall.

TENANT INDUCEMENT PACKAGE

Where the Franchisor holds the head lease and will sublet to a franchisee, the **franchisor and landlord may have a confidential agreement for a contribution to the build out** as described in the TI discussion above.



Should the Franchisor offer a “turnkey” package where they complete the build out, equipment and inventory and the franchisee literally has to turn the key and are in operation, there is **not always a requirement**³ for either the landlord or the franchisor to advise the franchisee of the existence of a TI package.

The TI package is usually contained in a separate document that is confidential.

Example:

Standard turnkey package

Construction Costs	\$250,000
Equipment	<u>\$250,000</u>
Total	\$500,000

³ If the Franchisor is located in a province that requires a disclosure document, there may be a requirement for the Franchisor to disclose this practice. Usually the Franchisor indicates that it “may” receive additional inducements. Check the disclosure document carefully and talk to other franchisees.

Turnkey sale price to franchisee	\$550,000
Profit to Franchisor	\$50,000

In the TI case, you may find the following:

Construction Costs	\$250,000
Equipment	\$250,000
Total	\$500,000
Less TI Package	\$100,000
Total Net Cost to Franchisor	\$400,000
TurnKey Sale Price of Franchise	\$550,000
Net Profit to Franchisor	\$150,000 ⁴

Either way, you are paying the same price for the turnkey operation, however, if you were aware of the TI situation, you may be able to negotiate a slightly better purchase price, particularly if the Franchisor is entering a new market. ***Also, in this situation, you are likely to be paying a higher basic rent as the landlord tries to recoup his inducements.***



One additional negative factor is that if the franchisor defaults on the lease in a bankruptcy situation for example, the landlord **MAY** try to come after the franchisee for repayment of the TI package depending on how the sublease and landlord's approval of the sublease is written. (Covenant of the sublessee to perform all obligations under the head lease).

⁴ Usually Franchise Fee, Training Costs etc are included in the turn key. They are left out here for the sake of clarity. In addition, the franchisor usually adds a markup on costs which is also not included here.

SIGNAGE AND MARKETING

Most landlords have strict guidelines for signage, both physical signs on the premises and marketing signs. The actual outside physical sign for your franchise will usually be negotiated as part of the lease, but ***make sure you check that the landlord has signed off on the signage drawings before proceeding.***



Don't rely on a verbal "OKAY" from the landlord. I have seen situations where a verbal OK was given, yet when a representative from the Landlord's head office came down, he didn't like the sign and there was no signed agreement in place. The franchisee had to replace it at considerable cost (shared in this case with the landlord).

Marketing pieces that are often provided by the Franchisor are an integral part of the franchised business; however, it is not practical to get approval for each piece to be displayed. The best way to handle this is to insert in the lease a clause that basically states that ***signage will be permitted that conforms to the Franchisor's national or regional image or marketing campaigns.***



USE CLAUSE

Similar to other retail establishments, you need to have a use clause designated in your lease. The landlord opted to lease to you because he wanted the franchise brand and image which includes your menu or product offering.

In many cases, a copy of the franchise menu is attached to the lease; however, this can lead to the same issues as above if you want to make additions to your menu. It is often dealt with similar to the signage issue, where you insert a clause that basically states that **the menu will conform to the Franchisor's standard menu for that region including any updates or promotions.**

INSURANCE

We have discussed this above, but, again, with a franchise you have another party involved. Typically, a franchise agreement will provide requirements for insurance, and the franchisor will usually be a named insured.



Again, copy the franchise insurance clause along with the lease insurance clause, take them both to your broker and have them shop the market for you. I know funds are tight on a start-up, but don't choose based upon price alone. Have your broker shop for the appropriate policy that meets all the criteria of your legal documents.

RADIUS CLAUSE

Many leases have a clause prohibiting the tenant from having another retail operation (**does not have to be the same business or competing**) within a specific area of the landlord's premises.

This is less of a problem in a major mall that is considered a consumer destination mall and another location will not likely have any impact on the mall or your sales. However, you



may find this clause in a strip mall, and you should endeavour to negotiate as wide an area as possible that is considered to be “reasonable”. For example, it is unlikely that you can negotiate an exclusive area that is a radius of 5 kilometers in an urban setting.

Your franchise agreement also contains a **“radius clause”** that you will have negotiated as wide as is reasonably possible as a protected territory. **This prohibits a franchisor from setting up a competing franchise within that area without your approval or assigning you the rights to that area.**

It is important that you coordinate the lease and franchise agreement so that you do not run into trouble by setting up your second location within your franchise radius only to find that you have contravened your current lease.



With the proliferation of sub franchises inside retail establishments (eg Starbucks in Chapters, McDonald’s in WalMart) many franchisors are now including the right to place these sub franchised operations within your trade area. In many cases, you **cannot negotiate this point** because the franchisor may lose a whole chain of major retailers who want to sub franchise, if they cannot establish a sub franchise in **ALL** of their area operations. **Just be aware that this is a possibility when you are doing your due diligence.**

Conclusion

As Stated in the introduction, it was not our purpose to give you a legal discourse on leases, but to give you some general points and particularly to point out areas where we have seen abuses and where new business owners have had the most problems.

If you are to make note of these issues and have thought about them before entering into negotiations with a landlord or landlord's agent, this document has served its purpose.

Although we have been involved in lease negotiations and analysis, **we strongly advise you to seek legal help to ensure you don't fall into some of the pitfalls above.**

This is one of our **FREE** e-books on various issues that a new or potential business owner may have to address in setting up his or her new business.

If you found it interesting and would like to know more, please contact us at

stewartscott@scottandassociatesconsulting.com

or

jimdixon@scottandassociatesconsulting.com

GLOSSARY OF COMMERCIAL REAL ESTATE TERMS

This is more comprehensive than you will need. However, should you come across these terms, you will have a basic understanding of what they mean.⁵

ADDENDUM - A legal document that adds to or amends the terms of a standard form lease.

ADDITIONAL RENT - Is the total reimbursements the tenant pays under the lease in respect to expenses of the landlord. Expenditures for real estate taxes, insurance, maintenance, utilities, janitorial, management fees, and other items paid in conjunction with the operation of the building.

AGENCY - A legal relationship created when an individual (the principal) delegates to another (the agent) the right to act on behalf of the principal in business transactions, specifically the leasing of office space.

AGENT - An individual authorized to represent and act on behalf of another person or entity, (referred to as the principal.)

AMENITIES - Tangible and intangible features that enhance and add to the subject property's desirability and perceived value, e.g., cafeteria, indoor parking, special janitorial services.

ANCHOR TENANT - A major shopping centre tenant that will draw the majority of customers.

ASSIGNMENT - The transfer of title, right, and interest in certain real property. The document used to convey a leasehold is called and "assignment of lease."

ASSIGNMENT OF LEASE The transfer of all a lessee's title, right, and interest in certain real property. Also, the document used to convey a leasehold is called an assignment of lease rather than a deed. (See also Sublease.)

AUDIT - An inspection of accounting records and procedures, conducted by a trained person, to check their accuracy, completeness, and reliability.

BASIC RENT - Minimum monthly rent payments, as set forth in a retail lease, excluding pass-through, percentage rents, and other additional charges.

BASE YEAR - The year in a lease term used as a standard in a rent escalation clause. Operating costs in the next year are compared with costs in the base year, and tenant's rent is adjusted either up or down.

"BOILERPLATE" LEASE - The owner's lease form containing clauses that are usually standard for all tenant-owner relationships.

⁵ Terms selected from Realty 101 by Ross Forman and Jeff Pilkington

BREAKPOINT - In retail leases, the point at which the tenant's percentage rent is equal to the base rent and beyond which the tenant will begin to pay overages; also called natural breakpoint. Sometimes tenant and owner negotiate an artificial breakpoint which allows the tenant to begin paying percentage rent either before or after the natural breakpoint is reached.

BUILD-TO-SUIT - An arrangement between a shopping centre developer and a large tenant (supermarket, department store, fast food franchise, bank, etc.) whereby the developer agrees to construct the tenant's building according to the tenant's specific instructions. The tenant will then lease that building and the site from the developer.

BUY-OUT - A form of concession whereby an owner or developer arranges to pay for the rent of a tenant's lease term so that the tenant will relocate to the owner's shopping centre or move out of a space that the owner wants to use for another purpose.

BUILDING MODULE - A unit of length and width by which a building's plan is standardized, facilitating office space design and layout.

BUILDING STANDARDS - The specific items of construction which a developer or owner decides to use throughout a building; for example, in an office building, building standards would include a certain type of carpeting, wall and floor coverings, etc.

CAPITALIZATION RATE - A rate used to calculate an estimate of a property's value based on that property's income.

CASH FLOW - The amount of spendable income from a real estate investment; cash available after all payments have been made for operating expenses and mortgage principal and interest.

COMMON AREA MAINTENANCE (CAM) CHARGES CLAUSE - In a retail lease, this clause stipulates how much the tenant will pay for maintaining the common area -- that area within a shopping centre or mall which tenants use in common; i.e., courtyards, escalators, sidewalks, skyways, parking areas, etc.

CONCESSION - A benefit granted by the owner to encourage the leasing of new space or to retain a tenant; usually related specifically to the rental rate or improvement allowance.

CONSUMER PRICE INDEX (CPI) - A way of measuring consumer purchasing power by comparing current costs of goods and services to those of a selected base year.

CONTINUOUS OCCUPANCY CLAUSE - A lease clause that requires the tenant to occupy the space continuously throughout the lease term.

CONTINUOUS OPERATION CLAUSE - A retail lease clause that requires tenants to keep their stores fully stocked at inventory levels equal to (1) when they first opened for business (2) their stores in other locations, or (3) stores offering similar merchandise in the area. There may also be

requirements regarding store hours, staffing, and business name.

CO-INSURANCE CLAUSE - A clause found in property insurance policies intended to encourage insuring the full value of a property. A co-insurance clause states that if you are insured for less than a certain percentage of the replacement value of your property, you suffer a penalty in the case of a claim.

CORE SPACE - The central or arterial area in a building that houses the building's function and service needs; usually includes elevator banks, washrooms, stairwells, and electrical and janitorial closets.

CORRIDOR - A hallway or a passageway which provides a common way of travel to an exit, another office, etc.

COVENANT - A promise by one party to another of performance or non-performance of certain acts or a promise that certain conditions do or do not exit.

CREDIT RATING - Evaluation of a company or individual's financial trustworthiness, particularly with regard to meeting obligations.

DECLINING PERCENTAGE RENT - A negotiated percentage rent structure such that the tenant pays a smaller percentage of gross sales after a specified sales volume is reached.

DEFAULT - Failure to make either a mortgage or lease payment; nonperformance of the terms of a loan or lease.

DEFERRED MAINTENANCE - Ordinarily, unperformed maintenance on a property that noticeably affects its use, occupancy, welfare, and value.

DEMOGRAPHICS PROFILE - The social and economic statistics of a specific population, including population density, age, education, occupation, and income.

DESTRUCTION PROVISION - A lease provision stating the applicable procedure and rights in the event that the leased premises are damaged or destroyed by fire or other mishap. As a rule, the lessee will be held financially liable if deemed responsible.

EQUITY - An owner's interest or value in a retail property over and above any mortgage or claim on it by others based on money invested.

EQUITY FINANCING - Capitalization of a retail project through partnerships or other investment entities that acquire an interest in the project.

ESCALATION CLAUSE - In a retail lease, a provision requiring the tenant to pay more rent based on increased operating costs, changes in a given economic index, or an agreed-upon schedule stated in the lease.

ESTOPPEL CERTIFICATE - A document by which the tenant states the terms of the rent agreement and the full amount of rent to be paid for the

entire term of the lease; commonly requested as part of a transfer of ownership or refinancing.

EXCLUSIVE USE CLAUSE - A clause preventing the owner from leasing space to other retailers that sell merchandise similar to that specified in the tenant's lease.

EXHIBIT - A lease attachment elaborating on points in the standard lease.

FIXED EXPENSE - A regular expense that does not vary according to sales volume.

FIXED RATE OPTION - The tenant's guaranteed right to renew at the end of a lease term at a previously determined rental rate.

FRONTAGE - The section of a store that faces the street or the pedestrian walkway in a mall; also refers to window display area and entrance.

GROSS LEASE - A lease that allows the tenant to pay a fixed rent while the owner pays all operating expenses for the property. (See also net lease.)

GROSS PROFIT - The retailer's sales income minus the cost of the goods sold; sometimes the cost of returns is also subtracted from the total.

GROSS SALES - The total sales that the retailer makes during a financial period, usually a calendar year.

GROUND LEASE - A lease that gives the tenant the right to use and occupy the land under a property. Under a subordinated ground lease, the owner offers the land as collateral for the mortgage commitment on the property. If the ground lease is unsubordinated, the land will not become collateral for the mortgage.

GUARANTY - A lease clause or addendum that promises the owner that, in case of tenant default, the tenant's rent will be paid and all other obligations performed. The individual or organization making such a pledge is called a guarantor.

HOLD HARMLESS LEASE CLAUSE - A standard provision that states that the owner will not be liable for damages or injury sustained in, on, or about the leased premises; also referred to as an indemnification clause.

HVAC - A building's heating, ventilating, and air conditioning system.

INDEX ESCALATION CLAUSE - A provision in a retail lease whereby the rental rate is adjusted according to a specified cost-of-living index.

INSURANCE PROVISION - A lease clause requiring the tenant to obtain a certain amount of public liability insurance and name ownership as co-insured in that policy.

LANDLORD - The owner of the leased premises. (See also lessor.)

LEASE - A contract between owner and tenant that transfers to the tenant the right to use a piece of property for a specified length of time under specific conditions.

LEASING PLAN - For a given site, the statement of rental rates and suitable tenants for specific space, usually presented to the owner or developer in the early stages of prospecting.

LESSEE - The tenant in a lease agreement.

LESSOR - The landlord in a lease agreement; the property owner.

MAINTENANCE - Care and work necessary to keep a property in good physical and operating condition and appearance.

MANAGEMENT - The job of planning, organizing, and controlling a business enterprise; the persons in an organization who are engaged in management.

MARKET RENT - The rent a retail site could command under prevailing market conditions.

MARKET RESEARCH - The gathering of information about a trade area and a particular retail site pertaining to population, economy, local industries, per capita expenditures, the competing retail sites, and sales potential.

MARKET SHARE - That portion of consumer dollars spend on a particular merchandise category which a given retailer can capture.

MERCHANT'S ASSOCIATION - An organization formed in shopping centres and controlled by the tenants to plan promotions and advertisements for the good of the centre as a whole; usually all tenants are required to participate and both tenants and landlord pay dues.

MINIMUM RENT - The rent which will always be due each month in a tenant's lease term, regardless of sales volume and exclusive of any additional charges. Often used in conjunction with a percentage rent arrangement, sometimes called fixed-minimum rent.

MIXED-USE DEVELOPMENT (MXD) - A type of real estate project, often found in central business districts, that develops a single property for several different purposes, including hotel, office, residential, and entertainment.

NEGOTIATIONS - The process of bargaining by tenant and owner to reach a mutually profitable agreement on rental rates, term of the lease, options, and other points.

NET EFFECTIVE RENT - The amount of rent a tenant actually pays when extra improvement allowances and other concessions are taken into account; contrasts with the quoted base rent that is stated in the lease.

NET LEASE - A lease specifying that the tenant will pay a share of the owner's operating expenses, real estate taxes, and insurance premiums, usually in return for a lower base rent. The terms net-net and net-net-net (or triple net) are also used. These terms are being discontinued in use, as their meaning is not clear in spelling out who pays, and what are the services offered.

NOTICE CLAUSE - In a retail lease, the clause that establishes the proper method and time frame each party must use to inform the other of matters that require notification as provided in the lease.

OCCUPANCY COST - The retail tenant's cost of the leased space; includes base and percentage rent plus pass-through prorations such as insurance, real estate taxes, utilities, common area maintenance, management and marketing fees, etc.

OCCUPANCY LEVEL - The relation of space already rented to the total amount of leasable space (Gross Leasable Area) in a centre, expressed as a percentage. (See also vacancy rate.)

OPEN SPACE PLAN - An office design eliminating fixed partitions and allowing tenants to rearrange their work stations as the need arises.

OPERATING EXPENSES - The expenditures for real estate taxes, salaries, insurance, maintenance, utilities, and similar items paid in connection with the operation of a retail site or centre and which are properly charged against income.

OPERATING STATEMENT - The record of a retailer's or developer's income and expenses over the course of a year; details expenditures and the percentage of income that can be expressed as profit.

OPTION - In a retail lease, a statement of the tenant's right to obtain a specific condition within a specified time; often incorporated as an addendum. Typical options are renewal, expansion, and cancellation.

OVERHEAD - The cost of doing business (i.e., wages, salaries, rent, common area fees, insurance, taxes, utilities, etc.) that cannot be charged to a particular part of the operation; in retailing, usually all expenses exclusive of the cost of goods sold or inventory.

OVERHOLDING - It occurs when the tenant remains in possession after the term expires.

PARKING AREA RATIO - The relationship between the size of the parking area and the size of the retail building.

PERCENTAGE RENT - Rent a tenant pays that is based on a percentage of gross sales or net income; often set against a guaranteed minimum rent, and therefore considered "Supplementary Basic Rent."

PRELEASING - The leasing of a large retail project before and during

construction to ensure a high occupancy level when completed; often necessary to obtain financing.

PRO FORMA - A financial statement developed by the owner and projecting costs for a retail site based on assumptions about construction, financing, leasing rates, and operating costs; also projects gross income and net operating income of a property.

PRO RATA SHARE - The gross leasable area (GLA) of the tenant's site divided by the GLA of the premises, the resulting fraction being used to compute the tenant's share of operating expenses, HVAC charges, common area maintenance (CAM) fees, taxes, insurance, etc.

QUIET ENJOYMENT - A clause in most leases stating that the tenant has a right of peaceful and disturbance-free possession of the premises, and that ownership will protect the tenant against the claims of others.

RADIUS CLAUSE - Article in a retail lease that prevents a retailer from opening and operating another business, whether competitive or not, within a certain radius from the shopping centre.

RENT ROLL - A record of rents and other income payable from and paid by tenants.

RENTABLE AREA - The interior area in a building, usually expressed in square feet, which a tenant leases. Can be computed differently according to the measurement system used. Usually includes a percentage of common areas, making it a higher figure than the actual usable area.

RENTAL CLAUSE - In an office lease, a provision stating the amount of rent to be paid, the method of payment, and to whom the payment is to be made.

RIGHTS AND NEGOTIATIONS - A section of a typical office lease clearly outlining the rights and obligations of the parties named in the lease.

SECURITY DEPOSIT - A payment by tenant to ownership before occupancy as a guarantee that lease conditions will be met.

SHELL SPACE - The condition of a tenant's space before occupancy and before any tenant improvements. For retail space, definition may vary with regional location and type of shopping centre.

SITE PLAN - A drawing of the retail site as it will look when it is completed, including individual tenant spaces, common areas, elevators, escalators, food courts, service areas, parking, and access routes.

SPECIALTY CENTRE - A shopping centre characterized by the use of a dominant theme or image and concentrating on a particular type of merchandise. Often these centres have no conventional anchor tenant.

STANDARD FORM LEASE - A basic lease form into which specific clauses or provisions may be written.

SUBLEASE - A lease given by one tenant to another to create a sub-tenancy, usually only for the duration of the original tenant's lease term. Original tenant remains liable to owner in case of default by subtenant. (Compare Assignment.)

SUBORDINATION - The condition whereby a tenant's lease is transferred to the mortgagee in the event of a foreclosure on the owner's mortgage.

SUBSTITUTION OF PREMISES CLAUSE - A lease clause reserving the owner's right to relocate the tenant to comparable space in the building.

TAKE BACK CLAUSE - A lease article giving the owner the right to take back subleased space in order to rent it to a new tenant.

TENANCY - The occupancy or holding of land or other real estate on a rental basis, with or without a written lease.

TENANT - The individual or entity that pays rent in order to exclusively occupy a retail site for a specific length of time. (See also lessee.)

TENANT IMPROVEMENT ALLOWANCE - Funds allowed by the owner for the tenant to use to improve the premises before move in; exact amount, if any, is negotiable.

TENANT MIX - The combination of retailers and service vendors leasing space in a shopping centre.

TENANT PROFILE - A study and listing of the similar and dissimilar characteristics of a property's current tenants.

TERM - The duration of a tenant's lease.

TURNKEY OPERATION - A concession whereby the owner agrees to provide a completely finished store space for a retail tenant.

USABLE AREA - On a given floor, any area that could be used solely by a tenant. On a multi-tenant floor, the gross area minus core space. (Core space includes the square footage used for public corridors, elevators, washrooms, stairwells, and electrical and janitorial closets.) On a single-tenant floor, the gross square footage excluding the building lobby, ducts, stairwells, and elevators.

USE CLAUSE - A lease clause indicating the purpose for which the leased space is to be used.

UTILITIES AND SERVICES CLAUSE - A lease detailing any and all utilities and services that the owner is to provide the tenant.

VACANCY RATE - The ratio of vacant space to total rentable area expressed as a percentage. (See also occupancy level.)

WAIVER OF SUBROGATION - A lease clause whereby tenant and owner both agree not to file insurance claims against each other for any damages to the property.