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CAN WE KEEP THINGS ON THE SIDE?

A REVIEW OF THE SIDE LETTER AND ITS USE IN COMMERCIAL LEASES

Candice Jones-Simmons

The vagaries of these pandemic times have caused commercial tenants and landlords to renegotiate the terms of their leases. Landlords have been forced to weigh the loss of income and terminating the leases of tenants in arrears, against the uncertainty of locating a new tenant and the attendant costs. Some landlords are willing to make temporary concessions by varying the terms of their leases to reduce or suspend the rent. A side letter is a simple way to document the agreed changes to the lease, rather than a Deed of Variation. A Deed of Variation must be prepared by an Attorney-at-Law and is required to be stamped and registered at the land registry, which makes the side letter a more attractive option.

It is tempting to pursue the ease afforded by keeping things 'on the side'. However, parties to side letters should exercise caution, as the letter may not be legally binding, or may expose them to risks that were not present in the lease.

Advantages of a side letter

A side letter is an agreement that is supplemental to the main contract. It is often used in real estate transactions to clarify, add to, or vary the terms of a lease. It is convenient to a landlord who wishes to tailor certain terms to meet the circumstances of each tenant, while preserving identical terms in the lease. In this way, a landlord may also have the benefit of confidentiality, as a side letter is not required to be registered and disclosed to the public, which may not always be the case with the lease.

Variations to a lease (at the time when the parties have already finalised the document) may result in the redrafting of several clauses, which can delay the completion and increase the costs of the transaction. Therefore, it may be easier, efficient and cost-effective to set out the changes in a side letter. Side letters are useful in real estate matters, as certain aspects of the negotiated terms between the original parties to the lease may not be intended for the successors/ subsequent owners of the property. These temporary arrangements may be appropriately recorded in a side letter.

Issues to keep in mind when pursuing a side letter:

Undoubtedly, there are significant benefits to keeping matters on the side. However, there are certain dangers with proceeding with a side letter.

O If you want a side letter to be enforceable you should ensure that it contains the basic elements of a contract. There must be an (i) offer which has been accepted, (ii) consideration (payment/benefit), (iii) certainty in the terms expressed and (iv) a clear intention to create legal obligations between the parties. In contracts for the sale of land, (v) the side letter must also be in writing and (vi) signed by or on behalf of all the parties to the contract. Although most of the criteria is straightforward, the elements of consideration and certainty can pose challenges to the enforceability of the letter.

O Consideration is not required to be a monetary payment. It will suffice if a benefit is exchanged, or a party has acted to his/ her detriment in reliance on the terms of the letter. Where the letter is used to amplify terms that are mutually beneficial to the parties, consideration may be established. In the absence of a benefit/ payment, the parties may opt to execute the letter as a deed. The letter must be signed in the presence of a witness and state that it is executed as a deed. In the case of a company, it is effectively signed by one director and a secretary, or two directors of the company in accordance with its by-laws.

O There must be a 'sufficiently complete and certain agreement on all essential terms' so that a court may interpret and give effect to them in the event of a dispute. In instances where the parties are

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