

Explain significant clauses, keep wording simple

In any type of agreement, unusual clauses are often complicated and can be difficult to understand. Clients are more likely to simply skim over such clauses, and may not fully appreciate how the clause will affect the client's overall interests. If the clause does not reflect the client's intentions, the lawyer may end up with a claim on his hands.

So, for example, when negotiating and drafting a commercial lease, it is easy for a solicitor to be consumed with the usual key issues such as the monetary terms of the agreement. But a deal is not fully considered, and a lease is not properly drafted, unless the client's overall interests have been sufficiently contemplated and addressed. A lease may impose certain use covenants or other restrictive covenants, or bind the client as a guarantor. These can have serious implications for the client, and may be terms that the client never would have accepted had he or she understood what the lease actually says.

When discussing the terms of any agreement with a client, take the time to explain significant or unusual clauses. Ensure that the client fully understands the implications of each and every term and clause in the document. And document these discussions for future referral. Test the clause on yourself: Do you understand what it means? If you have trouble understanding a clause, chances are your client will not understand it either.

Termination clauses

Pay special attention to termination provisions to ensure your client fully understands all possible scenarios under which a leasing or other commercial relationship could be terminated. A good example is one of our recent files in which a solicitor prepared a commercial lease for a landlord client. When the tenants could not obtain a building permit to renovate the premises, they terminated the lease. The landlord claimed against the solicitor for inappropriately drafting the lease so as to allow the tenants to exit the agreement.

Practitioners should call attention to clauses that are significant and which may terminate the agreement, and should canvass possible "termination scenarios" with the client to ensure that the lease accurately reflects the client's intentions and understanding of the terms of the relationship.

Renewal rights

Many agreements, including leases, are drafted with renewal options or rights. Although your client may be perfectly aware of the option to renew, he or she may not be familiar with the mechanics of renewal. For example, a lease may contain written notice requirements or deadlines by which to apply for renewal. Failure to comply with these requirements may result in a renewal not taking effect.

If there are renewal dates, advise your client about any conditions and procedures associated with the option to renew. You may

also want to establish who has responsibility for renewal from the outset. It helps to clarify this in writing, so that there can be no uncertainty later on.

Boilerplate clauses

In drafting any type of agreement, it is often convenient to simply tweak standard form clauses (or even an entire boilerplate agreement) to suit the client's particular situation. However, lack of attention to detail and sloppiness in drafting terms can result in ambiguous, misleading or even conflicting terms and obligations. This could affect future transactions where others look to and rely on the terms of the document as originally drafted.

For example, an individual may decide to buy a business based, in part, on a particular understanding of the terms of the lease agreements that govern the business. Sloppy drafting that creates ambiguities on what the wording of the lease actually means may result in the business having less market value than the purchaser initially thought. To avoid uncertainty and possible future disputes, make sure the intention of the original parties to the lease is made clear. If you have delegated the drafting of a lease to a junior member of your staff, it is essential that you review the lease and ensure that they understand the implications of all of the clauses.

Understanding the terms of an agreement

Other claims are made against lawyers when they are acting for clients who are making business decisions based on the terms of an agreement. For example, if clients are purchasing commercial properties, the terms and value of ongoing leases are extremely important. You should review each of the ongoing leases carefully to ensure that your client understands the value and consequences of each of the terms. It is one thing for you to understand the terms of a lease. It is quite another thing for your client, and ultimately it is the client who makes business decisions.

Conclusion

No matter how hard we try, some drafting errors are inevitable. What's important is that these mistakes don't end up forming part of the final executed agreement. Equally important is the need to discuss the terms with the client. A commercial relationship will run more smoothly if the final executed document clearly reflects the intentions of the parties to the agreement. Diligence in drafting is the first step. If there are significant onerous and complicated clauses, be sure to draw these to the attention of your client and document these discussions.

Keep these practice tips in mind when drafting a document for your clients and you will decrease your exposure to a malpractice claim.

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