BPF & BCO Model Clauses for an FRI Office Lease of Whole

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BPF and BCO Model Clauses for an FRI Office Lease of Whole

INTRODUCTION

The BPF and the BCO

1 We, the British Property Federation (BPF) and the British Council for Offices (BCO), are jointly responsible for a wide range of office interests, from landlords and tenants to contractors and professionals. As part of our efforts to improve the efficiency and attractiveness of the office sector, we have worked together to prepare these model clauses for a fully repairing and insuring (FRI) office lease of whole without service charge provisions.

2 These model clauses have been produced following an extensive consultation process. We are committed to publishing model clauses which will become widely regarded as being fair and reasonable for both landlords and tenants.

3 The model clauses have been drafted for an FRI office lease of whole, but they can also apply to other types of property. For example, with fairly minor changes, they can be used for retail, industrial and warehouse property. If the repairing obligation is changed and service charge provisions are added, the clauses can apply to internal repairing multi-let buildings.

4 Landlords may well be offering a mixture of terms of occupation to the tenant, including break clauses, upwards/downwards rent reviews, serviced office solutions and a traditional FRI lease. The model clauses are designed for that traditional FRI lease.

The need for model clauses

5 There is a growing acceptance that the documents used in the commercial property and construction sectors should be standardised. As long as they are fair, standard documents can ease the transaction process. They allow everyone involved to concentrate on key commercial terms, and any peculiarities of the deal, knowing that matters which often take up a lot of time consuming debate, but where a satisfactory compromise is often achieved, have already been dealt with in a way that is standard throughout the industry. This saves time and money. Standardisation helps prevent disagreement and benefits the property industry, its advisers and, most importantly, its customers.

6 We have prepared the model clauses for an FRI office lease to extend the consensus-based approach of the BPF's short term commercial lease to longer, more complicated leases designed for tenants who want to occupy an office for a number of years.

7 An FRI lease is a complicated financial document which reflects an important agreement between the landlord and the tenant. Over the past few years, landlords and tenants have become concerned about how complicated FRI leases have become - a typical FRI lease can easily be more than 60 pages. While some aspects of an FRI lease are inevitably complex, we believe that other aspects can be more simple. The BPF has tried to make its short term lease as easy to read as possible, and the model clauses of the FRI lease are also written, as far as practicable, in plain English.

8 Although we believe that the wording in FRI leases can be simpler, we decided that the concept of a standard FRI lease was an unrealistic goal as the circumstances within the property market would never be typical enough to make a standard document practicable. However, many parts of an FRI lease can be standardised and the model clauses, accompanied by a full commentary, reflect this.

9 If a landlord and a tenant decide to use the model clauses, both sides, together with their professional advisers, will be free to concentrate on agreeing those parts of the bargain which need to be discussed. With some exceptions, the model clauses set out the reasonable conclusions that are normally reached in the marketplace on important matters. If both sides know that they will almost always reach an agreement on a number of clauses within a lease, would it not be better to agree to that position at the start? The savings for both sides, in terms of time and money, resulting from using this approach could be significant.

The need for professional advice

10 As shown in the *Code of Practice for Commercial Leases in England and Wales* (see the note below[1]), no landlord or tenant should ever enter into a binding contract, such as a lease, without first getting appropriate professional advice. Any landlord or tenant who wants to use the model clauses must make sure that their professional advisers explain fully to them any aspects of the agreement which are unclear, and advise them on all of their options.

11 Most of the thinking and all of the consultation on the commentary and the clauses occurred prior to 11 September 2001. Clearly the position on insured risks has become more of an issue since then.

12 The Code of Practice for Commercial Leases states that service charge obligations should be appropriate to the length of term of the lease and the condition of the property. As this is a lease of a whole property, service charge obligations have not been provided for.

Conditions of use

13 This document or any part of it may be used unchanged without any charge, provided the user acknowledges that its use is with the consent of the British Property Federation and the British Council for Offices.

[1] Note: *A Code of Practice for Commercial Leases in England and Wales* is produced by the Commercial Leases Group, comprising the Association of British Insurers, Association of Property Bankers, British Property Federation, British Retail Consortium, Confederation of British Industry, Forum of Private Business, Law Society, National Association of Corporate Real Estate Executives (UK Chapter), Property Market Reform Group, Royal Institution of Chartered Surveyors and Small Business Bureau. In addition, the Code has received support from the British Council for Offices, the British Chambers of Commerce, Council for Licensed Conveyancers and the Federation of Small Businesses. It is published by RICS Business Services Limited, telephone 020 7222 7000, website: http://www.commercialleasecodeew.co.uk

Summary of the BPF and BCO Model Clauses for an FRI Office Lease of Whole

The following three pages are a summary of our model clauses. Any landlord or tenant who wants to use the model clauses should, with their professional advisers, read the model clauses and the accompanying commentary.

1 Paying rent

a The main rent must be paid on the normal quarter days and on time. If it is late, there is no period of grace and interest is due at 3% over base rate.

b Other payments must be made within 10 Business Days of demand. But interest will run from the date of demand if not paid in those 10 Business Days.

c The tenant may not set off.

2 Outgoings and services

The tenant must pay all outgoings, charges for services and charges for shared facilities used, but not the landlord's capital taxes.

3 Repair and maintenance

a The tenant is under a straightforward repairing obligation.

b Internal decoration is every fifth year, external every third. In both cases, it needs to be done in the last six months of the term.

c Breaches need to be remedied within a reasonable time. If the landlord has to remedy in default, its costs are recoverable as a debt.

4 Alterations and signs

a New buildings, new structures, alterations in the external design and appearance and most structural alterations, are prohibited absolutely.

b The tenant may make other alterations (including some minor structural alterations) with consent not to be unreasonably withheld.

c Internal demountable partitioning may be put up and removed without consent.

d Signage is allowed with consent (not to be unreasonably withheld).

5 Disposals

a There are no specified grounds under which the landlord can refuse consent to assign, leaving the question of whether a particular refusal is lawful or not to the test of reasonableness.

b There are some conditions that the tenant must observe before the lease can be transferred, for example, an automatic Authorised Guarantee Agreement (save on a lease renewal) and paying any unpaid sums due to the landlord.

c Group companies are allowed to share occupation.

d The tenant may underlet the whole with consent not to be unreasonably withheld.

e The tenant may underlet part on excluded tenancies with consent not to be unreasonably withheld.

f Underletting is at the market rent, not the higher of passing rent and market rent.

6 Insurance

a The landlord covenants to insure.

b The landlord covenants to rebuild if it is destroyed.

c Rent suspension applies until reinstatement or if there is an insurance break clause until the end of the loss of rent insurance period.

7 Costs

The tenant covenants to pay all the costs that result if the tenant breaches any of the terms of the lease. In relation to other matters, the costs must be reasonable.

8 Rent review

a There is no reference to “best” or “best rent reasonably obtainable”.

b The hypothetical term is 10 years.

c It is assumed that the landlord and the tenant have complied with their lease covenants.

d The Premises are assumed to be in a state ready to take fitting out works.

e Rent concessions are assumed to have been used up to the extent they equate to a traditional fitting out period only.

f Arbitrator or expert is a matter of choice, but the choice is to be made at the start of the lease.

g Interest on late reviewed rent is at base rate.

h Time is not of the essence.

9 Definitions

a Business Day

b Conduits

c Group Companies

d Insurance Cost

e Insurance Rent

f Insured Risks

g Interest Rate

h Occupiable Unit

i Occupier

j Plant and Machinery

k Principal Rent

l Rents

m Term

BPF/BCO MODEL LEASE CLAUSES FOR AN FRI OFFICE LEASE OF WHOLE WITHOUT SERVICE CHARGE

COMMENTARY

Introduction

1 The purpose of this commentary is to help landlords, tenants and their professional advisers who want to use the model clauses for an office lease of whole in their own preferred standard form. The model clauses have been prepared after extensive discussions within both organisations and we hope that they reflect a fair compromise on a range of important issues that landlords and tenants often have to discuss. To make sure that this is the case, we have carried out an extensive consultation exercise to test people's opinion of the model clauses.

2 By using this approach, we believe that it should be possible to remove unnecessary negotiation, delay and expense from the transaction process. If both sides know that they will almost always reach a compromise on a number of issues, why not agree to that position at the start? The model clauses aim to provide that option.

3 In this commentary, we have explained the reasoning behind each clause. We have tried to reach a reasonable compromise for most situations, balancing the interests and views of the landlord and the tenant. However, it is important to remember that there may be circumstances where the tenant or landlord cannot follow the principle behind a model clause. If this is the case, the landlord or tenant must explain and justify why they cannot do so.

4 In selecting the parts of a typical FRI office lease that will be covered by the model clauses, we have tried to identify those areas where a compromise is almost always reached.

5 We have prepared the model clauses assuming a 15 year FRI lease for a whole office building. As a result there are no service charge provisions. The Code of Practice for Commercial Leases states that landlord's control over change of use should not be more restrictive than necessary to protect the value of the property and any neighbouring property of the landlord. As this is an office lease of whole, no user clause has been drafted.

6 Many of the model clauses contain words and expressions that need defining. You may have your own standard definitions which you may prefer to use, but for convenience we have drafted some definitions to fit the clauses.

COMMENTARY

1 Paying rent

1.1 Obligation to pay

a This subclause contains the obligation to pay. You should reserve VAT as rent so the tenant does not have to pay unnecessary stamp duty. There will always be a debate about whether other payments, for example, insurance premiums, should also be reserved as rent. Reserving items as rent entitles the landlord to distrain for non-payment. Tenants will usually find this acceptable for the principal rent and VAT, but may be reluctant to agree this for other payments.

b The method of payment is not specified. This recognises the fact that some tenants are reluctant to pay by standing order or direct debit, leaving it up to the tenant and landlord to agree the payment method.

1.1.2 a In the case of a multi-let building the insurance rent should also include the service charge (and the rent suspension should apply accordingly).

b Insurance rent should include the cost of insurance valuations, as we believe that, in an FRI lease, it is reasonable for the tenant to pay this cost as long as valuations are not carried out more often than once in every three year period.

c Landlords and tenants have strong and conflicting views on whether insurance commission should be kept for the benefit of the landlord or passed to the tenant. Either way, the lease should deal with the issue. If the landlord's policy, for example, is to pass on the discount, but not any related commission to the tenant, then say so, although doing so will force successors to adopt the same policy.

1.1.3 VAT can be dealt with here or in a separate VAT clause.

1.2 Payment dates

1.2.1 The tenant must pay the principal rent in advance. In most cases, the payment dates will be the usual quarter days. If there is a rent-free period, the tenant will need to pay the sum due on the Rent Commencement Date. The landlord does not need to demand the principal rent because the tenant knows when the principal rent is due.

1.2.2 a Because insurance rent and the service charge will not necessarily have set payment dates, we believe these payments should be paid within 10 business days of the landlord's written demand. The tenant will have to pay interest on late payments (see clauses 1.4.1 and 2.3).

b A longer period of time (such as 15 business days) may be appropriate for some corporate tenants, but the tenant and landlord need to agree this on a deal-by-deal basis.

MODEL CLAUSES

1 Paying rent

1.1 Obligation to pay

The Tenant shall pay to the Landlord.

1.1.1 The Principal Rent every year, and proportionately for any part of a year.

1.1.2 The Insurance Rent.

1.1.3 VAT on the Principal Rent and the Insurance Rent to the extent lawfully due on any sums demanded by the Landlord.

1.2 Payment dates

The Tenant shall pay to the Landlord.

1.2.1 The Principal Rent in equal instalments in advance on 25 March, 24 June, 29 September and 25 December in every year. The first payment is the sum apportioned for the period from and including [*the rent commencement date*] to the day before the next quarter day and shall be made on [*the rent commencement date*].

1.2.2 The Principal Rent on the due date, whether or not demanded.

1.2.3 Insurance Rent within 10 Business Days after written demand.

1.3 Set-off

It is important from a landlord's point of view that the tenant can not exercise rights of set-off to preserve the income stream. If such a clause is either not included in the lease or not drafted properly and thereby casts doubt on the security of the income stream, some landlords may feel that the investment value of the premises may be affected.

The tenant will benefit from any overriding statutory right regardless of whether it is referred to in the lease, but some tenants may prefer it to be specifically mentioned.

1.4 Interest

1.4.1 a The tenant will always know when the principal rent is due (usually on the traditional English Quarter Days) so it is reasonable that if those payments are not paid when they are due, interest should apply immediately.

b In the case of other payments, which may not be regular, tenants should be given 10 Business Days to make the payment (but see 1.2.2b above). Ten business days gives the tenant the opportunity to pay and, if they do, no interest will be charged. But, if no payment is made after that grace period, interest will be charged from the date when the written demand was made.

c The reference to **"before and after judgement"** is necessary to make sure that the contractual rate under the lease applies from the date of the court judgement to the date of the actual payment.

d Interest is not compounded quarterly but it is calculated on a daily basis.

1.4.2 The landlord is entitled to refuse any payment of rent to ensure that it does not waive its right to re-enter and forfeit for the breach. Trivial breaches are excluded. If the landlord is found to have been wrong, the tenant will not have to pay any interest. If the landlord is found to have been correct, interest will be due. To recognise that this clause may cover different types of situation, interest is payable at the base rate. Inevitably the use of words such as "material" is a compromise between competing views ranging from the landlord wishing to have the right to refuse payment on any breach and the tenant not wishing the landlord to have the right at all.

There is usually little debate over what the incentive or "penal" interest rate should be. In the current economic environment we believe that 3% over the base rate is a fair compromise.

1.5 VAT

By law, a VAT invoice must be delivered within 30 days of the supply, but many landlords will supply the invoice with the rent demand or shortly after that.

1.3 Set-off

The Tenant (subject to any statutory right) shall not exercise any legal or equitable rights of set-off, deduction, abatement or counterclaim whatsoever to reduce its liability to pay the Rents.

1.4 Interest

1.4.1 If any of the Rents (whether or not formally demanded), or any other sum of money, payable by the Tenant under this lease has not been paid:

- in the case of the Principal Rent (and any VAT), on the date when payment is due;

and

- in the case of any other Rents or sums, within 10 Business Days of written demand;

the Tenant shall pay interest calculated on a daily basis on the unpaid sum at the Interest Rate for the period from and including the date when payment:

- was due (in the case of the Principal Rent and any VAT); or
- was demanded (in the case of any other Rents or sums);

until the date the Landlord receives payment (both before and after any judgement).

1.4.2 If the Tenant is in material breach of any obligation in this Lease and the Landlord refuses to accept payment of any of the Rents so as not to waive that breach, the Tenant shall pay interest on such sum at the Interest Rate for the period from and including the date when payment:

- was due; or
- would have been due if demanded on the earliest date on which it could have been demanded;

to the date when the Landlord accepts payment. This obligation is without prejudice to any other rights, remedy or power available to the Landlord. If it is subsequently established that the Tenant is not in material breach of obligation under this Lease, no interest shall be due on any Rent, payment of which has been refused by the Landlord.

1.5 VAT

1.5.1 All sums which the Tenant has to pay to the Landlord under this Lease are exclusive of VAT.

1.5.2 If the Tenant is required to pay any sum to the Landlord under this Lease by way of a reimbursement or indemnity, the Tenant shall also pay the Landlord a sum equal to any VAT incurred by the Landlord on that sum, except to the extent that the Landlord obtains credit for VAT under sections 24, 25 and 26 of the Value Added Tax Act 1994.

1.5.3 The Landlord shall send to the Tenant a VAT invoice within 10 Business Days of receiving payment in respect of any sums payable by to the Landlord by way of input VAT.

2 Outgoings and services

2.1 Outgoings

To allow the landlord to cover all its expenditure on the premises the tenant agrees to pay for all outgoings. The tenant is not responsible for any tax the landlord has to pay, such as corporation tax or capital gains tax. There is no need to refer to VAT here as VAT is dealt with specifically elsewhere.

The tenant does not have to pay the landlord for any lost rating relief.

2.2 Services

The tenant is not responsible to the landlord for outgoings and connection charges in relation to services supplied direct by a third party. But it will be responsible for services provided by the landlord. The definition of **services** will need to be wide enough to include all services including unforeseen services which may arise during the term (for example, internet charges).

2.3 Shared facilities

This follows the principles in clause 1.4.1 regarding the timing of payments.

3 Repair and maintenance

3.1 Repair

a This will require the tenant to put the premises in repair to the extent they are not. It does not require, nor should it require, the tenant to do any more than ensure that the premises are at all times in a good state of repair. It will not require the tenant to “rebuild” or to “renew” the whole of the premises. But it will require the tenant to renew and replace constituent parts of the premises where those constituent parts are beyond economic repair and where, within the context of the premises as a whole, the works would reasonably be viewed as works of repair rather than as an improvement of the whole.

b In some circumstances, such as when letting a new or refurbished building, it may be appropriate for the tenant to protect itself from material defects, by an appropriate method such as warranties or insurance. This is a matter for negotiation, but we believe that whatever solution the negotiation achieves should be dealt with and covered by an agreement for lease and not the lease as, in most cases, the need for that protection will diminish and fall away before the end of the lease. It may be more appropriate for the original developer and/or the professional team (or both) to be responsible for this.

c Where the parties have the time, inclination and are prepared to commit the resources and pay the extra costs, a schedule of condition could be prepared and the repairing obligation linked to it. This could be particularly useful for older buildings.

d The Code of Practice for Commercial Leases states that repairing obligations should be appropriate to the length of term of the Lease and the condition of the property. As this is a 15 year Lease of the whole, we believe that these repairing obligations are appropriate.

2 Outgoings and services

2.1 Outgoings

a The Tenant shall pay all existing and future rates, taxes and other outgoings payable during the Term in respect of the Premises or by the owner or Occupier and, in the absence of a direct assessment on the Premises, shall pay to the landlord a fair proportion of any such outgoings.

b The Tenant is not required under clause 2.1a to pay any tax (other than VAT) arising as a result of the receipt by the Landlord of the Rents and other sums that are payable under this Lease or any tax arising on any disposition of the reversion to this Lease.

2.2 Services

The Tenant shall pay to the Landlord a fair proportion of all the charges for services provided to the Premises by the Landlord, including any connection and hiring charges, and meter rents.

2.3 Shared facilities

The Tenant shall pay to the Landlord, within 10 Business Days of written demand, a fair proportion of all reasonable costs and expenses properly incurred by the Landlord in connection with any Conduits, structures, access or exit routes, equipment or other facilities which belong to, or are capable of being used or enjoyed by, the Premises in common with any adjoining property and, if not paid, such costs and expenses shall be a debt due to the Landlord.

3 Repair and maintenance

3.1 Repair

The Tenant shall repair the Premises and keep them in good and substantial repair and condition except any damage caused by an Insured Risk (save to the extent that payment of any insurance moneys is withheld because of any act or omission of the Tenant or any Occupier).

3.2 Decoration

In most cases, the decoration pattern set out here should be appropriate. As this is a 15-year lease, no decorating will be done in the 14th and 15th years. For leases of different lengths, appropriate wording may be needed to make sure that there is no obligation to decorate two years running.

3.3 Plant and machinery

a This clause may not be needed in basic buildings. But certainly for a complex building, the landlord has a legitimate interest in making sure (and checking) that plant and machinery which is used for efficiently running the building is properly maintained. If the definition of the premises includes plant and machinery, the tenant must maintain it but the specific obligation avoids a (possibly unmeritorious) argument that a non-functioning toilet is not a disrepair in the context of the whole.

b However, if there are potentially expensive items of plant and machinery (such as a new lift), there should be a debate before the lease is signed about whether the tenant should pay for these as the tenant's share could be disproportionately high. Some other compromise arrangement may be more appropriate.

3.4 Day-to-day maintenance

This is a good housekeeping clause. It should be relevant to most situations. It makes the assumption that conduits have been defined as those that only serve the premises.

3.5 Remedying breaches

3.5.1 If a notice is served asking the tenant to put something right, they must comply with it.

3.2 Decoration

3.2.1 The Tenant shall whenever necessary, but in any event not less than once in every period of five years during the Term and also during the last six months of the Term, in a good and workmanlike manner using good quality materials and in accordance with good practice at the relevant time prepare and decorate or otherwise treat, as appropriate, all internal parts of the Premises, such decoration and treatment in the last six months of the Term to be executed in colours and materials approved in writing by the Landlord (such approval not to be unreasonably withheld).

3.2.2 The Tenant shall whenever necessary, but in any event not less than once in every period of three years during the Term and also during the last six months of the Term, in a good and workmanlike manner using good quality materials and in accordance with good practice at the relevant time prepare and decorate in colours and materials approved in writing by the Landlord (such approval not to be unreasonably withheld) or otherwise treat, as appropriate, all external parts of the Premises.

3.2.3 The Tenant shall not be required under this clause to decorate or treat the Premises more than once in any 12 month period.

3.3 Plant and machinery

The Tenant shall:

a keep all Plant and Machinery properly maintained, and in good working order and condition; and

b renew or replace all parts of the Plant and Machinery when necessary.

To do this, the Tenant shall employ reliable contractors regularly to inspect, maintain and service all Plant and Machinery. The Tenant shall keep full records of any work carried out and make them available to the Landlord if the Landlord asks to see them.

3.4 Day-to-day maintenance

The Tenant shall:

a keep the Premises in a clean and tidy condition;

b regularly (and when needed) clean both sides of the windows and window frames and all other glass in the Premises;

c make sure all rubbish is stored properly and remove all rubbish from the Premises at least once a week); and

d keep all Conduits in good condition and clear at all times.

3.5 Remedying breaches

3.5.1 The Tenant shall:

a allow the Landlord at all reasonable times to enter the Premises to view its condition; and

b comply with any notice served by the Landlord requiring the Tenant to remedy any breach of its obligations relating to repairs, decoration, day-to-day maintenance or alterations.

3.5.2 Specifying a period of 20 business days to put things right has the advantage of making things certain, but we felt it was better to refer to reasonable periods of time in the lease to allow flexibility according to the type of problem. As a matter of practice, the landlord should set out the reasonable period of time in the notice.

3.5.2 If the Tenant does not comply with any notice within a reasonable time, the Tenant shall allow the Landlord to enter the Premises to remedy the breach.

3.5.3 The Tenant shall pay to the Landlord, as a debt and on demand, the costs and expenses properly incurred by the Landlord in exercising its rights under this clause.

3.6 Yielding up the Premises

3.6.1 At the end of the Term, the Tenant shall yield up the Premises back to the Landlord in line with the Tenant's obligations in this Lease.

3.6.2 The Tenant authorises the Landlord to remove from the Premises any Tenant's fixtures and fittings and any other items left at the Premises and dispose of them on such terms as the Landlord thinks fit.

4 Alterations signs and reinstatement

4.1 Prohibited alterations

The Tenant shall not:

4.1.1 erect any new structure on the Premises; or

4.1.2 alter the height, elevation or external appearance of the Premises, or

4.1.3 make any alteration which affects the structure of the Premises or any Plant or Machinery, or any mechanical or electrical systems, except as allowed under clause 4.3.

4.2 Other alterations

The Tenant shall not make any other alteration to the Premises without the prior written consent of the Landlord (such consent not to be unreasonably withheld).

4.3 Alterations to the structure and plant and machinery

This has been included to meet tenants' concerns that a total restriction on structural alterations is unworkable in practice.

4.4 Alterations that do not need permission

As the model lease clauses are designed for an office lease of whole, the tenant is automatically given the right to put up and move internal demountable partitioning without permission. Tenants and landlords will have specific views on whether the tenant should show the plans to the landlord and whether the landlord (or any one else such as the insurer) needs to have a copy but in any event the tenant should supply the copies to the landlord. The landlord and tenant should discuss and agree this clause specifically, according to their own requirements.

4.5 Signs and advertisements

Tenants are allowed to display notices that they need for their business, but landlords need a reasonable level of control over matters which could affect the outside appearance of the building. This is unlikely to be contentious in the case of a B1(a) office letting (but may be an issue for an A2 office lease), although some tenants may require a personal concession for their own corporate logo on an office building too.

4.6 Reinstatement

4.6.1 Any landlord's fixtures should be replaced. If it is feasible to do so, a list of the landlord's fixtures and fittings should be agreed at the start of the lease.

4.6.3 a The Code of Practice for Commercial Leases states that the landlord's control over alterations should not be more restrictive than necessary to protect the value of the property and any neighbouring property of the landlord. At the end of the lease, tenants should not be required to reinstate unless reasonably required. We believe that the principles within the model lease clauses for an office lease of whole reflect these principles.

b It may be that some landlords would prefer to deal with reinstatement in any licences to be granted. If so, appropriate wording will be needed to deal with it.

NOTE: Whether the tenant should replace carpets and ceiling tiles will depend on the type of premises. The tenant and landlord must decide whether they should or should not be replaced on a case-by-case basis.

4.3 Alterations to the structure and plant and machinery

The Tenant may with the Landlord's prior consent (such consent not to be unreasonably withheld) make minor alterations to the structure of the Premises and to the Plant and Machinery to the extent they are necessary to implement alterations permitted by clause 4.4 provided they do not adversely affect the structural integrity of the Premises or the operation of such Plant and Machinery.

4.4 Alterations that do not need permission

The Tenant may without the consent of the Landlord:

a erect, alter and remove internal demountable partitioning which does not involve cutting into the load-bearing parts of the Premises or which does not adversely affect any Plant and Machinery within the Premises as long as the Tenant sends to the Landlord two copies of its detailed plans and specifications showing the work within five Business Days of it being completed;

b make minor alterations to the Plant and Machinery as long as they do not adversely affect the structural integrity of the Premises or the operation of any Plant and Machinery.

4.5 Signs and advertisements

The Tenant shall not:

a erect any signs, notices, advertisements, lettering or announcement of any kind, which can be seen from outside the Premises without the prior written consent of the Landlord (such consent not to be unreasonably withheld); or

b advertise anything in the windows.

4.6 Reinstatement

Before the end of the Term, the Tenant shall:

4.6.1 replace any fixtures which are damaged and cannot be repaired or are missing or destroyed with new ones of a similar type and quality; and

4.6.2 remove any signs and all tenant's fixtures and fittings, furniture and belongings and repair to the reasonable satisfaction of the Landlord all damage caused by removing them; and

4.6.3 (save to the extent reasonably required in writing by the Landlord) remove and make good any alterations or additions made to the Premises during the Term, or any prior period of occupation by the Tenant or its predecessors, and reinstate the Premises in a good and workmanlike manner to the Landlord’s reasonable satisfaction.

5 Disposals

5.1 General restriction

These general words prevent the tenant from dealing with the premises other than in the way allowed by the clause.

5.2 Assignment of whole

The provisions of the 1995 Landlord and Tenant Act significantly affect this clause. Essentially there are circumstances in which the landlord can specify that it is reasonable to refuse permission. Having made a decision as to whether the landlord will agree to the assignment, based on either those circumstances, or reasonableness generally, the landlord can specify conditions which must be complied with before the assignment takes place.

Individual landlords may have reasons for specifying circumstances for refusing permission but we believe that in most cases there is no need to specify any particular circumstances which would prevent an assignment as long as the landlord can act reasonably in withholding permission.

Some of the main circumstances which may count as grounds for instant refusal and which are often discussed, but which we have not included, are set out below.

a Assignees which are not resident, or incorporated, within the United Kingdom. This may be difficult to enforce in relation to European companies and seems inappropriate, as a general rule, for modern landlord and tenant relationships. Issues such as reciprocal enforcement arrangements should be dealt with as they arise.

b Diplomatic immunity (save to the extent a potential assignee has lawfully waived their rights) is a difficult issue. It may be that the landlord can reasonably withhold consent anyway if the organisation has a record of non-compliance. Except in certain locations it seems inappropriate for there to be a total exclusion.

c A diminution in the value of the reversion test seems inappropriate for all but the most exceptional circumstances.

d The requirement that the assignee must be of at least the same financial status as the outgoing assignee seems inappropriate for most normal lease situations. Other financial tests again seem inappropriate for routine office lettings as they can be covered by reasonableness and it is difficult, if not impossible, to find a test or series of tests that apply to all situations. However, for lettings which are purely financially driven where the return is linked only to the covenant strength of the tenant, specific tests may need to be negotiated on a deal-by-deal basis.

e Some landlords may still prefer to see a reference to the proposed assignee being of sufficient financial standing (in the reasonable opinion of the landlord) without further security but inevitably this can prove contentious with many tenants as it could limit the pool of potential assignees.

5 Disposals

5.1 General restriction

The Tenant shall not assign, charge, underlet or part with possession or share the occupation of, or permit any person to occupy, or create any trust in respect of the tenant's interest in, the whole or any part of the Premises, except as may be expressly permitted by this clause.

5.2 Assignment of whole

The Tenant shall not assign the whole of the Premises without the prior written consent of the Landlord which, subject to clause 5.3, shall not be unreasonably withheld.

The Code of Practice for Commercial Leases requires that, unless particular circumstances justify greater control, the only restriction on assignment of the whole should be obtaining the landlord's consent, which is not to be unreasonably withheld. The model lease clauses reflect that principle.

f Non-payment of rent is a clearly identifiable breach and may well be the only circumstance which it would be sensible to include as an instant ground of refusal. But we believe it is equally as effective as a condition to the assignment taking place (ie, that unpaid rent is paid) rather than as a circumstance for refusal.

g Circumstances such as the repairing covenant having been complied with may be difficult to operate in practice because of the inevitability that many buildings are often in disrepair (albeit minor) at all times. A reference to "material" or "substantial" breaches is similarly difficult because, inevitably, the business flexibility given to the tenant by the assignment clause may depend on the interpretation of this wording at the time.

h Although some industry groups have recommended in the past that no transfers are allowed intra-group, we believe that there should not be a complete restriction. The tenant's need for commercial flexibility is more important than the simplicity of a complete restriction. Landlords may still fall back on:

  i reasonably objecting to a transfer if it were clearly designed to dilute the tenant's covenant strength;

  ii imposing conditions, if reasonable to do so; and

  iii if appropriate, agreeing extra wording if the circumstances so require.

5.3 Assignment conditions

These are the conditions which need to be complied with before an assignment can take place, once the identity of the assignee has been agreed in principle by the landlord.

5.3.1 Where reasonable, the landlord may require:

a a rent deposit. How long the deposit will be kept for will need to be agreed at the time. It may be appropriate, in certain circumstances, to include service charge as well. Although service charge is a variable sum, whereas the principal rent is a fixed sum, it is clearly a sum in respect of which the landlord may want some security. If the service charge can be estimated with a degree of accuracy, therefore, it may be appropriate for the service charge to form part of the rent deposit; or

b a bank guarantee. In some circumstances it may be appropriate to limit the bank to an English clearing bank because it means that there would be no need for a foreign company opinion which is yet more paperwork and could delay matters. We recognise however, that bank guarantees generally are not always a satisfactory solution to the covenant status issues.

5.3.2 a There has been much debate over whether the requirement that the tenant should enter into an authorised guarantee agreement (AGA) should be an absolute requirement or one that is subject to the test of reasonableness. The debate is likely to continue. On balance, most landlords, and many tenants, seem to accept the requirement for an automatic AGA except in the case of protected lease renewals. However, when implementing this clause, note that the Code of Practice for Commercial Leases urges landlords to consider only requiring an AGA when the assignee is of lower financial standing than the assignee at the date of the assignment.

b There are differing views on whether the form of the AGA should be specified in advance. It may be unsatisfactory to specify the form of legal words for an AGA that may be given at any time during a lengthy lease term because it takes away the flexibility of changing the form of wording if, for example, the Court decides that a particular form of guarantee wording is ineffective, or indeed, more onerous than the parties currently believe. On the other hand as many leases already specify the form of guarantee to be given by an assignee's surety, extending the principle to the AGA should not be contentious if landlord or tenant would prefer to specify its form.

NOTE: There continues to be differing views about whether it is possible to require a guarantor of the tenant's obligations to guarantee the AGA. We believe that the intention of the Act and its provisions allows the guarantor to be required to guarantee the AGA, but the issue is not free from doubt. As a result, if this provision is to be included (and it will not be appropriate in every lease), landlords may want to include a severability clause to make sure that if it is found to be valid, it is only this provision which is valid, and not the whole alienation clause. As pending a decision of the Court the issue is not free from doubt, some landlords might continue to seek additional protection.

5.3 Assignment conditions

For the purposes of Section 19 (1 A) of the Landlord and Tenant Act 1927 it is agreed that any consent of the Landlord to an assignment of the whole of the Premises may be subject to:

5.3.1 (where reasonable) a condition requiring the proposed assignee to deliver to the Landlord upon completion of the proposed assignment:

a a sum by way of deposit equivalent to the Principal Rent plus VAT reasonably estimated by the Landlord to be prospectively payable for a period of [ ] from the date of completion of the proposed assignment, accompanied by a duly executed deed of deposit in such form as the Landlord reasonably requires; and/or

b a bank guarantee in favour of the Landlord from a bank, and in a form, first approved in writing by the Landlord (such approval not to be unreasonably withheld); and/or

c a guarantee from a guarantor who is, and in a form which is, reasonably acceptable to the Landlord.

5.3.2 a condition that the Tenant shall, prior to completing the proposed assignment, execute and deliver to the Landlord an authorised guarantee agreement, as referred to in Section 16 of the Landlord and Tenant (Covenants) Act 1995 in a form which the Landlord reasonably requires.

5.3.3 a condition that any guarantor of the Tenant's obligations guarantees to the Landlord, in a form which the Landlord reasonably requires, that the Tenant shall comply with the authorised guarantee agreement and indemnify the Landlord against any breach.

5.3.4 By making payment of unpaid rent a condition the landlord knows that the assignment cannot go ahead until the rent has been paid.

5.3.5 It is always fair for the landlord to impose other reasonable conditions in the circumstances. So (for example) for some tenants it may be appropriate for them to be guaranteed by directors or other individuals. Further, it was felt, on balance, that rectification of other breaches of covenant prior to the assignment should be dealt with in this way rather than having a specific reference to, for example, complying with material breaches.

5.4 Underletting of whole

The tenant can underlet the whole of the premises with the consent of the Landlord such consent not to be unreasonably withheld. Except in appropriate circumstances, tenants should have the flexibility to grant protected underleases of the whole.

5.4.1 The landlord may require a guarantor for an undertenant because the undertenant may request a new tenancy at the end of the contractual term.

5.5 Underletting of part

5.5.1 Landlords recognise that for a lease of a whole office building, the tenant will probably need the flexibility to underlet part of it. There are various reasonable restrictions, such as a maximum number of underlettings, to make sure that the premises do not become a mini investment for the tenant in circumstances where if the landlord had to take over the lease, it would have many individual lessees. In that situation, the landlord will not have had the same level of control over selecting these individuals as they had with selecting the original tenant or its assignees.

5.5.2 What is an Occupiable Unit will vary from building to building.

5.5.3 If the landlord reasonably so requires, the tenant must obtain an acceptable guarantor for any proposed undertenant. If underlettings of parts are not to benefit from security of tenure, the landlord may well not be reasonable in requiring a guarantor.

5.5.4 Underlettings of part of the building should be excluded from the security of tenure provisions of the Landlord and Tenant Act 1954 to avoid a situation for the landlord at the end of the term where it may have some tenants demanding to stay on and some who do not. It may also be felt prudent to provide in the lease that any term granted by an underlease is limited to a certain period not exceeding the end of the contractual term.

5.3.4 A condition that all sums payable to the Landlord under the lease are paid prior to the proposed assignment being completed;

5.3.5 Such other conditions as may be reasonable in the circumstances.

5.4 Underletting of whole

The Tenant shall not underlet the whole of the Premises unless:

5.4.1 if the Landlord reasonably so requires, the Tenant obtains a guarantor reasonably acceptable to the landlord for any proposed undertenant;

5.4.2 the underlease complies with those of the provisions of clause 5.6 which relate to underlettings of whole; and

5.4.3 the prior written consent of the Landlord is obtained (such consent not to be unreasonably withheld).

5.5 Underletting of part

The Tenant shall not underlet any part of the Premises other than on the following conditions:

5.5.1 the Premises shall not at any time be in the occupation of more than [ ] occupiers, the Tenant and any group company which is permitted to share occupation under clause 5.7 counting as one;

5.5.2 the part of the Premises to be underlet comprises an Occupiable Unit only;

5.5.3 if the Landlord reasonably so requires, the Tenant obtains a guarantor reasonably acceptable to the Landlord for any proposed undertenant;

5.5.4 the underlease complies with those of the provisions of clause 5.6 which relate to underlettings of part.

5.5.5 the underlease incorporates an agreement, authorised beforehand by the Court, excluding sections 24 to 28 of the Landlord and Tenant Act 1954 in relation to such underlease; and

5.5.6 the prior written consent of the Landlord is obtained (such consent not to be unreasonably withheld).

5.6 Underlettings generally

5.6.1 Underlettings do not have to be at the higher of the market rent and the rent payable under the lease as we believe that is restrictive and may lead to a discount at rent review if, at the relevant review date, new leases generally do not contain such provisions.

Clearly, the definition of "Occupiable Unit" will vary according to the premises.

5.6.2 The undertenant cannot underlet again to avoid a chain of underleases occurring.

5.6.3 The landlord must decide whether they want to approve the form of the underlease or not so the clause does not provide for this.

Note: There are differing views on the question of whether the underlease should contain identical conditions for a rent review. The first is that this is impractical because on a new underlease, market terms will probably dictate that it should be a five year rent review pattern. This can be particularly difficult if the underlease is granted shortly before a review. The other view is that in a negotiation for an underletting, undertenants often acknowledge that they have little choice but to accept that they are dealing with a pre-existing situation which they can do little to change. So, the rent that is to be agreed may need to take account of the fact that there may be a review soon. This can be achieved as long as in clause 5.6.1 it is clear that the open market rent is the rent to be obtained for the premises to be underlet in accordance with the provisions of clause 5.6 (thereby bringing in, if relevant, the imminence of any rent review).

5.6 Underlettings generally

5.6.1 The Tenant shall not underlet the whole of the Premises or underlet an Occupiable Unit at a fine or premium or at a rent less than the open market rent of the Premises or, in the case of an Occupiable Unit, of the Occupiable Unit in question, in each case at the time of such underlease.

5.6.2 Before the grant of any permitted underlease, the Tenant shall procure that the undertenant enters into the following direct covenants with the Landlord:-

a not to assign or charge any part of the premises to be underlet;

b not to dispose of or share the occupation of or permit any person to occupy the whole or any part of the premises to be underlet save by way of an assignment of the whole of the premises to be underlet;

c not to assign the whole of the premises to be underlet without the prior written consent of the Landlord, such consent not to be unreasonably withheld;

d to perform and observe all the tenant's covenants contained in:

i this Lease (other than for the payment of the rents) so far as the same are applicable to the premises to be underlet; and

ii the permitted underlease,

and that any guarantor for the undertenant guarantees to the Landlord that the undertenant shall comply with such covenants and indemnify the Landlord against any breach.

5.6.3 Every permitted underlease shall contain:

a provisions for the review of the rent payable under it on an upwards only basis corresponding both as to terms and dates with the rent review provisions in this Lease;

b a covenant by the undertenant (which the Tenant covenants to enforce) prohibiting the undertenant from doing or allowing any act or thing on, or in relation to, the premises underlet inconsistent with, or in breach of, this Lease;

c a condition for re-entry on breach of any covenant by the undertenant; and

d the same restrictions as to assignment, underletting, charging and parting with or sharing the possession or occupation of the underlet premises, and the same provisions for direct covenants and registration, as are contained in this lease (with any necessary changes).

5.7 Occupation by group companies

This gives the tenant the flexibility to allow occupation by a group company as long as certain protections for the landlord are observed.

It may not always be practical for some corporate tenants to give (nor desirable for landlords to receive) what could be many and frequent notices.

5.8 Management of underlettings

Most of these provisions are self explanatory, but we comment on specific ones as follows:

5.8.3-4 Most landlords would not want the right to participate in underlease rent reviews, but some may do.

5.8.5 The tenant should not vary the terms of any permitted underlease in such a way as to make it fail to comply with the requirements of the lease. The landlord will want to prevent the tenant from making variations thereby creating an underlease that would not have been agreed to in the first place (acting reasonably).

There is no requirement for initial underleases to be approved. Some landlords may wish to see one and if so, clause 5.8.5 would be a convenient place to insert such a clause.

5.8.6 It is important that the rent is not payable more than one quarter in advance to avoid a situation arising whereby the tenant receives, for example, one year's rent up front, then goes into liquidation, leaving the undertenant in occupation.

5.9 Charging

This clause recognises the commercial reality that tenants may need to create floating charges over the premises.

5.10 Registration

Some landlords may prefer to refer to assignments, underleases, mortgages, rather than "**disposition**".

5.7 Occupation by group companies

The Tenant may permit the whole or any part of the Premises to be occupied by any company which is, for the time being, a group company of the Tenant subject to:

a the Tenant giving to the Landlord written notice of such occupation and the name of the group company concerned within five (5) Business Days after the occupation begins;

b the Tenant and that group company remaining in the same relationship whilst such occupation lasts; and

c such occupation not creating a relationship of landlord and tenant between the Tenant and that group company.

5.8 Management of underlettings

The Tenant shall:

5.8.1 enforce the performance and observance of the covenants by the undertenant contained in any permitted underlease;

5.8.2 not, at any time, either expressly or by implication, waive any breach of them;

5.8.3 procure that the rent under any permitted underlease is reviewed in accordance with its terms but shall not agree any reviewed rent with the undertenant before the rent review between the Tenant and the Landlord is completed, except in circumstances where the undertenant or the rent review surveyor requires that the rent review is concluded before the rent review between the Tenant and the Landlord is concluded;

5.8.4 have due regard to the Landlord's representations as to the rent payable following a review under that underlease;

5.8.5 not vary the terms of any permitted underlease without the prior written consent of the Landlord (such consent not to be unreasonably withheld); and

5.8.6 procure that the rent payable under any permitted underlease is not commuted or made payable more than one quarter in advance, and shall not permit any reduction of that rent.

5.9 Charging

5.9.1 The Tenant may with the prior written consent of the Landlord (such consent not to be unreasonably withheld) charge the whole of the Premises and this Lease by way of fixed charge.

5.9.2 The Tenant may without the consent of the Landlord charge the whole of the Premises and this lease by way of floating charge created in the normal course of the Tenant's business to a Bank of England authorised financial institution.

5.10 Registrations

Within 15 Business Days of any disposition of or relating to the Premises or any part of it, the Tenant shall provide the Landlord or its solicitors with a certified copy of the document evidencing or effecting such disposition and, on each occasion, shall pay to the Landlord its reasonable registration fee.

6 Insurance

6.1 Landlord to insure

Clearly this is a clause that will require a number of definitions to cover for example, Reinstatement Costs, Insured Risks. Other definitions such as premises, service charge (where there is to be a service charge) and rents (and whether it includes service charge) will be of particular relevance.

This is, and should be, an absolute obligation by the landlord as virtually every landlord will insure its property. The reference to the London insurance market is intended to prevent the landlord from obtaining insurance other than from an established market as it is generally the most convenient established market for UK property to be insured in.

The Code of Practice for Commercial Leases states that where the landlord is responsible for property insurance, policy terms should be competitive. The model lease clauses require the landlord to insure with a reputable and substantial insurer and on terms and conditions which are usual. In deciding where to place, or renew its insurance, the landlord should have regard to the fact that policy terms should be competitive, but to require competitive terms in the lease may lead to undue emphasis upon cost rather than value. Similarly, recommendation 8 of the Code of Practice requires the tenant of an entire building to be given the opportunity to influence the choice of insurer. This may well be appropriate for landlords who do not have insurance block policy arrangements, but may not be appropriate for landlords with such arrangements.

6.1.1 a Insurance should be for the Reinstatement Cost which should be defined to include, also, ancillary costs, any upgrades needed by the relevant authorities in order to rebuild the premises, professional fees and VAT where the premises are not elected.

There should be little debate over the identity of the Insured Risks. But there may be an issue relating to terrorism and other location specific risks such as subsidence and flood. Most landlords should accept an obligation to insure against fire and explosion with no terrorist exclusion save to the extent that they cannot obtain insurance on reasonable terms and at a reasonable premium. This, however, raises important issues on reinstatement and rent suspension, referred to below, in the event of damage by an uninsured risk.

Insured risks will include the landlord's public liability but not that of the tenant for which the tenant will need to arrange separate cover.

b The definition of the “Premises” should either:

i include tenant’s fixtures and fittings, in which case they could be insured with a covenant:

- by the tenant to notify the landlord of their cost and not to insure them; and
- by the landlord, to pay over the insurance monies and by the tenant, to reinstate them; or

ii exclude tenant's fixtures and fittings, in which case the tenant should insure them (although in that case the tenant will need to agree to repair them).

Clearly, the type of premises will affect the decision about what to do.

6 Insurance

6.1 Landlord to insure

The Landlord shall insure with a reputable and substantial insurer (subject to such exclusions, excesses, limitations, terms and conditions as are usual in the London insurance market).

6.1.1 the Premises in their reinstatement cost against loss or damage by the Insured Risks;

6.1.2 The length of the "loss-of-rent" period will depend on the location and type of property involved. If there is a service charge, most landlords will insure the service charge and suspend it on damage by an insured risk.

Note on insurance commission

The lease is silent on insurance commissions. Landlords take the view that it is their buying power and individual situation which entitles them to a refund of the commission. Many large tenants either disagree or point out that if they insured they could secure the same sort of arrangement. If it is agreed that the landlord may keep the commission the lease should say so.

We believe a fair compromise is for landlords to keep the commission, but for the discount to be passed on, although we acknowledge that in some cases distinguishing between the two may be difficult.

6.2 Reinstatement

If there is damage or destruction, save to the extent the tenant (or any occupier) causes it, the landlord will use reasonable endeavours to obtain any necessary consents and subject to obtaining them, will reinstate the premises.

There is no detailed reference to the manner of the reinstatement or to the provision of collateral warranties. It is, still, statistically unlikely that an insured risk will materialise and destroy property and so we believe it is unnecessary in most cases to draft for it. The chances are that if the premises is destroyed the landlord and the tenant will come to a new agreement to deal with the situation.

6.3 Insurance vitiation and insurer's requirements

6.3.1 The tenant has the exclusive right to occupy the premises and therefore should accept an obligation to do nothing to compromise the insurance policy.

6.3.3 As long as the landlord is under an obligation to insure with a reputable and substantial insurer, it is felt on balance that it is reasonable to require the tenant to comply with all their requirements as those will be essential terms of the policy. Complying with recommendations is more objectionable to most tenants so there is no such covenant on the basis that if a recommendation becomes significant it will probably become a requirement.

6.1.2 [three] years loss of Rents;

6.1.3 Plant and Machinery (to the extent not covered by clause 6.1.1); and

6.1.4 property owner's liability and such other insurances as the Landlord may reasonably require, from time to time.

6.2 Reinstatement

If the Premises or any part of them are damaged or destroyed by any of the Insured Risks then:-

6.2.1 unless payment of the insurance moneys is refused wholly or partly as a result of any act or default of the Tenant or Occupier of any part of the Premises and the Tenant has not complied with clause 6.3.2; and

6.2.2 subject to the Landlord being able to obtain any necessary planning permission and other licences, approvals and consents which the Landlord shall use reasonable endeavours to obtain as soon as practicable; and

6.2.3 subject to any necessary labour and materials being and remaining available, which the Landlord shall use reasonable endeavours to procure as soon as practicable;

6.2.4 subject to payment to the Landlord of all excesses which are a term of the insurance policy;

the Landlord shall reinstate the Premises so damaged or destroyed substantially as they were before any such damage or destruction (but not so as to provide accommodation identical in layout if it would not be reasonably practical to do so).

6.3 Insurance vitiation and insurer's requirements

6.3.1 The Tenant shall not do, or omit to do, anything which could cause any insurance policy covering the Premises to become wholly or partly void or voidable or the insurance monies payable under such policy to be subject to any abatement or reduction.

6.3.2 If payment of any insurance money is refused as a result of some act or default of the tenant, or any Occupier of any part of the Premises the Tenant shall pay to the Landlord, within 10 Business Days of written demand, the sum so refused.

6.3.3 The Tenant shall, at all times, comply with all requirements of the insurers.

6.4 Rent suspension

Many tenants will take the view that as the landlord controls the loss-of-rent period, the rent should be suspended until reinstatement. Generally, this may be a fair position unless the tenant has the option to terminate the lease before the rent starts again where reinstatement has not been completed, hence the words in square brackets.

Note that, as long as the landlord may charge the tenant for insuring it, where there is to be a service charge, it should also be suspended until reinstatement.

6.5 Notification

6.5.1 This is a deliberately wide obligation as the tenant is entitled to exclusive occupation of the premises.

6.5.2 The Code of Practice for Commercial Leases requires that the terms of the insurance should be made known to the tenant and that any material change in the insurance should be notified to the tenant. Model lease clause 6.5.2 achieves this in relation to material changes. Disclosure of the initial terms should occur in pre-contract enquiries.

6.6 Noting of interest

a The Code of Practice for Commercial Leases requires that the Landlord should note the Tenant's interest on the insurance policy. Model lease clause 6.6 achieves this.

b The legal effect of noting the tenant's interest is unclear. But on a practical level, it puts the insurance company on notice that the tenant has an interest in the property which could be particularly relevant for subrogation.

c Because of the way in which this lease is drafted, it would be difficult for an insurer to argue successfully that it may exercise its rights of subrogation against the tenant. However, tenants will want the comfort of knowing that there is a specific contractual provision which prevents the insurer from exercising its rights of subrogation against the tenant and most commercial insurers are now happy to provide this. The possibility of an insurer being able to claim that it wishes to exercise its rights of subrogation in respect of an insurance claim, means that most tenants will continue to require landlords to be under some commitment to obtain a subrogation waiver.

d It is possible for the tenant to be joint insured with the landlord (even on a block policy) but in many cases it is commercially undesirable (for non disclosure reasons) and inappropriate as it is unlikely that the tenant will have a capital interest in the premises.

6.4 Rent Suspension

If the Premises or any part of them are damaged or destroyed by any of the Insured Risks so as to render them unfit for use and occupation or inaccessible then, unless payment of the insurance moneys is refused wholly or partly as a result of any act or default of the Tenant, or any Occupier of any part of the Premises, the Principal Rent or a fair proportion of it according to the nature and extent of the damage sustained, shall not be payable until the Premises or the part damaged or destroyed have again been rendered fit for use and occupation and accessible [or until the expiry of the period for which insurance of loss of rent was placed (whichever is the earlier)].

6.5 Notification

6.5.1 The Tenant shall give notice to the Landlord of anything which might affect any insurance policy relating to the Premises.

6.5.2 The Landlord shall notify the Tenant of any material change to the terms of any insurance policy relating to the Premises.

6.6 Noting of interest

The Landlord shall use reasonable endeavours to procure that the interest of the Tenant is noted on the insurance policy or policies either specifically or generically.

Note on termination

There is no specific drafting to deal with the issue of what happens if there is damage or destruction by an insured risk, because there are a number of ways of dealing with this issue and there is no industry wide consensus on the correct approach.

Many landlords prefer to deal with this by a simple mutual break clause. Either party can serve a notice to terminate after a specified period of time if reinstatement has not occurred. For straightforward office buildings and many other types of unit, three years is the appropriate benchmark, but the location and type of the premises is, again, very important. The period should be limited to the loss of rent period.

However, some landlords are reluctant to grant a one off mutual break and prefer to deal with the issue by way of an unlimited suspension of rent. This does, however, create uncertainty for the tenant going forward.

For complex buildings, a more sophisticated mechanism may be needed with, for example, notification at appropriate times as to whether the landlord is proposing to reinstate.

Note on uninsured risks

The risk foremost in people's minds here is terrorism. Traditionally the landlord's position in respect of the possibility of the terrorist risk becoming uninsurable has been that this contingent liability should rest with tenants under full repairing leases. Tenants object to assuming this risk generally and in particular with regard to repair and also because rent suspension (and any option to break) would not apply in these circumstances. Landlords are reluctant to become self-insurer in the event of Pool Re or any 'replacement' ceasing to provide cover for this risk and where the risk has not been assumed by general insurers.

The Code of Practice for Commercial Leases states that if the property is damaged by an uninsured risk, so as to prevent occupation, the tenant should be allowed to terminate the lease unless the landlord agrees to rebuild at its own cost. This is to apply both to insured and uninsured risks. Consultation on these clauses however has shown that there is no industry wide consensus on this issue, hence this commentary note and the lack of any model lease clauses drafting for it.

7 Costs

Landlords should only recover costs to the extent they are properly incurred. There are differing views on whether the level of costs should be limited to "reasonable" costs. In a "breach" situation it seems unfair for a landlord to be constrained as urgent action may cost more than "the cheapest quote". In a non-breach situation a limitation of "reasonableness" may be more appropriate.

8 Rent review

8.1.1 The reference to the rent reserved (rather than payable) immediately before the relevant rent review date is to counter claims that a rent which is payable but which is suspended because of destruction by an insured risk, leaves zero rent as the base level.

8.1.2 a The actual dates should be inserted so that there is no disagreement as to what they are.

7 Costs

Within ten (10) Business Days of written demand, the Tenant shall pay all costs and expenses properly incurred by the Landlord:

7.1 in the reasonable contemplation of, and the preparation and service of, a notice under section 146 of the Law of Property Act 1925 or any proceedings under section 146 or section 147 of that Act (whether or not any right of re-entry or forfeiture has been waived by the Landlord or a notice served under section 146 is complied with by the Tenant or the Tenant has been relieved under the provisions of that Act and even though forfeiture may be avoided otherwise than by relief granted by the Court);

7.2 in the preparation and service of all notices and schedules relating to any wants of repair, whether served during or within six months after the expiration of the term (but relating in all cases only to such wants of repair which accrued not later than the expiration or earlier determination of the Term);

7.3 in remedying any breach of covenant by the Tenant;

7.4 in respect of any application for consent under this Lease whether or not it is granted (except in cases where the Landlord is obliged not to withhold its consent unreasonably and the withholding of its consent is held by the Court to be unreasonable), or the application is withdrawn.

8 Rent review

8.1 In this clause the following expressions have the respective specified meanings:

8.1.1 **"Current Rent"** means the sum of the yearly rent first reserved by this lease immediately before the relevant Review Date;

8.1.2 **"Review Dates"** means:

a the day of and the day of ; and

b any date so stipulated by virtue of clause 8.6,

and Review Date and relevant Review Date are to be construed accordingly.

8.1.3 This is not headline rent wording. It simply removes the discount that would apply for the traditional fitting-out period. The reason for this is because the actual tenant will have had the opportunity to, and certainly should have, fitted-out by the first rent review so no discount should be applied because the willing tenant will need a period of time to fit-out. In return for this the disruption that would be suffered by the tenant having to move from the premises, and any goodwill that applies to their business, is disregarded preventing the landlord from arguing for a higher rent.

8.1.3 e For some types of building, with an extensive fit out, the assumed term may need to be 15 rather than 10 years.

8.1.3 f If there are any unusual provisions to remove from the hypothetical lease, then this is the place to do it.

8.1.3 g i Sometimes tenants object to the assumption that the landlord has complied with its obligations. However, on balance it seems fairest to assume that both the landlord and the tenant have complied with their covenants because if the landlord has failed to comply, the tenant will be able to calculate its loss by virtue of the increased rent. If on the other hand the landlord failed to comply with a covenant, but then remedied it shortly after review, the landlord would be penalised for the rest of the review period.

8.1.3 g iii This is consistent with the fitting-out assumption at the start of sub-clause 8.1.3 because this simply assumes that the premises are available to the willing tenant with all services and facilities having already been connected.

8.1.3 **"Review Rent"** means the yearly rent which might be expected to be payable following the expiry of any period at the beginning of the Term which might be negotiated in the open market for the purposes of fitting out, during which no rent or a concessionary rent is payable, if the Premises had been let as a whole on the relevant Review Date

a in the open market

b by a willing landlord to a willing tenant

c with vacant possession

d without premium

e for a term equal to the residue of the term or a term of 10 years if longer

f otherwise upon the provisions contained in this Lease, including the provisions for rent review at five yearly intervals, but save as to the amount of the rent first reserved

g on the assumptions that:-

i such provisions have been fully complied with;

ii the permitted use and the Premises comply with all statutory requirements and that the Tenant may lawfully implement and carry out the permitted use;

iii the Premises are in a state and condition ready to be fitted out by the willing tenant;

iv no work has been carried out to the Premises which has diminished their rental value;

v if the Premises have been destroyed or damaged, they have been fully restored;

h but disregarding any effect on rent of:

i the fact that the Tenant or any undertenant or other occupier or their respective predecessors in title have been or are in occupation of the Premises; and

ii any goodwill attached to the Premises by the carrying on in them of the business of the Tenant or any undertenant or other occupier or their respective predecessors in title; and

iii (without prejudice to sub-clause 8.1.3(g)(iv)) any works carried out to the Premises by the Tenant or any permitted undertenant in either case at its own expense in pursuance of a licence granted by the Landlord (where required by this lease) and otherwise than in pursuance of any obligation to the Landlord;

8.1.4 **"Review Surveyor"** means an independent chartered surveyor appointed pursuant to clause 8.3.1 and, if to be nominated by or on behalf of the President of the Royal Institution of Chartered Surveyors, the President shall be requested to nominate an independent chartered surveyor with recent substantial experience in rent reviews of office premises of a similar character and quality to those of the Premises.

8.2 The Principal Rent payable from each Review Date shall be the higher of:

8.2.1 the Current Rent (ignoring for this purpose any rent cesser pursuant to Clause 6.4); and

8.2.2 the Review Rent.

8.3 If the Landlord and the Tenant shall not have agreed the Review Rent by the relevant Review Date it shall (without prejudice to the ability of the Landlord and the Tenant to agree it at any time) be assessed as follows:

8.3.1 the Review Surveyor shall if his appointment is agreed by the Landlord and the Tenant be immediately appointed by the Landlord or the Tenant to assess the Review Rent or (in the absence of agreement at any time about his appointment) be nominated to assess the Review Rent by or on behalf of the President for the time being of The Royal Institution of Chartered Surveyors on the application of the Landlord or the Tenant;

Either

8.3.2 the Review Surveyor shall act as an arbitrator and the arbitration shall be conducted in accordance with the Arbitration Act 1996.

8.3.3 the Review Surveyor shall be required:

a to give written notice to the Landlord and the Tenant inviting each of them to submit to him within such time limits as he shall reasonably stipulate a proposal for the Review Rent supported by any or all of:

i a statement of reasons;

ii a professional rental valuation;

iii information in respect of any other matters they consider relevant; and (separately and later)

iv submissions in respect of each other's statement of reasons, valuation and other matters; and

b upon written request from the Landlord or the Tenant to assess the Review Rent with a hearing and not solely upon the written submissions and other matters referred to in clause 8.3.3(a).

Or

8.3.2 the Review Surveyor shall act as an independent expert and not as an arbitrator

8.3.3 the Review Surveyor shall be required to give written notice to the Landlord and the Tenant inviting each of them to submit to him within such time limits as he shall reasonably stipulate a proposal for the Review Rent supported by any or all of:

a a statement of reasons;

8.4 It is a matter of choice as to whether the rent review surveyor should act as an arbitrator or expert. This may depend on the level of rent and it may depend on the location and specialised nature, or otherwise, of the building, and also the resources of the parties to the lease. Either way the decision on expert or arbitrator should be made when the lease is granted.

8.5.2 It is appropriate for the landlord to receive interest, but at a non-penal rate, on the rent that the Landlord has not received due to the ongoing rent review. Hence it should be paid at Base Rate. Clearly interest will not be payable on the total shortfall because the landlord would have only received the shortfall as part of the rental payments on the normal quarter days.

8.7 Time should never be of the essence.

8.8 The drafting allows for the memorandum to record a nil increase.

b a professional rental valuation;

c information in respect of any other matters they consider relevant; and (separately and later)

d submissions in respect of each other's statement of reasons, valuation and other matters

but he shall not be bound thereby and shall make the assessment in accordance with his own judgement, including any determination concerning any party's liability for the costs being the costs of the expert and the parties) of the reference to him.

8.4 If the Review Surveyor refuses to act or is incapable of acting or dies the Landlord or the Tenant may apply to the President for the further appointment of another Review Surveyor if they cannot agree upon one.

8.5 If the Review Rent has not been agreed or assessed by the relevant Review Date the Tenant shall

8.5.1 continue to pay the Current Rent on account; and

8.5.2 pay the Landlord, within ten Business Days after the agreement or assessment of the Review Rent:

a the sum (if any) by which the Review Rent for the period commencing on the relevant Review Date and ending on the day before the [quarter day] following the date of payment exceeds the Current Rent payable on account for the same period;

b plus interest (calculated at [3%] per annum below the Interest Rate) for each instalment of rent due on and after the relevant Review Date:

i on the difference between what would have been paid on that [quarter day] had the Review Rent been agreed or assessed and the sum paid on account;

ii for the period from the date on which the instalment was due up to the date of payment of the shortfall.

8.6 If the right to review rent or to recover an increase in rent otherwise payable is restricted by law, when the restriction is released, the Landlord may at any time within six months after the date of release give to the Tenant not less than one month's notice requiring an additional rent review as at the next following quarter day which shall for the purposes of this Lease be a Review Date.

8.7 Time is not of the essence for any of the purposes of this clause.

8.8 As soon as possible after any increase in rent is agreed or determined pursuant to this clause 8, a memorandum recording the outcome of the review shall be signed on behalf of the Landlord and the Tenant respectively and exchanged between them.

9. Definitions

"Business Day" means any day from Monday to Friday (inclusive) other than Christmas Day, Good Friday and any statutory Bank Holiday in England;

"Conduits" means any transmission medium through which matter may pass including without limitation all wires pipes sewers drains cables ducts and other like media for the conducting of any services including without limitation water gas electricity drainage telephone or other utilities;

"Group Companies" means a company which is either the holding company of the Tenant or a wholly owned subsidiary of the Tenant or of the Tenant's holding company (as both expressions are defined in Section 736 Companies Act 1985);

"Insurance Cost" means the aggregate of the sum which the landlord reasonably incurs:

i in insuring against the Insured Risks in relation to the Premises in their reinstatement cost with such allowance as is appropriate in respect of related liabilities and expenses; and

ii in insuring the property owners' liability and the employer's liability of the Landlord in relation to the Premises; and

Note: This would be a service charge item if service charge were relevant.

iii in professional fees relating to insurance including fees for insurance variations carried out at reasonable intervals and fees and expenses payable to advisers in connection with effecting and maintaining insurance policies and claims;

"Insurance Rent" means for any relevant period the aggregate of:

i the Insurance Cost;

ii the sum which the Landlord properly incurs insuring against the Principal Rent for three years or such longer period as the Landlord reasonably considers appropriate;

"Insured Risks"	fire, lightning, explosion, aircraft and articles dropped from them, riot, civil commotion, malicious damage, storm, tempest, flood, earthquake, bursting or overflowing of water tanks, apparatus and pipes, impact by any vehicle and such other risks as the Landlord may reasonably consider necessary to insure;
"Interest Rate"	means a yearly rate three per cent above the base rate of [ ] Bank plc (or such other rate or rates by reference to which London clearing banks decide their own rates of interest);
"Occupiable Unit"	means [any part of the Premises comprising the whole or one or more complete floor levels] [the whole of the parts of the Premises which are shown hatched black on the Plans] excluding the structural and loading bearing parts of the premises [and the ground floor entrance lobby area shown cross hatched black on the Plans] [and all circulation areas and plant and equipment which are common to that part of the premises and the remainder of them];
"Occupier"	means the tenant any undertenant or other occupier and their respective employees contractors agents licensees or invitees;
"Plant and Machinery"	means any plant machinery and equipment belonging to the Landlord in or about the Premises including (without limitation) the Conduits and all lifts shafts escalators water treatment plant boilers heating ventilation and air conditioning systems generators;
"Principal Rent"	means the sum of [ ] pounds (£[ ]) as reviewed under clause 8;
"Rents"	means the Principal Rent and the Insurance Rent [include Service Rent in the case of a multi-let building] and "Rents" shall be construed accordingly;
"Term"	means the term of years granted by this Lease [including where applicable any extension of the term].

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