



RICS professional standards and guidance,  
England and Wales

## Code for leasing business premises

1st edition, February 2020



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RICS professional statement

1st edition, February 2020



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# Contents

<b>Acknowledgments</b> .....	<b>ii</b>
<b>RICS professional standards and guidance</b> .....	<b>1</b>
RICS professional statements .....	1
<b>Part 1 Introduction</b> .....	<b>3</b>
<b>Part 2 Mandatory requirements</b> .....	<b>4</b>
<b>1 Negotiations and heads of terms</b> .....	<b>4</b>
<b>Part 3 Lease negotiation best practice</b> .....	<b>6</b>
1 The premises .....	6
2 Length of term, renewal rights and break rights .....	6
3 Rent deposits and guarantees .....	6
4 Rent and rent review .....	7
5 Service charges, insurance costs and other outgoings .....	7
6 Assigning, subletting, charging and sharing .....	7
7 Repairs .....	8
8 Change of use, alterations and fit-out .....	8
9 Insurance and damage .....	9
10 Management and operational performance .....	9
11 Energy Performance Certificates (EPCs) .....	9
12 Landlord's title .....	10
Informatives .....	10
<b>Part 4 Appendices</b> .....	<b>11</b>
<b>Appendix A Template heads of terms and checklist</b> .....	<b>11</b>
A1 Template heads of terms .....	11
A2 Checklist .....	17
<b>Appendix B Guide for landlords and tenants</b> .....	<b>18</b>
B1 Negotiations and heads of terms .....	19
B2 The premises .....	19
B3 Length of term, renewal rights and break rights .....	20
B4 Rent deposits and guarantees .....	22
B5 Rent and rent review .....	23
B6 Service charges, insurance costs and other outgoings .....	25
B7 Assignment, subletting, charging and sharing .....	26
B8 Repairs .....	28
B9 Change of use, alterations and fit-out .....	29
B10 Insurance and damage .....	31

B11	Management and operational performance .....	32
B12	Energy Performance Certificates (EPCs) .....	33
B13	Landlord's title .....	33
B14	Ongoing matters and lease expiry .....	33
B15	Checklist of occupancy costs .....	35

# RICS professional standards and guidance

## RICS professional statements

### Definition and scope

RICS professional statements set out the requirements of practice for RICS members and for firms that are regulated by RICS. A professional statement is a professional or personal standard for the purposes of *RICS Rules of Conduct*.

### Mandatory vs good practice provisions

Sections within professional statements that use the word ‘must’ set mandatory professional, behavioural, competence and/or technical requirements, from which members must not depart.

Sections within professional statements that use the word ‘should’ constitute areas of good practice. RICS recognises that there may be exceptional circumstances in which it is appropriate for a member to depart from these provisions – in such situations RICS may require the member to justify their decisions and actions.

### Application of these provisions in legal or disciplinary proceedings

In regulatory or disciplinary proceedings, RICS will take into account relevant professional statements in deciding whether a member acted professionally, appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS professional requirements into account.

RICS recognises that there may be legislative requirements or regional, national or international standards that have precedence over an RICS professional statement.

## Document status defined

The following table shows the categories of RICS professional content and their definitions.

### Publications status

Type of document	Definition
<i>RICS Rules of Conduct for Members and RICS Rules of Conduct for Firms</i>	These Rules set out the standards of professional conduct and practice expected of members and firms registered for regulation by RICS.
International standard	High-level standard developed in collaboration with other relevant bodies.
RICS professional statement [PS]	Mandatory requirements for RICS members and RICS regulated firms.
RICS guidance note [GN]	A document that provides users with recommendations or an approach for accepted good practice as followed by competent and conscientious practitioners.
RICS code of practice [CoP]	A document developed in collaboration with other professional bodies and stakeholders that will have the status of a professional statement or guidance note.
RICS jurisdiction guide [JG]	This provides relevant local market information associated with an RICS international standard or RICS professional statement. This will include local legislation, associations and professional bodies as well as any other useful information that will help a user understand the local requirements connected with the standard or statement. This is not guidance or best practice material, but rather information to support adoption and implementation of the standard or statement locally.

# Part 1 Introduction

This RICS professional statement is the result of pan-industry discussion between representatives of landlords, tenants and other trade bodies.

The objective is to improve the quality and fairness of negotiations on lease terms and to promote the issue of comprehensive heads of terms that should make the legal drafting process more efficient. The statement and code do not prescribe the outcome, but seek to make it fair and balanced by identifying the terms that are usually important and encouraging both parties to obtain advice from property professionals. This enables negotiations to proceed properly so that each party can make an informed decision about whether to proceed on the terms that they negotiate.

The lease code and the accompanying template heads of terms and checklist should be used as a reminder for negotiations before the grant of a new lease and at the time of any lease renewal. They should assist RICS members in ensuring that landlords, tenants and guarantors who they are advising have a clear understanding of the commitments that they are entering into.

The professional statement applies to lettings of premises in England and Wales to tenants who will carry on trade, professional or other business activities in them, but it does not apply to agricultural lettings, to premises that will only be used for housing plant and equipment (such as electricity transformers or telecoms) or advertising media (such as hoardings), to premises that are intended to be wholly sublet by the tenant, or to premises being let for a period of not more than six months.

## RICS standards and regulatory requirements

You must comply with the **RICS Rules of Conduct for Firms**, the **RICS Rules of Conduct for Members** and the five RICS ethical principles, which say that you must:

- Act with integrity.
- Always provide a high standard of service.
- Act in a way that promotes trust in the profession.
- Treat others with respect.
- Take responsibility.

You must also comply with any related RICS professional statement – global and UK.

For ease of reference these include the current editions of:

- **RICS property measurement**, RICS professional statement.
- **UK commercial real estate agency**, RICS professional statement.
- **Conflicts of interest**, RICS professional statement.
- **Conflicts of interest – UK commercial property market investment agency**, RICS professional statement.
- **Service charges in commercial property**, RICS professional statement.

Further information can be found on the **RICS website**.

## Effective date

This professional statement is effective from 1 September 2020.



## Part 2 Mandatory requirements

### 1 Negotiations and heads of terms

**1.1** Negotiations over the lease **must** be approached in a constructive and collaborative manner.

**1.2** A party that is not represented by an RICS member or other property professional **must** be advised by the other party or its agents about the existence of this code and its supplemental guide and **must** be recommended to obtain professional advice.

**1.3** The agreement as to the terms of the lease on a vacant possession letting **must** be recorded in written heads of terms, stating that it is 'subject to contract' and summarising, as a minimum, the position on each of the following aspects:

- the identity and extent of the premises (and requiring the landlord to arrange the provision of a Land Registry-compliant plan if the lease is registerable)
- any special rights to be granted, such as parking or telecom/data access
- the length of term and whether the *Landlord and Tenant Act 1954* will apply or be excluded
- any options for renewal or break rights
- any requirements for a guarantor and/or rent deposit
- the amount of rent, frequency of payment and whether exclusive of business rates
- whether the landlord intends to charge VAT on the rent
- any rent-free period or other incentive
- any rent reviews including frequency and basis of review
- liability to pay service charge and/or insurance premiums
- rights to assign, sublet, charge or share the premises
- repairing obligations
- the initial permitted use and whether any changes of use will be allowed
- rights to make alterations and any particular reinstatement obligations
- any initial alterations or fit-out (if known) and
- any conditions of the letting, such as subject to surveys, board approvals or planning permission.

**1.4** At a lease renewal or extension, the heads of terms **must** comply with the above except for any terms that are stated to follow the tenant's existing lease subject to reasonable modernisation.

**1.5** Negotiations should aim to produce letting terms that achieve a fair balance between the parties having regard to their respective commercial interests.

The landlord, or its letting agent where relevant, will be responsible for ensuring that heads of terms complying with those provisions are in place before the initial draft lease is circulated.

The remaining provisions of the lease code indicate good practice. They include not only matters to be covered by the parties and their agents in the negotiations leading to the heads of terms but also matters to be considered by the parties and their legal advisers in the preparation and negotiation of the lease itself.

# Part 3 Lease negotiation best practice

## 1 The premises

**1.1** The identity and extent of the premises being let should be clearly defined, including which elements of the structure or fabric are included.

**1.2** A lease plan should be supplied by the landlord for attaching to the lease if that is necessary or desirable for identifying the premises and in all cases where the duration of the lease will exceed seven years, where it should comply with the requirements for registration of the lease at the Land Registry.

**1.3** The tenant should be granted all rights necessary for the intended use of the premises. This includes clear arrangements for any special rights such as parking or for electronic communication connections including, where necessary, the right to require the landlord to grant wayleaves for data cabling.

## 2 Length of term, renewal rights and break rights

**2.1** The length of term should be clearly specified and any date when it is intended to start.

**2.2** Where the landlord proposes that statutory rights of renewal under the *Landlord and Tenant Act 1954* are to be excluded, the tenant should be notified at the outset in order to obtain early professional advice as to the implications.

**2.3** Any break rights or options for renewal for either party should be clearly specified, including the dates (or range of dates) when a party can end the lease, the length of prior notice to be given and any pre-conditions for the break being effective.

**2.4** Unless the parties have agreed stricter conditions in the heads of terms, a tenant's break should be conditional only on the tenant paying all basic rent payable on any date before the break date, giving up occupation and leaving no subtenants or other occupiers. Disputes about the state of the premises, or what has been left behind or removed, should be settled later, as at normal lease expiry.

**2.5** Leases should require landlords to repay any rent, service charge or insurance paid by the tenant for any period after a break takes effect. Repayment of service charges may be deferred until the service charge accounts are finalised.

## 3 Rent deposits and guarantees

**3.1** Details of any rent deposit should include the amount (including where required any sum to cover VAT), the time it will be held, whether it will be security for only the rent or all the tenant's obligations under the lease and the circumstances in which the deposit will be returned to the tenant with any accrued interest.

**3.2** Rent deposit agreements should provide that landlords will hold rent deposit funds in bank accounts designated for holding only rent deposits and that any bank interest will accrue for the tenant.

**3.3** Details of any guarantee should include whether it will cover only the rent or all the tenant's obligations under the lease, the amount of any cap on the guarantor's liability and the circumstances (if any) in which the guarantee will be released.

**3.4** Landlords and managing agents should refer to the current edition of *Client money protection*, RICS professional statement for further information on the steps that should be taken when handling deposit funds.

## 4 Rent and rent review

**4.1** The initial rent, the frequency of payment and whether the landlord intends to charge VAT on the rent should all be clearly stated, together with details of any rent-free period or other incentive. The initial rent may be a fixed sum or expressed as a certain sum per square foot or square metre, in which case the method of measurement should be stated.

**4.2** Where the landlord proposes that rent is to be subject to review, the tenant should be notified of the proposed frequency and the method or formula of review at the outset in order to obtain early professional advice as to the implications.

**4.3** Rent review clauses should be clearly expressed. Definitions of market rent should not result in a 'headline rent' unless that has been expressly agreed by the parties, such as where that is agreed in return for a financial inducement. Provisions for indexed rent reviews should not contain obscure formulae designed to produce a greater increase than is proportionate to the increase in the index over the appropriate period or outside any agreed caps or collars.

**4.4** Leases should allow either party to start the rent review process and should not impose time limits intended to prevent a review or set a new rent through inaction by either party.

## 5 Service charges, insurance costs and other outgoings

**5.1** The landlord should indicate the range of main services, if any, and provide proper estimates of service charges and insurance payments. The landlord should also disclose the types of other outgoings (such as business rates) that the tenant will incur under the lease. Landlords should disclose known irregular events that would have a significant impact on the amount of future service charges.

**5.2** The parties should have regard to the current edition of **Service charges in commercial property**, RICS professional statement and, so far as practicable in the circumstances, service charge provisions in leases should be drafted in conformity with the core principles and mandatory provisions of that professional statement.

## 6 Assigning, subletting, charging and sharing

**6.1** Leases should allow tenants to assign the whole of the premises with the landlord's consent, which is not to be unreasonably withheld or delayed. Landlords may set out circumstances in which consent can be refused, such as where there are arrears of rents, service charges or insurance premiums that are not the subject of a legitimate dispute, or where the assignee has insufficient financial strength, but all such circumstances should be reasonable and appropriate.

**6.2** Leases should also provide that, if in each case the landlord reasonably requires, the assigning tenant is to provide an authorised guarantee agreement (AGA), any existing guarantor is to guarantee that the assigning tenant complies with the AGA, and/or the assignee is to procure a new guarantor and/or rent deposit.

**6.3** Leases should allow corporate tenants to share the premises with other companies while they are in the same corporate group and do not create a subletting. In appropriate cases, leases of retail units may allow the tenant to grant licences of areas for use by concessions, such as where retail brands can be given stalls in a large store.

**6.4** Leases should allow tenants to sublet the whole of the premises and may allow subleases of parts, if appropriate without security of tenure, and in each case with the landlord's consent, which is not to be unreasonably withheld or delayed and at rents not less than market rent. Subleases should be required to be on terms consistent with the tenant's own lease, except that subleases which are to be excluded from statutory renewal rights and subleases of only part of the premises may be granted on different terms where appropriate. Where the tenant operates through franchisees, the tenant may require the right to sublet the unit to a franchisee on particular terms.

**6.5** Leases should allow tenants to grant a bank or other reputable lending institution a charge over the lease, without the landlord's consent needing to be obtained unless the lease is to contain step-in rights for chargees if the landlord intends to take action where the tenant defaults.

**6.6** Paragraphs 6.1 to 6.5 do not prevent landlords from imposing stricter provisions where justified by the particular circumstances, such as lettings of short duration or on concessionary terms, or leases of retail units where the tenant's business or brand may affect the character or value of the centre or parade or the amount of any turnover rent. Any such provisions should be on reasonable terms, for example a provision for surrender of the lease instead of assigning should apply only if the landlord is willing to pay its market value.

## **7 Repairs**

**7.1** Leases should contain tenant's repairing obligations appropriate to the length of the term, the condition of the premises and the financial terms.

**7.2** If the tenant's repairing obligations are to be limited to the initial condition of the premises, a schedule of condition will normally be required and the parties should agree which party is responsible for the cost of obtaining it.

**7.3** Where the premises are or will be newly built, a tenant taking on direct or indirect responsibility for repairs should be given suitable protection against inherent construction defects for an appropriate period.

## **8 Change of use, alterations and fit-out**

**8.1** Leases should give landlords control over alterations and changes of use that are no more restrictive than are necessary to protect the value of the premises and any adjoining or neighbouring premises of the landlord, and this may differ between different types of property.

**8.2** Where the landlord intends to prohibit certain changes of use or the making of certain alterations, or to require a licence from the landlord before they can take place, the tenant should be notified at the outset in order to obtain early professional advice as to the implications. This does not apply to normal provisions against changing the use outside the existing use class under planning law.

**8.3** In a lease of an entire building, a landlord should not normally prohibit, or require its consent to be obtained for, internal non-structural alterations that do not adversely affect the character, value, structural stability, statutory compliance or energy efficiency performance of the building, but landlords will require the tenant to carry out such works properly and without causing damage or nuisance and to give written details to the landlord.

**8.4** In a lease of a unit in a multi-let building, a landlord may require that its consent for internal non-structural alterations is to be obtained and that such consent is not to be unreasonably withheld or delayed, and may prohibit any alterations that adversely affect the character, value, structural stability, statutory compliance or energy efficiency performance of the building or its building services.

**8.5** Except where the heads of terms state that there will be a reinstatement specification or an obligation on tenants to remove alterations, a lease should allow the tenant to leave alterations in place unless it is reasonable for the landlord to require their removal.

**8.6** The tenant should be notified at the earliest practicable time if the landlord intends to impose any obligations for an initial fit-out that might involve material cost or to restrict how the tenant can fit-out or use the premises. The heads of terms and the lease should set out any agreed minimum requirements and any capital contributions.

## 9 Insurance and damage

**9.1** Where the landlord will insure the property, leases should provide that the policy will be on normal market terms, that full terrorism cover will be provided if it is available at reasonable rates of premium, and that the landlord will insure with reputable insurers and provide details of the insurance to the tenant on reasonable request.

**9.2** Leases should state that rent suspension will apply if the premises or any landlord's areas or services serving them are damaged by an insured risk or, other than where due to an act or default of the tenant, an uninsured risk. If the lease limits the period in which rent is to be suspended, either party should be allowed to terminate the lease if reinstatement of significant damage is not completed within that period.

**9.3** Leases should state that if the whole or a substantial part of the premises or any landlord's areas or services serving them are so damaged by an uninsured risk as not to be capable of normal use by the tenant, either party should be allowed to terminate the lease unless the landlord agrees to rebuild at its own cost.

**9.4** Landlords should pass on to tenants the benefit of discounted premiums and should disclose to tenants whether the landlord benefits from insurance commissions.

## 10 Management and operational performance

**10.1** Leases of parts of multi-let buildings should contain provisions, appropriate to the characteristics of the building, that encourage cooperation between the parties to improve operational efficiencies in the building and to share available data.

**10.2** Consideration should be given to including in the lease other 'green' provisions, see examples in the Better Building Partnership's **Green Lease Toolkit**.

## **11 Energy Performance Certificates (EPCs)**

**11.1** Leases should state which party is responsible for obtaining any EPC that may be needed during the lease term.

**11.2** Landlords should be required to act reasonably if they reserve the right to choose which EPC assessor the tenant may use.

## **12 Landlord's title**

**12.1** Where the landlord's title (freehold or leasehold) is subject to enforceable covenants that prevent the landlord from complying with any provision of this Code, the landlord should act in conformity with those covenants but if challenged should explain the position to the tenant.

**12.2** The landlord should be responsible for obtaining any consent for the grant of the lease required from a superior landlord, mortgagee or other third party.

## **Informatives**

This code is supplemented by:

- template heads of terms and checklist (appendix A)
- supplemental guide for the parties, containing useful additional information (appendix B).

## Part 4 Appendices

# Appendix A Template heads of terms and checklist

This template should be read in conjunction with Parts 1 to 3 of this document.

This template heads of terms mirrors the sections of the lease code. These items are also listed in the checklist that follows the template heads of terms, which can be used as an alternative. The checklist is likely to be a useful tool when a landlord or their agent wishes to use their own form of heads of terms document, and the checklist should then be used to ensure that at the very least the minimum information required by the lease code is being captured.

The items marked with an asterisk (\*) must be included within the heads of terms in order to comply with paragraph 1.3 of this professional statement's mandatory requirements.

## A1 Template heads of terms

### 1 Initial information

#### 1.1 Type of lease

Head lease  sublease

#### 1.2 Landlord

Name of landlord: ..... Registered no.: .....

Registered office: .....

Correspondence address: .....

Contact name: .....

email: .....

Telephone: .....

Mobile: .....

#### 1.3 Tenant

Name of tenant: ..... Registered no.: .....

Registered office: .....

Correspondence address: .....

Contact name: .....

email: .....

Telephone: .....

Mobile: .....



**2 Premises and rights**

**2.1 Description of the premises \***

Detailed description, measured area and Land Registry-compliant plan attached if available:

.....  
.....

**2.2 Rights \***

Detailed description of any special rights being granted:

.....  
.....

**3 Length of term, renewal rights and break rights**

**3.1 Lease length and start date \***

..... years and ..... months commencing on .....

**3.2 Landlord and Tenant Act 1954 protection \***

Lease to benefit from the protection of the 1954 Act: Yes  No

**3.3 Options to renew**

(a) Any option to renew: Yes  No

(b) Notice period for exercising ..... months

(c) New term to be ..... years

(d) New rent to be .....

(e) Details of any other terms .....

**3.4 Break rights \***

(a) Any break rights: Yes  No

(b) Notice period for exercising ..... months

(c) Single break date on ..... or at any time after .....

(d) Break operable by: landlord  tenant  both

(e) Details of any break clause payments or pre-conditions: .....

.....

**4 Rent deposits and guarantees**

**4.1 Rent deposits \***

(a) Rent deposit required: Yes  No

(b) If yes, amount of rent deposit: £ .....

(c) Period of time the deposit will be held: .....

(d) Deposit held as security for: rent  all obligations

(e) Details of circumstances in which the deposit will be returned: .....

.....

## 4.2 Guarantors \*

- (a) Guarantor required: Yes  No
- (b) If yes, identity of guarantor .....
- (c) Guarantor providing security for: rent  all obligations
- (d) Guarantor's liability capped: Yes  No
- (e) If yes, amount of cap: £.....
- (f) Details of circumstances in which the guarantor will be released: .....
- .....

## 5 Rent and rent review

### 5.1 Rent \*

- (a) If fixed amount: £ ..... per annum exclusive of VAT
- (b) If based on area: £ ..... per [sq ft] [sq m] [GIA] [NIA] [IPMS1] [IPMS2] [IPMS3A] [IPMS3B], per annum exclusive of VAT
- (c) Payment dates: monthly  quarterly

### 5.2 VAT \*

Will VAT be charged on the rent and other lease payments: Yes  No

### 5.3 Rent-free period (and other incentives) \*

- (a) Rent-free period: Yes  No
- (b) If yes, length of rent-free period ..... months
- (c) Details of any other incentives: .....
- .....

### 5.4 Rent reviews \*

- (a) The lease includes rent review provisions: Yes  No
- (b) Basis of review: .....
- (c) Reviews every ..... years

## 6 Assigning, subletting, charging and sharing

### 6.1 Requirements before alienation can take place \*

	Prohibited	Consent not to be unreasonably withheld	Permitted without consent
Assignment of whole	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sublease whole	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sublease part	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sub-sublease	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Concession	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Group sharing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Charging	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**7 Services and service charge**

**7.1 Is a service charge payable? \***

- (a) Service charge payable: Yes  No
- (b) Proportion .....% and estimate or actual annual charge £ .....
- (c) Any special or unusual provisions: .....

**8 Repairs**

**8.1 Repairing responsibilities \***

- (a) Tenant repairs: whole building  interior only  interior, windows and doors
- (b) Landlord repairs structure and common parts

**8.2 Schedule of condition/hand back specification**

- (a) Schedule of condition to be completed: Yes  No
- (b) Responsibility for cost of preparing this: landlord  tenant
- (c) Tenant to hand back the property to a pre-stated specification: Yes  No

**9 Use and alterations**

**9.1 Permitted use \***

- (a) Permitted use: .....
- (b) Limitations on changing use: .....

**9.2 Landlord's initial works \***

- (a) Landlord to undertake works: Yes  No
- (b) If yes, brief description of works: .....
- (c) Long stop date by which works must be done: .....
- (d) Specification agreed: Yes  No
- (e) If no, to be provided by: landlord  tenant
- (f) Tenant to make contribution: Yes  No
- (g) If yes, amount or formula: .....

**9.3 Tenant's initial works \***

- (a) Tenant to undertake works: Yes  No
- (b) If yes, brief description of works: .....
- (c) Long stop date by which works must be done: .....
- (d) Specification agreed: Yes  No
- (e) If no, to be provided by: landlord  tenant
- (f) Landlord to make contribution: Yes  No

(g) If yes, amount or formula : .....

#### 9.4 Alterations \*

(a) Landlord's control over alterations:

	Prohibited	Consent not to be unreasonably withheld	Permitted without consent
External structural	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
External non-structural	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Internal structural	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Internal non-structural	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

(b) Tenant to hand back the property to a pre-stated specification: Yes  No

(c) Tenant to remove all alterations at lease end: Yes  No

(d) Tenant to remove alterations at lease end if the landlord reasonably requires: Yes  No

### 10 Insurance

#### 10.1 Liability for insurance costs

(a) Landlord to insure the property: Yes  No

(b) Premium to be recovered from tenant: Yes  No

(b) Terrorism to be an insured risk: Yes  No

(c) Mutual break clause for insured damage: Yes  No

(d) Mutual break clause for uninsured damage: Yes  No

### 11 Other issues

#### 11.1 Rates and utilities

(a) Responsibility for paying business rates: landlord  tenant

#### 11.2 Legal costs

(a) Each party to pay own legal costs including costs of approval for tenant's fit-out.

#### 11.3 Conditions

Completion of the lease conditional on:

(a) Board approvals

(b) Planning or other local authority consents

(c) References

(d) Superior landlord's consent

(e) Survey/schedule of condition

(f) Other  please specify: .....

**12 Contact details**

**12.1 Landlord's solicitor**

Name of solicitor's practice: .....

Address: .....

Contact name: .....

email: .....

Telephone:.....

Mobile: .....

**12.2 Tenant's solicitor**

Name of solicitor's practice: .....

Address: .....

Contact name: .....

email: .....

Telephone:.....

Mobile: .....

**12.3 Landlord's agent**

Name of agent's practice: .....

Address: .....

Contact name: .....

email: .....

Telephone:.....

Mobile: .....

**12.4 Tenant's agent**

Name of agent's practice: .....

Address: .....

Contact name: .....

email: .....

Telephone:.....

Mobile: .....

**No contract**

These heads of terms are subject to contract.

## A2 Checklist

As a minimum, written heads of terms should answer the following questions:

- What is the extent of the premises?
- Will a Land Registry-compliant plan be obtained by the landlord?
- Are any special rights being granted under the lease?
- What is the duration of the lease?
- When does the lease start?
- Will the lease be protected by the 1954 Act?
- Are there any options to renew or break rights?
- Will a rent deposit be required?
- Will a guarantor be required?
- How much is the annual rent?
- Is that rent exclusive of business rates?
- On which dates will the rent be payable?
- Will VAT be charged on the rent and other lease payments?
- Is there a rent-free period or any other incentives?
- What are the rent review dates and the basis for the reviews?
- Can the tenant assign, sublet, charge or share occupation?
- Will a service charge and/or insurance premiums be payable?
- Who has responsibility for repairing the premises?
- What is the initial permitted use of the premises and will any changes of use be allowed?
- What rights does the tenant have to make alterations to the premises?
- What initial works/fit out will the landlord be completing and when?
- What initial works/fit out will the tenant be completing and when?
- Is the letting subject to survey, board approval, planning or other conditions?

## Appendix B Guide for landlords and tenants

This guide is a supplemental to this professional statement and does not hold any mandatory status. It is an additional document to help occupiers and is for information only. RICS does not regulate against the content.

Before signing a lease, all parties (landlords, tenants and any guarantors) should work with professional advisors to ensure the lease matches their requirements and that they understand all the terms and conditions. Parties should consult property professionals even before agreeing heads of terms, since the early stage of negotiations is often the best time to resolve important issues.

A lease is a **binding contract** in law that sets out the terms and conditions of the tenancy between the parties and it defines their rights and obligations.

This guide, which is supplemental to the *Code for leasing business premises, England and Wales* (the **lease code**), describes some of the main factors that the parties will need to consider when agreeing a lease. Many of the topics included can be highly complex, and this guide will provide an outline of the key points. It is not a substitute for the depth of knowledge and experience that property professionals – surveyors and property lawyers, working in some instances with an accountant – can provide.

RICS members must comply with the mandatory requirements of this professional statement, including preparing heads of terms that comply with those paragraphs.

The lease code provides a framework within which prospective tenants can reasonably expect landlords to operate, but not all landlords comply with the lease code. A prospective tenant should not assume that a landlord complies with the lease code unless the landlord confirms that it is doing so, and in any event the lease code does not provide all the protection needed when leasing premises, so obtaining professional advice is essential.

Sometimes the landlord will itself be a tenant of the property and this may restrict the flexibility of terms the landlord can offer. Landlords should always state in advance if this is so and the tenant's property lawyer should check the terms of the landlord's lease.

If the tenant intends to buy an existing lease (take an assignment) from the current tenant, parts of this guide may help the tenant to interpret some of the terms of the existing lease but there may be many other issues covered in the lease that the tenant and its advisors should consider.

In this guide, the following terms have been used:

**Landlord:** the person or company who will grant the lease and who may be a freeholder or leaseholder.

**Tenant:** the person or company who will rent the property from the landlord.

**Guarantor:** a person or company who will guarantee to the landlord the obligations of the tenant.

**Heads of terms:** a summary of the agreement between the parties, used to instruct lawyers to produce the actual lease. Both the heads of terms and the lease should comply with the recommendations of the lease code but once the lease has been signed the heads of terms will fall away.

The structure of this guide is intended largely to mirror that of the lease code. It is organised into similar sections and within each section there are key issues that the parties should consider.

## **B1 Negotiations and heads of terms**

Parties should not assume that the initial or asking terms put forward by the other party are non-negotiable. In most cases parties are willing to discuss alternative terms. Bear in mind that a variation of one term may justify changing another. For example, a change in the duration of the term or the balance of the parties' repairing obligations may change the level of the market rent.

The lease code provides a checklist showing the most important pieces of information that should, as a minimum, be included in a set of heads of terms that must be prepared and agreed by the parties (paragraph 1.3 of the mandatory requirements), along with a template that should ideally be used to make the work of the solicitors more straightforward when drafting the actual lease (appendix A).

Each party needs certainty as to the identity of the other party or parties, especially where a party is a member of a group of companies that will nominate a particular group company to enter into the transaction.

The tenant should ascertain details of all the costs that will be incurred in occupying the property and how long they will be liable for these. Landlords should provide as much information as possible about these outgoings including how shared costs are apportioned between tenants. Where costs will fluctuate, such as service charges (see section B6) and insurance costs that will vary over the lifetime of the lease, the landlord should make this clear. If significant increases in any costs are expected, this should be disclosed to the tenant so that the tenant can understand the risks and can assess whether it can afford all the costs of leasing the property.

Tenants can be liable to the landlord throughout the length of the lease for paying rents, and other outgoings and repair costs. This liability will only end if the tenant passes (assigns) the lease on to someone else with the landlord's consent and even then the tenant may have to act as a guarantor to the landlord and meet those liabilities if the person to whom the lease is assigned defaults.

See Table 1 in section B15 for a checklist of the most likely occupancy costs.

## **B2 The premises**

The parties should agree exactly what the property is that is being let and for which the tenant will take responsibility. The heads of terms should clearly describe the extent of the property, preferably with the boundaries clearly marked on a plan, and the floor area noted. For a term of over seven years a scale plan meeting the Land Registry's requirements will be needed, as such leases must be registered at the Land Registry.



Landlords should be responsible for supplying the required plans and if the building is complicated it may be advisable for a solicitor to ask the Land Registry to approve the plans before they are used on a letting.

Tenants should ideally commission a surveyor to check the accuracy of lease plans on site and verify any floor area measurements. Where the landlord commissions an independent surveyor or reputable measurement specialist to measure the property, that person may be willing to give the tenant a 'duty of care' letter so that the tenant can rely on that person's measurements.

Leases should also contain detailed provisions for the following where they apply, and tenants should be made aware of them at an early stage:

- a** all means of access and escape
- b** any access or areas the tenant shares with other occupiers
- c** limitation of hours of use and
- d** restrictions in the type of use.

Landlords should also disclose to tenants:

- e** legal or planning limitations or
- f** obligations that come with the property.

Lettings of entire buildings usually make the tenant responsible for the whole of the property. However, where only part of a building is being let (such as a shop unit or an office suite) the lease should make it clear which elements of the structure and fabric of the building are being included in the lease and which are being retained by the landlord. Usually the tenant will have direct responsibility for repairing the parts included in the lease and usually the landlord will agree to repair the parts retained by the landlord. The allocation of repairing responsibilities will vary between different lettings. Items that particularly need clarity in their allocation between the landlord and the tenant on a letting of part of a building include:

- roofs and other structural parts
- lifts
- dividing walls
- windows and
- shopfronts.

The landlord may want the costs of repairing and maintaining its retained parts of a building to be borne between the tenants in the building through cost contributions, usually called 'service charges' or 'maintenance charges'. Further advice can be found in section B6.

## **B3 Length of term, renewal rights and break rights**

The parties should agree how long the duration (term) of the lease will be, whether any break options will exist for either party and what right, if any, to continue to occupy the property the tenant will have at the end of the lease.

Landlords traditionally prefer to grant leases of fairly long terms, often from 15 to 25 years. While such leases are still being granted in appropriate situations (especially in

the case of modern large or high value premises, those with high fit-out costs and those specially designed for the particular tenants), in recent years there has been a trend towards increased mobility of tenants in some business sectors, with leases of those types of property being granted for shorter terms.

A landlord owning a modern high value building will often want to grant leases in the building for quite long terms in order to secure a flow of rental income, except where the landlord's business model is to offer mobility to tenants as in the case of serviced offices or start-up accommodation. Where a building is of lower grade or is being let pending redevelopment, the landlord may actually want to grant, or be content to accept, shorter term lettings.

The tenant's requirements for the length of term will depend on the tenant's business plans. A new start-up venture may not be certain of its future and may not want to commit to the liabilities of renting premises for more than a limited time, with the ability to walk away at a future date if the business fails to thrive or to relocate if it outgrows the premises. Tenants running established businesses may be willing to commit for longer periods and may need a longer term in order to justify the cost of fitting-out or improving the premises.

Where either or both parties want the ability to end the lease earlier than the maximum term that they have in mind, an alternative to the grant of a short term might be the grant of a longer term lease with a provision (commonly called a break clause) giving the right for one party, or either party, to end the lease sooner by giving a notice either at any time or on or between specified dates. An advantage of this approach over a short term lease is that it avoids having to negotiate the renewal that would be needed if the tenant wanted to stay on after the short term expires, but a disadvantage for the tenant could be that the longer term attracts a larger amount of stamp duty land tax or land transaction tax, which is not refundable if the lease is ended early under the break clause. Legal advice should be obtained in order to weigh up the advantages and disadvantages.

A tenant's right to break should allow the tenant to walk away from the lease at a given time after informing the landlord in writing. This should normally be conditional only on the tenant having paid the main rent due under the lease and giving up occupation of the property, leaving behind no continuing subleases or occupation by others. The tenant may have other liabilities under the lease to fulfil, such as paying service charges or handing the property back in good condition, but failure to comply with these should not be used by landlords to invalidate the right to break.

In some cases the landlord may want to impose a term requiring the tenant to pay a specified sum to the landlord if the tenant exercises the break, particularly where the tenant is being given a capital contribution or extended rent-free period at the start of the lease. Occasionally the landlord may agree to a term that the landlord will give the tenant a capital contribution or rent-free period if the tenant refrains from exercising a break.

The tenant should ensure that the lease requires the landlord to repay any rent or other payments the tenant may have paid covering a period beyond the date at which the break takes effect. Service charge refunds may be deferred until the end of the accounting period in which the break occurs. Not all leases include the requirement for these refunds.

Where a lease is being granted by a landlord who is himself a leaseholder, both parties need to check whether the landlord's lease contains any break clauses and to take legal advice on the implications for each party. The law on these issues is complex.

In many cases the parties' desires for the length of term may coincide, but where they do not, each needs to consider its requirements carefully and may wish to take advice from property professionals as to what they can reasonably expect to be able to negotiate in the then current market conditions.

The parties should discuss whether the tenant is to be given security of tenure under the *Landlord and Tenant Act 1954*, so that at the end of the lease term the tenant, if still using the property to carry on business, will be entitled to claim a new lease, on terms that the parties agree or that a court will decide if they cannot. There are only limited grounds under the 1954 Act on which landlords can oppose a tenant's claim for renewal, such as where the landlord intends to redevelop the property or offers the tenant suitable alternative accommodation or where the tenant has been persistently late in paying rent. If the landlord opposes a renewal, the tenant can ask the court to rule on the validity of the landlord's ground or grounds of opposition. A landlord who succeeds in opposing a renewal may in some cases have to pay the tenant an amount of compensation calculated in accordance with the 1954 Act.

Landlords sometimes insist that the lease excludes security of tenure under the 1954 Act. This may be particularly justified where the lease is to be for a short term, such as in the case of serviced offices or start-up accommodation or where short leases are being granted on concessionary terms imposing weaker obligations on the tenant than would be expected if the tenant would remain in the property longer and the tenant ought not to have the right to renew and continue those concessionary terms. Short leases are also frequently granted for the temporary occupation of premises pending redevelopment or improvement where the landlord, having made its intentions clear to the tenant, does not want to give the tenant the right under the 1954 Act to challenge the landlord's opposition to renewal and delay the landlord obtaining possession while waiting for a court hearing. Whatever the landlord's explanation, the tenant should take professional advice before agreeing to give up the security of tenure that the 1954 Act normally provides.

## **B4 Rent deposits and guarantees**

Individuals considering taking a lease should take care in deciding whether to take the lease in their personal names or alternatively in the name of a limited company or other legal entity such as a limited liability partnership (LLP) and should obtain advice from an accountant as well as legal advice.

Landlords should check the financial ability of the proposed tenant to pay the rent and meet the other obligations under the lease. The landlord should specify any requirements for personal or company guarantees, rent deposits and/or other forms of security for the tenant's obligations. These arrangements should specify how much is to be deposited or whether any guarantee is unlimited or capped in amount, and when the deposit or other security will be returned or the guarantor released.

If the landlord demands a deposit, the tenant should take professional advice to understand the conditions under which it will be held and the basis on which it will be repaid. The parties should remember that it is the tenant's money that the landlord will

be holding as a protection against any failure by the tenant to comply with its obligations under the lease.

Interest on the deposit should normally accrue to the tenant and be at a normal rate for money on deposit. Deposits should be held in separate bank accounts not used for the landlord's own monies and the bank accounts should be designated as tenants' deposits to protect the funds in case the landlord becomes insolvent.

The tenant should normally be refunded any deposit when the tenant no longer has an interest in the property (such as when the lease ends or when the tenant assigns the lease with the landlord's consent) and sometimes a landlord will agree to refund a deposit earlier if the tenant satisfies specified conditions. The conditions will normally relate to financial parameters such as the tenant achieving a specified level of profitability over a particular period.

All these agreed arrangements should be recorded in a detailed rent deposit deed.

Where an individual or company is required to give the landlord a guarantee for the rent and other obligations under the lease, the parties need to agree whether the guarantee will be of an unlimited amount or capped at a specified sum. Guarantees usually make the guarantor liable not only for rent but also for the tenant's other obligations, including service charge payments and repairs, and often require the guarantor itself to take a replacement lease if the tenant becomes insolvent and the lease is ended under insolvency law. The deed of guarantee may contain provisions making the guarantor responsible even after the tenant has assigned the lease. This may be commercially justified in the circumstances but guarantors should obtain legal advice on the provisions of the guarantee. Guarantors should understand when and how the landlord may call on the guarantee and what the guarantee would cover. In some cases, landlords may be willing to agree that the guarantor will be released from these obligations either at a pre-agreed point in time or when a certain condition has been met. The parties should be clear on what is agreed in this respect.

## **B5 Rent and rent review**

The parties must agree what the rent for the property will be, and when and how the rent might change over the term of the lease. However, the rent cannot be viewed in isolation without considering the other terms of lease. The tenant should, for example, expect to pay more if the landlord takes responsibility for repairs than if the tenant were responsible for them.

The lease will state the payment terms for the rent. This will often be quarterly or monthly and usually in advance. Leases normally impose a charge of interest where rent is not paid on its due date.

The amount of the starting rent must be agreed before the lease is signed and can be a sum fixed in the negotiations or be calculable by reference to an agreed formula, such as a set amount of rent per square foot that will be multiplied by the floor area of the property once it has been measured. In the latter cases it may be appropriate to engage an independent specialist to carry out the measurement. The method of floor measurement should be agreed in advance, in accordance with the current edition of **RICS property measurement**, RICS professional statement. Different measurement processes suit different types of property and the parties should obtain professional advice on this.

The landlord may require the rent to be reviewed at set intervals. The rules by which the rent can be changed should be clear and understandable. The lease should not be written in such a way that the landlord can simply impose a rental increase and a formula or method to be used as the basis of the rent review must be agreed. Traditionally the most usual method has been to the open market rental value that the property has at the review date. That is still a common method, particularly under leases for terms over seven years. One alternative is indexation, where the rent increases in line with increases in a published index such as the Retail Prices Index (RPI) or Consumer Prices Index (CPI).

Reviews under leases with terms of ten years or more are usually at intervals of five years. Reviews under shorter term leases may be more frequent, such as every three years or even annually. Open market rent reviews can be costly to operate since the parties will normally need to engage surveyors to advise on and negotiate the amount of new rent, so that particular type of review should not apply at very frequent intervals. Indexed rents, or even fixed increases agreed before the lease is signed, are more appropriate for short term leases and do not normally involve incurring significant costs at each review.

Traditionally, commercial leases have imposed rent review provisions that are 'upwards only', which allow the rent to be increased but never decreased. If this applies the rent will not reduce even if there is a fall in the market rent or inflation index by the review date, and it is important for tenants to be aware that this can result in the rent continuing at a higher level than a new letting would achieve.

If there is an open market rent review provision, the formula for assessing the rent should require the disregarding of any added value from improvements the tenant makes (other than under an explicit obligation) or any value arising from the tenant's business. The tenant should also make sure that, if the parties cannot agree on what the open market rent is, either party refers this to an independent expert or arbitrator to settle.

The way in which a rent review clause operates can be complicated and may have the potential to both create disputes and significantly increase the amount that the tenant must pay. For these reasons, it is important that the tenant understands what is being proposed and obtains professional advice on the implications.

Sometimes retail or leisure premises are let on rents that are linked to the tenant's turnover at the property. This has been most prevalent in shopping centres, but is becoming less common in view of the surge in online retail purchasing. Where a turnover rent is being considered, the detailed formula for calculating the turnover and the rent needs careful consideration.

Sometimes a tenant can negotiate a rent-free period at the beginning of the lease. This is often intended to cover the period during which the tenant is fitting-out the property, so the tenant is not paying rent before it is able to trade. A surveyor advising the tenant on the lease negotiations should be able to advise about obtaining a rent-free period.

The tenant needs to know whether VAT will be charged on the rent and other lease payments. Many commercial properties are 'opted for VAT' by the landlord, with the result that the tenant must pay VAT in addition to the rents. A change of landlord during the term of the lease may result in a change in the VAT position. The tenant may need to take professional advice, perhaps from the tenant's accountant, on minimising the financial impact of this VAT.

## B6 Service charges, insurance costs and other outgoings

Service charges may be payable where the property being leased is only part of the landlord's building or estate. Landlords have traditionally liked to grant such leases on terms that make their tenants liable to repair the parts let to them and also liable to contribute (through cost contributions commonly called service charges) towards all the costs incurred by the landlord of repairing and insuring the structure and common parts of the building or the communal areas of the estate. These leases are often called 'full repairing and insuring' (FRI) leases.

Such full service charges are still commonly payable, although in some cases landlords letting premises for shorter terms or in poor or outmoded condition are willing to quote rents that are inclusive of service costs or to restrict the amount or scope of the service charge.

Where the lease is to reserve a service charge, the landlord should indicate:

- the types of services and works that the service charge will cover
- how the tenant's contribution will be calculated and
- the estimated initial yearly amount expected to be charged.

Often the service charge will be a proportion of the cost of maintaining and decorating the exterior and common parts of the building, and the cost of matters such as structural repairs and the repair or renewal of communal boilers, lifts and other plant and equipment serving the building. If major items of equipment need replacement, the tenant's contribution could be a large sum and tenants should get a chartered surveyor to look into the implications of the proposed service charge liability and the likelihood of high service charges becoming payable.

Sometimes (especially, but not limited to, cases of short-term lettings) the tenant can negotiate a maximum (cap) on the amount chargeable for all or some of the service costs. Some landlords are willing to cap just those service costs that are largely within their control but may refuse to cap items such as utility charges payable to energy suppliers. Where a cap is agreed, the landlord may fix the amount of cap for the first year and require it to be linked after that to an annual inflation index such as the RPI or CPI (mentioned in section B5).

Tenants should ask landlords whether the service charges are administered in compliance with the current edition of **Service charges in commercial property**, RICS professional statement. That professional statement sets out good practice on a number of service charge issues such as regular transparent accounting and ensuring that the landlord has to bear a fair share of the cost attributable to any unlet space in the estate or building.

The parties should agree who is to be responsible for arranging the insurance of the property and who is to be liable for the costs of the insurance. Where the premises being let are only part of a building, the landlord will invariably accept the obligation of insuring the building (but not tenants' contents or their business equipment) and will normally require the tenants to contribute their appropriate proportions of the insurance premiums and of any insurance valuation costs. If an entire building is being let on one lease, usually the landlord will still want to arrange the insurance and will expect the tenant to pay the whole of the insurance premiums and valuation costs.



Very occasionally a landlord might agree that the tenant of an entire building can be responsible for arranging the insurance, but this usually only happens where the tenant is a very large reputable company that can be relied upon to carry appropriate insurance cover or be able to meet the rebuilding cost out of its own funds.

Sometimes landlords receive commission payments for arranging buildings insurance. If this is the case, landlords should be willing to disclose this fact.

There are also other occupational costs that tenants need to consider before a lease is entered into, the most significant of these is likely to be business rates. Businesses are liable to pay the 'uniform business rate' (UBR), and it is usually the tenant who will be responsible. Occasionally, however, the landlord will pay the UBR and pass on the cost to the tenant, perhaps in the service charge. The lease should make clear where the responsibility lies and the prospective tenant should make enquiries with the local authority responsible for administering the UBR as to the likely charge for the property.

See Table 1 in section B15 for a checklist of the most likely occupancy costs.

The tenant may have to pay stamp duty land tax (in England) or land transaction tax (in Wales) on the lease, depending on the amount of rent and the duration of the lease term. Any such payment will be due within 14 days on completion of the lease or, if earlier, the tenant going into occupation, whether to start fit-out works or for trading. Online calculators are available but the tax calculation can be complicated and ideally advice from a solicitor should be sought. Different considerations apply if and when the lease is renewed.

## **B7 Assignment, subletting, charging and sharing**

The parties must agree what rights the tenant will have to assign the lease, to sublet or to share the property with another party.

There are two main possibilities if the tenant wants to vacate the premises before the lease expires:

- a** 'assign' (transfer) the lease to another party who will take over occupation of the property and responsibility for the lease obligations including paying the rent to the landlord or
- b** continue to hold the lease and pay the rent to the landlord but sublet the space to another party (a subtenant) from whom the tenant will in turn collect rent.

Leases may limit or impose conditions on the tenant's ability to follow either course and the tenant needs to understand these limitations fully before signing the lease. The clauses in the lease relating to assignment and subletting can have an important effect on the flexibility that the tenant may have in responding to changes in its business. The tenant should instruct a surveyor or solicitor to advise on the terms that the tenant is being asked to agree and the possible implications.

It is common for landlords to require a tenant who assigns a lease to guarantee to the landlord the performance of the lease obligations by the party to whom the lease is assigned. The assigning tenant's liability under this guarantee (called an authorised guarantee agreement (AGA)) will continue until the end of the lease or until the named assignee assigns the lease, with any necessary consent from the landlord, to another party. Tenants should try to negotiate a provision under which they do not have to

give an AGA if, for example, the new tenant is financially strong enough or pays an appropriate rent deposit and/or provides a suitable guarantor.

From the tenant's viewpoint the ideal position is that the only precondition for being allowed to assign the lease should be obtaining the landlord's consent that the landlord may not unreasonably withhold or delay, but landlords often require further provisions. A simple provision that the landlord's consent will not be unreasonably withheld may allow the landlord to reject a proposed assignee that a reasonable landlord might consider unsuitable, for example due to the proposed assignee's lack of sufficient financial strength to meet the tenant's obligations under the lease. However, landlords may want to impose stricter or more specific conditions, such as a requirement that any assignee must be of no less financial strength than the current tenant and/or guarantor. Such a requirement may be reasonable in certain circumstances, such as where the tenant's financial strength is an important factor in securing the initial letting. Tenants should particularly take advice on overly broad conditions such as those requiring the tenant to have fully complied with every one of its lease obligations, where even a trivial breach can lead to a refusal of consent. Generally tenants should try to avoid agreeing onerous and inappropriate conditions, as it could potentially mean that the landlord could prevent the tenant from assigning the lease even to a suitable assignee. The lease code states that landlords may set out circumstances in which consent can be refused, such as where there are arrears of rents, service charges or insurance premiums that are not the subject of a legitimate dispute, or where the assignee has insufficient financial strength, but all such specified circumstances must be reasonable and appropriate.

Some landlords are concerned that certain tenants in corporate groups may want to assign leases within the group to a company of weaker financial strength, which may result in a dilution of the value of the landlord's investment. The landlord may justifiably want to impose a covenant prohibiting the lease being assigned within the tenant's group to a company of weaker financial standing than the current tenant and any current guarantor.

If the lease allows subletting, it may limit the amount of space that the tenant can sublet or sometimes will only allow the tenant to sublet the whole of the premises and not just part. Sublettings of part will normally be inappropriate if the size and configuration of the premises make them unsuited for use as two or more separate units. The lease may also lay down a minimum rent for the tenant to charge on a subletting. Tenants should avoid provisions that prohibit the tenant from subletting at a rent below the level of rent that they are paying, in case the market rent has fallen by the time they wish to sublet.

It is usual for landlords to insist that subleases of only part of the premises, if permitted, must be granted outside the protection of the *Landlord and Tenant Act 1954* and sometimes they impose that requirement even in the case of a sublease of the whole of the premises. Leases often require subleases to be on similar terms to the lease, although the lease code acknowledges that it may be appropriate in some cases for subleases that are outside the 1954 Act's protection to be allowed to be granted on different terms.

Where, as is very common, the landlord's written consent is required before the tenant can sublet, the lease should provide that the consent of the landlord, and of any superior landlord, is not to be unreasonably withheld so that they cannot refuse consent without good reason.



Where the tenant is a company that carries on business through franchising to individual operators, typically in the retail and food sectors, the tenant may require the right to sublet the unit to a franchisee on particular terms.

Leases frequently allow corporate tenants to share the premises with other companies while they are in the same corporate group, provided that the arrangement does not create a tenancy. In appropriate cases, leases may allow the tenant to grant licences of areas for use by concessions, such as where retail brands can be given stalls in a large store, but again the lease will normally impose a limitation that the arrangement is not to create a tenancy.

Leases often also restrict the ability of the tenant to charge (mortgage) the lease as security against a loan. Short and medium term leases are often not considered suitable to be the main security for a loan but some lenders to a business may require security over all the assets of the business including leases of the business's premises. Tenants should ensure that their leases allow them to charge the leases to bona fide lenders.

## **B8 Repairs**

Leases of whole buildings have traditionally made the tenant responsible for repairing and maintaining the entire building, while leases of just part of a building have usually made the tenant directly responsible for repairing the internal non-structural parts of the area let to the tenant (and sometimes windows and shopfronts) with the tenant contributing to communal repairs through a service charge (see section B6).

In addition to repairs, tenants will usually be made responsible for the regular redecoration of the premises. Where the lease comprises part of a building, such as an office suite or shop unit within a building, the tenant will normally be responsible for redecorating the interior of the premises and in appropriate cases also certain external parts such as windows and shop fronts.

Unless the tenant and the landlord specifically agree otherwise, the fact that the premises were in a poor condition when the tenant took them on is largely irrelevant – the tenant may still have to put them into good condition. Under common law, a requirement in a lease to 'repair' a property may by legal implication include an obligation to undertake any repairs necessary at the time the tenant signs the lease (sometimes called a 'put and keep' obligation), so tenants should obtain professional advice from surveyors and solicitors on the proposed repairing obligations under the lease, and surveyors should be commissioned to check the condition of the property.

When leases are being granted for short terms, tenants may be able to negotiate limits to their repairing obligations, especially where the premises are not in the best of repair and condition. A common limitation is that the tenant need not repair existing disrepair, sometimes expressed as not having to improve the condition of the property or hand it back in any better condition than that in which it was let. In this case, after the tenant has had the premises surveyed, the parties should record the condition of the property in a 'schedule of condition' to be referred to in the lease and attached to it or kept with it. This schedule may consist of a written description of the state of the property or a set of photographs, or both. It is in the interests of both landlords and tenants to have this level of clarity as to the extent of the tenant's repairing obligations.

A formal photographic schedule of condition can be prepared by a firm of surveyors, although some tenants may choose to undertake this task themselves, in which case

they should take plenty of photographs of all parts of the property on or before taking the lease, have the photographs dated and agreed by the landlord and keep a set with the lease documents.

It is recommended that any required schedule of condition should be prepared in sufficient time before the grant of the lease to allow the parties to check and agree it as being an accurate record.

The fact that, under such arrangements, certain items may be excluded from the tenant's repairing obligation does not automatically mean that the landlord has to repair them. If neither party is liable to repair certain defects, they may be left unrectified. If the premises cannot sensibly be used while such disrepair exists (such as a leaking roof), the tenant should try to impose an obligation on the landlord to repair those particular defects itself within an agreed timescale.

Tenants taking over an existing lease (taking an assignment) should bear in mind that the condition of the property when the tenant takes it over may be poorer than it was at the beginning of the lease. Depending on the wording in the lease, the tenant may be required to put the property back into its original condition. Again, in such cases tenants should seek professional advice on the possible repairs that the tenant may have to carry out.

If the tenant is taking over premises that have been previously occupied, the tenant should also find out which fixtures and fittings will be removed by the previous occupier.

Where a property is newly or recently built or refurbished, the tenant should be given some protection in respect of construction defects that emerge within a specified initial period. This would usually be the period in which such defects, if they exist, are most likely to become apparent. There are a number of different ways in which such protection may be given, depending on the circumstances, and the parties should obtain professional advice as to what may be appropriate in individual cases. This might include warranties or defects insurance.

Many leases contain a provision for the tenant to 'yield up' the premises at the end of the term in the state and condition required by the tenant's repair obligations, although that obligation may exist even if not expressly stated.

## **B9 Change of use, alterations and fit-out**

Leases usually restrict the type of business that can be carried on at the property. The degree of control that a landlord will want to exercise should depend upon the circumstances. For example, a landlord owning a shopping centre or parade of shops will often have a policy of achieving a certain mix of businesses and brands and will want tighter control than a landlord who owns a single retail unit. A landlord owning a property having a valuable established use under planning law may not want to allow the tenant to change the use so that the valuable planning rights are lost. In the case of a letting of an office suite in a high-class office building, the landlord may allow most types of office use but may not want to allow tenants to conduct office business that attracts a flow of public off the street, such as an employment agency.

Tenants should ensure that the use to be permitted by the lease will cover not only the tenant's existing business but also any expected diversification and an appropriate business that a future assignee or subtenant may want to conduct in the property. That

may be achieved by ensuring that the permitted use is by reference to a type of use rather than a specific trade or business.

Sometimes a lease will require the tenant's use to fall within a specified category of use under planning law. This is usually worded by reference to the *Town and Country Planning Act (Use Classes) Order 1987*, and the tenant should obtain professional advice to check that the definition of that use class matches the tenant's required range of uses.

Landlords should disclose to the tenant any particular restrictions on use imposed by covenants on the landlord's title or by specific planning permissions or planning agreements and state how the property has been used in the recent past. The lease will usually put the responsibility on the tenant to check that the proposed use complies with covenants and planning law, so tenants should take advice from their surveyors and solicitors on these matters. The use of the property will inevitably be subject to some restrictions imposed generally under planning legislation; for example, the tenant will not normally be able to use a high street shop as an office. Solicitors' local searches will usually reveal any local council directions that further restrict changes of use or development.

Tenants should also check that there are no particular planning or regulatory restrictions on the property that may affect its ability to run the business, such as a limitation on working hours or noise emissions. If the tenant needs to obtain planning permission for its proposed use, it should allow at least eight to ten weeks (sometimes longer) for the application to be processed.

Altering services such as electricity and gas can be expensive, so the tenant should always ensure that the property has adequate mains services and that they are in good order, as well as checking that the premises comply with health and safety requirements, including fire regulations and access requirements under disability legislation.

Leases normally require tenants to comply with all legislation and at their own cost. Tenants should be aware of the issuing of new laws and regulations that could affect their occupation and business and take professional advice on the implications. The provision to comply with all legislation should not be taken lightly and the tenant should ensure that the property complies with existing regulations (for example, with the *Equality Act 2010*, the *Town and Country Planning Acts*, the *Health and Safety Acts* or the *Environmental Protection Acts*) when the tenant takes the lease. A chartered surveyor and other professional advisors can assist the tenant with this.

Landlords often impose restrictions on tenant's signage and on alterations to the property. Where the landlord wants a right to approve the size and appearance of signage, tenants should ask for a provision that the landlord's approval will not be unreasonably withheld or delayed. In the case of alterations, landlords should be able to prevent the property being devalued or endangered by works carried out by the tenant but should not require such a degree of control that they can prevent the tenant making reasonable alterations that do not carry those risks.

Where just part of a building is being let, it is common to prohibit the tenant from making structural and external alterations (apart from altering shop fronts, if appropriate) but to allow internal non-structural alterations with some degree of control by the landlord. Some landlords allow tenants freedom to make internal non-structural alterations and

just require the tenant to notify the landlord of the details, while other landlords require the tenant to obtain the landlord's approval first, which will not be unreasonably withheld. The lease code states that the former should apply in a lease of an entire building; the latter may be more appropriate to lettings of units in multi-let buildings. In some cases landlords give tenants freedom to install and remove lightweight partitions. The degree of control exercised by the landlord should be appropriate to the property; the tenant of a whole industrial building may be given greater freedom to carry out alterations than the tenant of a unit in a shopping centre. The landlord may want more control over a tenant's alterations if the building is of particularly high value or has a special character, such as a listed building subject to strict planning controls.

Landlords will want to control works and alterations that impact the energy performance of the property in relation to the *Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015*. In such instances a landlord may request the tenant demonstrates the impact the alterations will have on the energy performance of the property before approving, or undertake their own assessment.

If particular alterations will be essential to enable the tenant to carry on business at the property, the tenant should make sure, before entering into the lease, that it will be permitted to carry them out.

A tenant who wishes to make alterations that need the landlord's consent must expect the landlord to seek the right to require the tenant to remove the alterations and restore the premises at the end of the lease, particularly where the landlord thinks that the alterations may detract from the value of the building. Such an obligation to reinstate, if it has to be fulfilled, may be costly for the tenant. In some cases, when obtaining consent to make alterations, tenants may be able to persuade landlords that particular alterations do not need removing at the end of the lease and if so that arrangement should be recorded in the landlord's consent (or 'licence') for the alterations. Where the lease contains a provision for the tenant to 'yield up' the premises at the end of the term (see section B8) provisions about the reinstatement of alterations may be contained there instead of in the main clause regarding alterations. The lease code states that where the parties have not specifically agreed about reinstatement when consent for the alterations is obtained, the leases should allow the landlord to require reinstatement only where it is reasonable to do so. Where reinstatement may be required, the parties should consider inserting provisions for identifying the extent of the required reinstatement works at a suitable time.

Tenants taking over an existing lease (taking an assignment) should bear in mind that a previous occupier may have made alterations to the property and there may be an obligation in the lease or in a consent to alterations enabling the landlord to require the premises be reinstated to their unaltered condition at the end of the lease. In such cases tenants should seek professional advice on the possible reinstatement works that the tenant may have to carry out.

## **B10 Insurance and damage**

In most cases the building will be insured by the landlord (see section B6).

Tenants should request details of the landlord's insurance policy before signing the lease and satisfy themselves that the sum insured is sufficient to rebuild the building, that the insurance is on terms giving value for money and that the insurance company is

reputable. Surveyors can advise tenants on such matters. The tenant might also ask the landlord whether there is any intention to change the insurance.

The lease should provide for proceeds from the landlord's insurance policy (other than the cover for loss of rent) to be used to repair or rebuild the property in the event of it being damaged by a risk covered by this insurance, unless the insurance is invalidated by anything the tenant does, in which case the tenant may be liable for the reinstatement cost. Many modern insurance policies designed for commercial buildings that are let contain provisions stating that the insurance will not be invalidated by acts of tenants and that tenants cannot be sued (under a rule of law called 'subrogation') for causing fire or other damage, unless the tenant acted unlawfully or maliciously. Tenants should check whether the insurance policy contains those provisions.

The landlord's insurance policy should give cover for loss of rent from the building for a period sufficient to allow the building to be rebuilt if it is seriously damaged. That will usually be at least three years and may be five or six years for a large or complex building. The lease should then provide for the tenant's obligation to pay rent (and service charges if relevant) to be suspended or appropriately reduced where all or part of the tenant's premises cannot be used due to insured damage occurring to the premises or to some other part of the building. Most leases limit the period of rent suspension to the period for which loss of rent is insured, in which case the lease should give the tenant the right to terminate the lease if rent would resume being payable at a time when the premises have not yet been restored. Some leases give landlords the choice to terminate the lease if the property is seriously damaged, rather than having to rebuild.

Most tenants will also want to arrange their own insurance of their contents and fittings, and against disruption to their business and loss of profits should the property become unusable following a fire or other peril. A buildings insurance policy taken out by the landlord will not normally cover the tenants' business losses.

Tenants should inform the landlord and their own insurer if they intend to alter the property or change the way it is used, about the storage of any hazardous substances or if the property is to be left vacant and unattended at any time. The landlord should be asked to ensure that such activities are covered by the building's insurance policy and to inform the tenant of any changes in the insurance policy terms.

Leases sometimes contain provisions that apply if a peril that was previously insurable becomes incapable of being insured at sensible rates of premium, commonly called an uninsured risk. In the past this happened in relation to terrorist damage (which at the moment can normally be covered by insurance due to a government re-insurance scheme). Currently there are concerns about the continuing availability of insurance against flood damage for buildings in areas of high risk of flooding. Leases that address this issue usually provide that:

- neither party has to repair uninsured damage of that type
- rent suspension or reduction will apply if it occurs and
- if the damage is substantial the landlord has a period of time – usually between six months and a year – to notify the tenant that the landlord has chosen to remedy the damage at the landlord's own cost, with the lease ending if the landlord decides not to do so.



Not all leases contain provisions about uninsured damage but it is sensible to have these provisions in leases of properties in high flood risk areas or areas such as major city centres where there may at some time be a real risk of terrorist activity.

## **B11 Management and operational performance**

When leasing space, it is important tenants clearly understand the delegation of management responsibilities between the landlord and the occupier. This can include facilities and building management, cleaning, security, utilities, landscaping, waste management, etc.

Parties are encouraged to include in leases provisions relating to sustainability and the environment that urge cooperation throughout the lease term between the landlord and the tenant to ensure that the property is used as sustainably as possible. These are sometimes called ‘green clauses’ and are usually aimed at facilitating the reaching of understandings between the parties from time to time on voluntary measures but do not compel either party to spend significant sums on environmental improvements or processes.

## **B12 Energy Performance Certificates (EPCs)**

Energy Performance Certificates (EPCs) are used to assess the energy efficiency of a building. These are required by law in the course of a sale or letting and are developing an increased level of importance due to the introduction of Minimum Energy Efficiency Standards in April 2018. These prohibit the letting of properties with EPC ratings lower than E.

A tenant who wishes to assign a lease or sublet the premises will normally have to produce an EPC to the assignee or subtenant. If no valid EPC exists at that time, the tenant may have to commission the preparation of one. Landlords sometimes want to take control of that process and insert provisions in their leases for the landlord to obtain the EPC at the tenant’s cost or to nominate the energy efficiency assessor who will prepare the EPC for the tenant. The lease code states that landlords should be required to act reasonably when exercising such rights.

## **B13 Landlord’s title**

The landlord may own the freehold of the building or may hold only a lease of it. In either case the landlord may be bound by enforceable covenants that prevent the landlord from complying with particular provisions of the lease code. In such situations the landlord should act in conformity with those covenants but if asked should explain the position to the tenant.

The landlord may be bound to obtain the consent of a third party, for example a superior landlord or mortgagee, before the landlord can grant the lease. The landlord should be responsible for obtaining any such consent.

## **B14 Ongoing matters and lease expiry**

The lease code governs the negotiations leading to the grant of the lease. Once the lease is entered into, it forms a legal contract between the landlord and the tenant. Any breach of their obligations can cause loss to the other party and have serious consequences, so each party should have a clear understanding of its rights and

obligations under the lease. The laws relating to landlord and tenant relationships are complex and many clauses in leases are affected by statutory provisions that are not even mentioned in the clauses, so landlords and tenants should seek professional advice when needing to check their obligations and rights.

### **Rent reviews**

Each party should obtain professional advice in respect of rent reviews that arise under the lease (see section B5). In the case of reviews to open market rent levels, the expertise and market knowledge of chartered surveyors is vital in agreeing a rent, because they will know the level of rents that have been achieved for similar recent lettings in the area, can advise on what figure is reasonable and can conduct the negotiations.

### **Rent deposits**

Landlords should ensure that they comply with their obligations under rent deposit deeds (see section B4), particularly regarding how funds are held and interest credited. Tenants should ask landlords for annual statements to confirm that the money is still in the account and that all interest earned has been paid to the tenant or accrued within the account. If the landlord sells the building, the rent deposit should normally be paid over to the new landlord for holding on the same basis, and the rent deposit deed may contain provisions about this with which the old and new landlord must comply.

### **Breaches**

Landlords and tenants should try to stay on good terms. Landlords should allow tenants enough opportunity to fix any problems they cause (without loss to the landlord) before any legal action is taken. If a tenant fails to remedy a breach of the lease, the landlord may have a range of remedies such as suing for arrears or damages, sending in enforcement agents to seize goods to the value of the breach, or even taking back the property ('forfeiture'). Tenants should note that they can still be sued for arrears of rent or for damage caused (including failing to carry out repairs) even if the landlord exercises the right of forfeiture. Landlords should note that if they forfeit the lease they resume responsibility for the property and its outgoings.

### **Forfeiture**

Even though most leases say that the landlord can forfeit the lease (called 're-entry' in many leases) for arrears of rent or breach of covenant by the landlord simply re-entering the property, legislation requires landlords to give formal notice of a breach other than for rent arrears and to allow a reasonable time for the tenant to remedy the breach before the landlord can forfeit the lease by re-entry for that breach of covenant. Legislation gives the tenant the right to apply to the court to give the tenant more time to remedy breaches or to pay arrears (called 'relief from forfeiture'). Parties should each seek professional advice if circumstances arise where forfeiture may be contemplated or threatened.

### **Consent for alterations**

Where a tenant who wishes to make alterations needs the landlord's consent (see section B9) and applies to the landlord for that consent, the landlord should respond to the application for consent within a reasonable time. If the landlord receives a proposal for alterations that includes a specification and plan, and the landlord fails to object to

the proposal within three months, the *Landlord and Tenant Act 1927* may make the landlord lose the right to object to the alterations.

Information on the process that can be followed for the approval of alterations can be found in the **Alterations Protocol**.

### **Consent for assignment or subletting**

A tenant who wishes to apply for the landlord's consent for an assignment or subletting (see section B7) can find information on the process that can be followed in the **Alienation Protocol**. A landlord who receives such an application should respond to the application within a reasonable time and should comply with any obligation under the lease that the consent is not to be unreasonably withheld, since a landlord who acts unreasonably in this respect may be liable to compensate the tenant under the provisions of the *Landlord and Tenant Act 1988*.

### **Dilapidations**

The term 'dilapidations' is normally used to cover defects and disrepair that the tenant will be required to deal with or pay to have remedied when the tenant vacates the premises at the end of the lease, due to the tenant's failure to rectify these matters during the term under its repairing obligations (see section B8).

The landlord may give the tenant a 'schedule of dilapidations' towards the end of the term, describing the items of disrepair and often specifying the work that the tenant needs to carry out. The tenant can challenge the correctness of the schedule of dilapidations and each party should consult a chartered surveyor experienced in dealing with dilapidations since legal and technical issues can arise. Landlords cannot generally make dilapidations claims earlier than three years before the end of the lease. If the tenant has a statutory or contractual right to a new lease, the landlord will normally not make a dilapidations claim unless the tenant declines to renew the lease. For full details on the timings to expect and the process that should be followed see the **Dilapidations Protocol**.

### **Termination and renewal**

Where the tenant has the protection of the *Landlord and Tenant Act 1954*, both parties should take professional advice not later than a year before the term is due to end, so that they understand their respective rights under the 1954 Act and the choices available to them. The 1954 Act is complex and a party receiving a notice under the Act from the other party should immediately take professional advice.



## B15 Checklist of occupancy costs

Cost item	Who pays?	What is the occupier's cost each year?	If this cost is not fixed, what does it depend on?	How much?	How often?
Rent					
VAT					
Rates					
Service charges					
Insurance					
Utilities					
Repairs/dilapidations					
Fitting-out/alterations					
Any additional costs					
Total each year					
Total lease cost					

**Table 1: Checklist of most likely occupancy costs**

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We are RICS. Everything we do is designed to effect positive change in the built and natural environments. Through our respected global standards, leading professional progression and our trusted data and insight, we promote and enforce the highest professional standards in the development and management of land, real estate, construction and infrastructure. Our work with others provides a foundation for confident markets, pioneers better places to live and work and is a force for positive social impact.

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