

## Model Commercial Lease

### June 2021 Updates

#### Introduction

We have published version 1.5 of the Model Commercial Lease (MCL) and made some minor updates to the related suite of documents. This note highlights the changes that we have made.

We are grateful to everyone who has taken the time to comment on the MCL. It has not always been possible to acknowledge contributions individually, but they have all been considered.

Production of version 1.5 of the MCL has been delayed both by the Coronavirus pandemic and also by the continuing uncertainty about the changes to the Town and Country (Use Classes) Order 1987 that came into force on 1 September 2020. Rights: Community Action is seeking leave to appeal against the High Court decision that upheld the changes made to the Use Classes Order. We understand that the Court of Appeal will hear the application and, if leave is given, immediately hear the appeal against the High Court judgement. It may, therefore, be some time before we know the outcome of the appeal. The effect of this on the terms of the leases is set out below.

A number of people have asked whether pandemic clauses should be included in the MCL. We considered this and decided not to include them. The terms of the MCL are intended to reflect market practice and, at present, there is no consensus on how the long-term effects of the pandemic should be reflected in the drafting of leases. We will keep the position under review.

#### Changes to the terms of the lease

- Any rights that benefit the landlord's title will benefit the tenant unless the lease says otherwise. Following guidance from the Land Registry on how to prevent rights passing for the benefit of the tenant, we have updated Land Registry Prescribed Lease Clause L4 to include optional wording for use where rights benefiting the landlord's title will not benefit the tenant.
- For leases of part of a building and part of a shopping centre, we have updated the list of items included in the optional definitions of "Building Management Systems" and "Centre Management Systems" and added a guidance note to remind users to tailor the list to reflect what is present in the building or centre if the definition is used.
- In the definition of Common Parts, we have deleted the words "in accordance with clause 5.8";
- Following Brexit, we have removed the reference to Article 3 of the EC Regulation on Insolvency Proceedings 2000 from the definition of "company".
- The definition of "Outgoings" now refers to "financial impositions charged on the Premises **or any owner or occupier of them;**"
- For the "Permitted Use" in the leases:
  - we have provided alternative wording to include uses defined by reference to the Use Classes Order as in force on 31 August 2020 or the new classes under the current version of the Use Classes Order. If the Court of Appeal refuses leave to appeal or hears the appeal and decides that the new Use Classes Order is lawful, we will not have to make immediate changes to the MCL. Until the proceedings have been finally determined, users of the MCL can choose which version of the Use Classes Order they wish to use.
  - A corresponding change has been made to the interpretation provisions. Users can choose whether references to the Use Classes Order are to that Order in force on 31 August 2020 or at the date of the lease.

- Remember that for premises in Wales, the 1 September 2020 changes do not apply.
- For food and drink leases, there is a corresponding change in paragraph 1.1 of the “Additional User Provisions” schedule.
- We have updated the definition of “Uninsured Risk” so that an uninsured risk does not include “loss or damage (or the risk of it) caused by reason of the Tenant’s **wilful** act or failure to act”.
- The VAT provisions in clause 4.4 (clause 4.3 in leases without a service charge) now refer to VAT “charged in respect of any VAT Supply to the Landlord **in respect of this Lease** where that VAT is not recoverable by the Landlord from HM Revenue & Customs” instead of “**in respect of the Premises**”.
- We have amended the tenant’s repairing obligation in clause 4.9 (clause 4.8 in leases without a service charge). There are now four options for the standard of repair that applies (all of which include an obligation to keep the premises clean and tidy). Briefly, these are:
  - good and substantial repair and condition;
  - good and substantial repair and condition except for those parts of the premises identified in a schedule of condition;
  - in the same state of repair and condition as at the date of the lease, as evidenced by a schedule of condition; or
  - free from damage caused by the tenant’s act or omission.
- The alterations provisions in clause 4.11 (clause 4.10 in leases without a service charge) now include an overarching obligation not to carry out alterations that will have a material adverse impact on the Environmental Performance of the premises. The corresponding wording has been removed from the other sections of the clause.
- We have added a reminder in the user clause of all leases (other than the logistics leases) that they do not include specific clauses that deal with contamination. Where the property or proposed use may give rise to this issue, users may want to consider adding an appropriate clause.
- To reflect changes in insolvency law, forfeiture of the lease is now permitted where a corporate tenant enters into a compromise, scheme of arrangement or restructuring under Part 26 or Part 26A of the Companies Act 2006 or a moratorium under Part A1 to the Insolvency Act 1986.
- There is a new option in clause 6.5 for the service of formal notices by e-mail.
- Expert determination clauses and arbitration clauses in the lease (and other relevant MCL documents) have been updated to use gender neutral language.
- In leases that contain a service charge, in paragraph 3.1.3 of the part of the “Service Charge” schedule dealing with service charge exclusions, we have replaced the word “Insurers” with “Landlord’s insurers” as Insurers was not a defined term.
- The tenant’s obligation to pay the amount of any insurance proceeds withheld by the insurer in paragraph 1.1 of the “Insurance” schedule now applies where the monies are withheld “because of the Tenant’s **wilful** act or failure to act”.
- We have added wording to paragraph 4 (termination) of the “Insurance” schedule to make it clear that the provisions apply only where there is damage by an insured risk or, if the relevant provisions are included, an uninsured risk.

- The “Title Matters” schedule no longer requires the parties to attach official copies of the landlord’s title to the lease.
- In the “Works” schedule, the definition of “Prohibited Materials” now refers to products or materials that “do not conform to relevant standards or codes of practice” rather than “relevant **British and European** standards or codes of practice”. A corresponding change has been made to the licences for alterations.
- Paragraph 2.2 of the “Works” schedule no longer refers to the tenant carrying out works “in compliance, to the extent applicable, with the CDM Regulations” as this obligation is contained in paragraph 2.8 of the schedule. A corresponding change has been made to the licences for alterations.
- A definition of “Sub-Underlet Premises” has been added to the “Underletting” schedule.
- A new paragraph 2.2 in the “Underletting” schedule allows the landlord to request a guarantee of the undertenant’s obligations in the underlease where it is reasonable to do so.
- In leases that include a turnover rent (and in the corresponding standalone Turnover Rent clause):
  - we now refer to “Turnover Year” rather than “Turnover Period” with consequential amendments made throughout the “Turnover Rent” schedule;
  - a new paragraph 9 in the “Turnover Rent” schedule addresses apportionments of turnover rent where any period is not a full on-account period or full turnover year;
  - applications to the President of the Institute of Chartered Accountants in England and Wales for the appointment of an expert or arbitrator have to be made jointly by the parties. We have updated the provisions for the determination of disputes in paragraph 10 of the “Turnover Rent” schedule accordingly; and
  - the tenant’s obligation to pay a closing amount of turnover rent prior to an assignment of the lease in paragraph 11 of the “Turnover Rent” schedule now requires payment when the tenant enters into the licence to assign rather than at the date of the assignment.

A redline version of the lease of part of an office building is available to download on the MCL website showing the changes to the lease.

### Licences for alterations

- We have added a user note to the licences for alterations reminding the draftsman to consider whether granting consent to make alterations that are prohibited under the Lease would put the Landlord in breach of its covenants (if any) given to the other tenants of the property (see *Duval v 11-13 Randolph Crescent Limited* [2020] UKSC 18).
- The tenant’s obligations that apply on completion of the works now have to be complied with as soon as practicable after completion of the works, not on completion of the works.
- The licences for alterations by an undertenant have an additional obligation on the tenant to give the landlord the original of any health and safety file in relation to the works when the lease comes to an end.

### Licences to assign

- Where the assignor has commissioned an EPC on the assignment of the lease, the licences to assign have an additional obligation on the assignor to provide a copy of this to the landlord.

- Optional provisions have been added for the assignee and any assignee's guarantor to provide e-mail addresses for the service of notices where service by e-mail is permitted under the terms of the lease.
- The licence to assign an underlease (new tenancy) (MCL-LICASSIGN-05) now correctly defines the undertenant's guarantor as the "Undertenant's Guarantor" rather than the "Tenant's Guarantor" in the parties to the licence.

#### **Licences to underlet**

- Where the person underletting commissioned an EPC on the underletting, the licences to underlet have an additional obligation on that person to provide a copy of this to their landlord.
- Some minor grammatical changes have been included in the schedule setting out the terms to be contained in the underlease.

#### **Rent deposit deed**

- The numbering in the definition of "Repayment Date" has been corrected.

#### **Additional clauses**

- **Turnover rent (MCL-LEASECLAUSE-01)**
  - The changes made to the turnover provisions in the leases have been included in this clause and gender-neutral drafting adopted in the determination of disputes clause.
- **Indexed-linked rent review (MCL-LEASECLAUSE-03)**
  - Applications to the President of the Institute of Chartered Accountants in England and Wales for the appointment of an arbitrator have to be made jointly by the parties. We have updated the provisions for the determination of disputes in this clause accordingly.
  - A new worked example for a compounded rent review with cap and collar has been added.
- **Additional user clauses (MCL-LEASECLAUSE-05)**
  - The changes to the permitted use provisions made to the lease have been included in this clause.