



AGREEMENT FOR LEASE

Drafting Notes

1. INTRODUCTION

- 1.1 The MCL agreement for lease (**MCL AFL**) adopts the same principles as the MCL Lease as far as possible in the context of the landlord and tenant relationship prior to lease grant. The agreement aims to be a broadly fair and balanced starting point for both parties.
- 1.2 There is a range of different types of agreement for lease but (unlike leases) less of a clear industry standard position. The MCL AFL is intended to reflect the standard position to the extent there is one.
- 1.3 Two MCL AFLs have been published initially. **MCL-AFL-01** is a simple agreement for lease where the landlord is carrying out relatively minor repurposing works (see more details below). **MCL-AFL-02** is a version for use where there are no landlord works at all.
- 1.4 It may also be possible to substitute some of the provisions for more sophisticated drafting to cater for more complex commercial arrangements, conditionality and construction works while retaining the drafting style, structure and other provisions of the MCL AFL. However, the MCL AFL has not been prepared with this use in mind so if adapted in that way, particular care must be taken to ensure provisions interact and operate as intended by the parties.
- 1.5 As with all MCL documents, the MCL Committee welcomes any comments, both on style and content of the MCL AFL, before embarking on a longer form or additional supplementary provisions (which could include simple uncontroversial conditions such as superior landlord consent, vacant possession or co-tenancy conditions) and/or obligations for more significant landlord works. There is a [feedback/contact page on the MCL website](#).

2. LANDLORD MINOR WORKS AND TENANT WORKS

- 2.1 The MCL-AFL-01 provides for minor landlord works and tenant fit out works and is not intended for significant development works or where the tenant is taking on the obligation of significant works to the building beyond a normal fit out. This is important context for the positions and mechanisms adopted by the drafting committee.
- 2.2 The types of minor landlord works the committee had in mind when drafting the MCL AFL included stripping out a previous tenant's fit out, reconfiguring internal parts of a unit, installing a dividing wall or combining units.

Full development of new premises or significant construction operations are outside the contemplation of the MCL AFL. Users should also take care where landlord works include significant mechanical and engineering works or installation of plant and machinery that will be used by the tenant as the landlord works obligation in the MCL AFL may be inappropriate for those situations.
- 2.3 The MCL AFL does not set out obligations on the Tenant in relation to tenant works. It cross refers to obligations set out in the Lease (which is the case for MCL Leases) or the licence for alterations (intended to be attached to the MCL AFL as an Annex). If using documents that do

not contain the relevant tenant obligations, the relevant provisions will need to be added to the MCL AFL expressly.

- 2.4 The MCL AFL also assumes that works will not trigger the requirement for a new energy performance certificate (EPC) and so does not expressly provide for obtaining an EPC or preserving a particular level of energy efficiency. Parties should consider whether an EPC requirement could be triggered by works (for example in some cases of units being combined or sub-divided) in which case express drafting will need to be added.

3. **INDUCEMENT PAYMENTS**

Recognising that inducement payments are common in the market, the MCL AFL provides alternative options for payment provisions. Either a simple inducement payment from the landlord to the tenant not linked to tenant works (with options for the timing of payment) and an alternative provision for a payment linked to tenant works with optional provisions dealing with VAT, The Construction Industry Scheme and capital allowances. Users should take specialist tax advice on the appropriate tax treatment (and therefore choice of drafting) that is appropriate for the particular situation.

4. **MEASUREMENT & TOLERANCES**

- 4.1 Clause 8 (of MCL-AFL-01) is an optional provision for measurement of the Premises by an independent measuring surveyor. Measurement will be needed if the parties have agreed that the agreement can be terminated based on size outside of a tolerance (clause 20.4) or the Main Rent is to be set by measurement (clause 12.2).
- 4.2 The choice of the most appropriate drafting option will be based on the nature of the transaction. As drafted it is anticipated that the identity of the measurement surveyor would be agreed by the parties before entering into the agreement or simply appointed by the landlord. There are optional provisions for the landlord to provide a copy of the calculation and measurement report (8.1.3) and/or to procure the measurement surveyor provides a reliance letter to the tenant (8.1.4). The circumstances and the risk to the tenant should lead the parties to what is commercially appropriate.
- 4.3 If termination is included (clause 20.4), Maximum Area and Minimum Area are defined terms drafted on the assumption that these figures will be calculated and inserted into the definition as fixed numbers. These numbers are the tolerances (not the targets) meaning there are no references to percentages around them.
- 4.4 The default provided is square feet as that is currently used most often for tolerances in simple agreements – and square feet is used as the default metric for area throughout the MCL AFL. Users should ensure that figures use the correct metric and have been approved by the parties.
- 4.5 If measurement is the basis of calculation of Main Rent, the definition of Maximum Area (as a fixed figure) can also be optionally used to cap the Main Rent (clause 12.3).

5. **COMPLETION OF LANDLORD WORKS (MCL-AFL-01)**

- 5.1 Due to the nature of the landlord works anticipated by this agreement, the works completion mechanism is relatively simple. The Landlord decides whether or not the works have been completed and serves notice on the tenant after practical completion (clause 7.3). Practical completion is deliberately not defined and it is up to the landlord to decide when it is appropriate to serve notice. There is no right for the tenant to challenge the notice but the notice does not affect the landlord's liability to complete the work. Landlords should take care on the timing in order to minimise the risk of liability to the tenant for any loss arising from an early notice. Although the landlord works obligations are personal to the landlord (clause 25), there is no release from liability on completion of the lease or transfer of the landlords interest.

This is a concession to the tenant who is not getting any construction package due to the nature of the works and is intended to be a fair position that avoids complicated drafting or works sign off for very simple works. This position is not appropriate for major landlord works and is not something that should be carried over to more complicated agreements that provide for more sophisticated landlord works. If this position is not appropriate users should replace the mechanism with the position agreed by the parties.

5.2 Clauses 7.6 and 7.7 expressly provide for ongoing liability for snagging items if these may be anticipated as a result of the nature of the works and for the landlord to have access to the Premises for this purpose.

5.3 The MCL AFL does not include other remedies (e.g. extension to rent free or liquidated damages). These are uncommon in minor landlord works agreements. Where they are included in agreements it is considered that they are led by the commercial agreement and there is no particular market standard.

6. **MCL CONCEPT OF REASONABLENESS**

6.1 Clause 2.4.8 reflects the MCL's general concept of reasonableness. The default position of any approval, consent or decision by either party will therefore be that it is subject to acting reasonably/not to be unreasonably withheld etc. If users are including any additional provisions, they should take care to ensure that any expectation of absolute discretion is preserved.

6.2 The only absolute discretion provided for in the MCL AFL as drafted are:

6.2.1 "Access Date" – absolute landlord discretion for tenant early access.

6.2.2 Clause 9.1/9.4 – clarification that approval of plans (not included in agreement) is subject to absolute discretion if that is the case under the lease terms.

6.2.3 Clause 29 – optional absolute discretion in context of confidentiality obligation.

7. **MCL CONCEPT OF FORMAL NOTICE**

7.1 Clause 2.3 incorporates the MCL concept of formal notice. Essentially the more rigid notice requirements of Clause 24 are only required where a provision expressly requires formal notice. Any written notice will suffice in other cases. This is useful for the landlord and tenant relationship under a simple agreement for lease where communication and obligations can usefully (and deliberately) be triggered in correspondence between surveyors and clients without the need or delay linked to formalities.

7.2 The only notices requiring formal notice in the MCL AFL as drafted are:

7.2.1 Landlord Works Completion Notice (clause 7.3 – optionally), and

7.2.2 Termination for non-completion of Landlord Works, measurement outside tolerance or breach or tenant insolvency (clause 20).

8. **SCPC NOT INCORPORATED**

The MCL Committee acknowledges that there is mixed market practice as to whether the Standard Commercial Property Conditions (3rd edition – 2018 Revision) (**SCPC**) are incorporated into agreements for lease. SCPC are not incorporated into the MCL AFL because it is intended that all relevant matters are covered by express terms.

9. **RENT DEPOSITS**

9.1 The drafting committee felt there was no single market position in terms of dealing with rent deposits when entering into agreements for lease. The terms and timing of putting the security

in place depends on the nature of the transaction, the parties, their respective bargaining positions and the deposit amount. The drafting in the MCL AFL reflects the most common arrangements but may not be exhaustive and does not necessarily mean that the MCL Committee is holding out either option as the market standard.

9.2 Clause 4 (Rent Deposit) provides for two principal options. Option 1 (clauses 4.1 and 4.2) obliges the tenant to pay the deposit amount to the landlord on the date the lease is due to complete (whether or not the lease completes on that date).

9.3 Option 2 (clauses 4.3 -4.7) provides for payment of the amount before completion of the lease as security for completion of the lease – and then when lease liabilities arise, changes the basis on which that amount is held to a rent deposit to secure those lease liabilities in the usual way. Clause 4.5 provides for an adjustment of the paid amount if required after measurement.

10. **SCHEDULE OF CONDITION**

Although the MCL leases provide optionally for qualifying the tenant's repair obligation by reference to a schedule of condition, the MCL AFL assumes that this would be prepared before entering into the MCL AFL and be part of the form of lease attached. There may be circumstances in which the schedule cannot be prepared until after the completion of even minor landlord works, in which case appropriate drafting for the preparation and approval of the schedule will need to be added and consideration given to the impact (if any) on the timings for access, completion and commencement of payments.

11. **TAX IMPLICATIONS GENERALLY**

In addition to the specific tax treatment of inducement payments, landlords and tenants should consider the need for specialist tax advice generally as there could be tax implications for either party entering into the agreement for lease.

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MCL-AFL-01 v1

MCL-AFL-02 v1