COMMERCIAL PROPERTY

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Preface

The aim of this book is to provide law students with a comprehensive introduction to the areas of property law particularly relevant to commercial property.

Part I of the book deals with areas relevant to property acquisition and development. These include structures for joint ownership, arrangements for funding, contractual arrangements with the seller, the need for planning permission, environmental considerations, contractual arrangements with members of the construction team and taxation. Part II takes the reader through the grant of a commercial lease, the assignment of that lease and its termination. Part III deals with the law relating to property and insolvency.

Although we hope that this book will provide a useful guide to trainee solicitors and others involved in commercial property work, it is primarily intended to complement the Stage 2 Advanced Property Law and Practice elective on the Legal Practice Course. This elective is only undertaken once the Stage 1 Property Law and Practice course has been completed. Apart from the matters specifically mentioned in Part I of this book, the conveyancing process for the transfer and leasing of commercial property is as described in the Legal Practice Guide entitled Property Law and Practice accompanying the Stage 1 course, so the conveyancing process is not dealt with in this book.

The current team of authors would like to acknowledge the valuable contribution made by Paul Butt to earlier editions of this book. Needless to say, the current team of authors bears responsibility for any failings in this edition.

This edition is dedicated to the memory of Neil Duckworth, a superb teacher, course designer and author, whose influence will live on in these pages for many years to come.

The law is as stated as at 1 September 2010.

Anne Rodell

The College of Law
Guildford

Contents

PREFACE v

TABLE OF CASES xiii

TABLE OF STATUTES xix

TABLE OF SECONDARY LEGISLATION xxi

LIST OF ABBREVIATIONS xxiii

Part I SITE ACQUISITIONS 1

Chapter 1 THE COMMERCIAL CONTEXT *Anne Rodell* 3
- 1.1 What is commercial property? 3
- 1.2 Who buys commercial property? 3
- 1.3 Buying commercial property jointly 5
- 1.4 Methods of structuring a property joint venture 5
- Review activity 7

Chapter 2 OBTAINING PROPERTY FINANCE *Leona Mason* 9
- 2.1 Methods of finance 9
- 2.2 Debt finance 10
- Review activity 14

Chapter 3 MATTERS OF CONTRACT *Anne Rodell* 17
- 3.1 The contract of sale 17
- 3.2 Different types of contract 18
- 3.3 Overage 23
- Review activity 26

Chapter 4 PLANNING CONTROL *Neil Duckworth* 27
- 4.1 The planning system 27
- 4.2 When is planning permission needed? 29
- 4.3 Planning permission 36
- 4.4 Application to the local planning authority 41
- 4.5 Appeals against adverse planning determinations 44
- 4.6 Stop press 48
- Review activity 48

Chapter 5 PLANNING OBLIGATIONS *Neil Duckworth* 51
- 5.1 Introduction 51
- 5.2 Fundamentals 52
- 5.3 Government policy 53
- 5.4 Practical points 55
- 5.5 Modification and discharge of planning obligations 57
- 5.6 Unilateral undertakings 57
- Review activity 58

Chapter 6 ENFORCEMENT OF PLANNING CONTROL *Neil Duckworth* 59
- 6.1 Introduction 59
- 6.2 Definitions and time limits 59
- 6.3 Certificates of lawful use or development (ss 191–192) 60
- 6.4 Right of entry for enforcement purposes (ss 196A–196C) 61
- 6.5 Planning contravention notice (ss 171C–171D) 62

	6.6	Breach of condition notice (s 187A)	63
	6.7	Enforcement notice (ss 172–182)	63
	6.8	Stop notice and temporary stop notice (ss 183–187 and ss 171E–G)	67
	6.9	Injunctions (s 187B)	69
	6.10	Appeals against enforcement notices (ss 174–177)	69
		Review activity	71
Chapter 7	ENVIRONMENTAL ISSUES *Robert Tam*		73
	7.1	Introduction to environmental law	73
	7.2	Environmental risk management	74
	7.3	Contaminated land	76
	7.4	Nuisance	84
	7.5	Environmental Damage Regulations	86
	7.6	Environmental permitting and regulation	86
	7.7	Climate change law and energy performance	89
	7.8	Regulatory Enforcement and Sanctions Act 2008	95
	7.9	Asbestos	95
	7.10	Japanese knotweed	96
		Review activity	97
Chapter 8	SEARCHES AND ENQUIRIES *Anne Rodell*		99
	8.1	Local search and enquiries	99
	8.2	Planning matters	99
	8.3	Drainage	100
	8.4	Highways	100
	8.5	Contaminated land	100
	8.6	Enquiries of the seller	100
	8.7	Survey and inspection	100
	8.8	Special searches	101
	8.9	Investigation of title	101
		Review activity	101
Chapter 9	CONSTRUCTION PROJECTS *Simon Halliwell*		103
	9.1	Introduction	103
	9.2	Who will be involved? The design and construction team	103
	9.3	Different forms of procurement	106
	9.4	Duties owed to third parties	112
	9.5	Protecting third parties	115
	9.6	Dispute resolution	119
		Review activity	120
Chapter 10	AN OUTLINE OF TAXATION OF COMMERCIAL PROPERTIES *Anne Rodell*		123
	10.1	Value added tax	123
	10.2	Stamp duty land tax on leases	128
		Review activity	129
Part II	**COMMERCIAL LEASES**		**131**
Chapter 11	LANDLORD AND TENANT LAW		133
	11.1	Introduction	133
	11.2	Liability of the parties on the covenants in the lease	133
	11.3	Security of tenure	134
	11.4	Lease/licence distinction	134
Chapter 12	AGREEMENTS FOR LEASE		135
	12.1	Introduction	135
	12.2	When are they used?	135
	12.3	A typical agreement	136

Chapter 13	LEASE DRAFTING		141
	13.1	Principles of drafting	141
	13.2	Rules of construction	141
	13.3	Prescribed clauses leases	142
	13.4	The structure of the lease	143
	13.5	The 2007 Code for Leasing Business Premises in England and Wales	148
Chapter 14	THE PARTIES TO THE LEASE		151
	14.1	Introduction	151
	14.2	The landlord	151
	14.3	The tenant	153
	14.4	The guarantor	156
	14.5	Rent deposits	160
Chapter 15	THE PARCELS CLAUSE		163
	15.1	Purpose	163
	15.2	Airspace and underground	163
	15.3	Fixtures	163
	15.4	Rights to be granted and reserved	164
Chapter 16	TERM		165
	16.1	Introduction	165
	16.2	Break clauses	165
	16.3	Options to renew	167
	16.4	Impact of SDLT	167
Chapter 17	RENT		169
	17.1	Introduction	169
	17.2	Amount	169
	17.3	Time for payment	170
	17.4	Other payments reserved as rent	170
	17.5	Suspension of rent	170
	17.6	Interest	170
	17.7	VAT	171
Chapter 18	THE RENT REVIEW CLAUSE *Clare Harris*		173
	18.1	The need for review	173
	18.2	Types of rent review clause	173
	18.3	The dates for review	175
	18.4	Working out the open market rent	176
	18.5	The assumptions	176
	18.6	The disregards	183
	18.7	The mechanism for determining the rent	185
	18.8	The late review	186
	18.9	Recording the review	187
Chapter 19	REPAIR *Stephanie McGuiness*		189
	19.1	Introduction	189
	19.2	Tenant's covenant to repair	190
	19.3	Definition of the subject matter of the covenant	190
	19.4	Extent of liability	190
	19.5	Tenant's concerns and amendments	194
	19.6	Enforcement of covenant by landlord	195
	19.7	Covenant to yield up in repair	195
	19.8	Decorating	195
	19.9	Landlord's covenant to repair	196
		Review activity	196

Chapter 20	ALIENATION *Clare Harris*		197
	20.1	Dealings with the premises	197
	20.2	Restrictions on alienation	199
	20.3	Seeking consent from the landlord	203
	20.4	Notice of assignment or sub-letting	206
	20.5	Virtual assignments	207
Chapter 21	USER		209
	21.1	The need for a user covenant	209
	21.2	The permitted use	210
	21.3	The extent of the landlord's control	212
	21.4	Ancillary clauses	213
Chapter 22	ALTERATIONS *Stephanie McGuiness*		215
	22.1	Introduction	215
	22.2	Lease controls	216
	22.3	Restrictions outside the lease	219
	22.4	Compensation for improvements	220
	22.5	The 2007 Code for Leasing Business Premises	220
		Review activity	220
Chapter 23	THE LANDLORD'S COVENANT FOR QUIET ENJOYMENT		223
	23.1	Nature of the covenant	223
	23.2	Acts constituting a breach	223
Chapter 24	INSURANCE *Clare Harris*		225
	24.1	Introduction	225
	24.2	The obligation to insure	226
	24.3	The obligation to pay for the insurance	228
	24.4	Compliance with the terms of the insurance	228
	24.5	The obligation to reinstate	229
	24.6	Rent suspension	230
	24.7	Termination	231
	24.8	Damage by uninsured risks	233
	24.9	Additional provisions	233
	24.10	Insurance by the tenant	233
Chapter 25	FORFEITURE		235
Chapter 26	LEASE OF PART		237
	26.1	Introduction	237
	26.2	Boundaries and easements	237
	26.3	Responsibility for repairs	237
	26.4	Service charges	238
	26.5	Sinking and reserve funds	242
	26.6	Insurance	243
	26.7	RICS Code of Practice for Service Charges	243
Chapter 27	SELLING THE LEASE		245
	27.1	Applications for consent to assign	245
	27.2	The landlord's licence	247
	27.3	Authorised guarantee agreements	247
Chapter 28	UNDERLEASES		249
	28.1	Liability of sub-tenants	249
	28.2	Reasons for sub-letting	249
	28.3	Drafting points	249
	28.4	The sub-tenant's concerns	252

Chapter 29	REMEDIES FOR BREACH OF COVENANT *Sue Highmore*		253
	29.1	Landlord's remedies	253
	29.2	Tenant's remedies	258
Chapter 30	METHODS OF TERMINATION		261
	30.1	Introduction	261
	30.2	Expiry	261
	30.3	Notice to quit	261
	30.4	Operation of break clause	262
	30.5	Forfeiture	262
	30.6	Surrender	266
	30.7	Merger	266
Chapter 31	THE LANDLORD AND TENANT ACT 1954, PART II		267
	31.1	Introductory matters	267
	31.2	Termination under the Act	273
	31.3	The application to court	277
	31.4	Interim rents	278
	31.5	Grounds of opposition	279
	31.6	Compensation for failure to obtain a new tenancy	283
	31.7	The renewal lease	285
	31.8	The order for the new lease	287
Part III	**PROPERTY AND INSOLVENCY**		**289**
Chapter 32	INSOLVENCY AND ITS EFFECT ON COMMERCIAL PROPERTY *Sue Highmore*		291
	32.1	Why insolvency matters	291
	32.2	Measures to reduce the perceived risk of insolvency	291
	32.3	Always establish the type of insolvency regime	292
	32.4	Identify the type of contract	293
	32.5	Different types of insolvency regime	294
	32.6	Setting aside transactions which have already been completed	299
	32.7	The effect of a tenant becoming insolvent	301
	32.8	Requiring the insolvency official to pay rent	308
	32.9	Disclaimer and its effects	309
Appendix 1	Review Activity Answers		313
Appendix 2	Prescribed forms of notice under the Landlord and Tenant Act 1954		321
Appendix 3	The Code for Leasing Business Premises in England and Wales 2007		335
Appendix 4	Lease of floor(s) of an office block with guarantee and prescribed clauses		347
Appendix 5	Specimen Authorised Guarantee Agreement		385
Appendix 6	Extracts from the Landlord and Tenant Act 1954, Part II		391
INDEX			409

Table of Cases

A

ABC Coupler and Engineering C Ltd (No 3) [1970] 1 All ER 650 310
Actionstrength Ltd v International Glass Engineering [2003] 2 AC 541 159
Addiscombe Garden Estates v Crabbe [1958] 1 QB 513 268
Akasuc Enterprise Ltd v Farmar & Shirreff [2003] EWHC 1275 (Ch) 25
Albany Holdings Ltd v Crown Estate Commissioners [2003] EWHC 1480 264
Allen v Corporation of the City of London [1981] JPL 685 37
Allied Dunbar Assurance v Homebase Ltd [2002] 2 EGLR 23 205
Allied Dunbar Assurance plc v Homebase Ltd [2002] EWCA Civ 666, [2002] 27 EG 144 250
Allied London Property Investment Ltd v Secretary of State for the Environment (1996) 72 P & CR 327 44
Allnatt London Properties Ltd v Newton [1984] 1 All ER 423 266
Anglia Building Society v Secretary of State for the Environment and Another [1984] JPL 175 38
Anstruther-Gough-Calthorpe v McOscar and Another [1924] 1 KB 716 193
Arundel Corporation v The Financial Training Co Ltd [2000] 3 All ER 456 266, 273
Ashworth Frazer Ltd v Gloucester City Council [2002] 05 EG 133 205
Atlantic Computer Systems plc, Re [1990] EWCA Civ 20 308
Attorney-General v PYA Quarries Ltd [1957] 2 QB 169 84
Avonridge Property Co Ltd v Mashru [2005] UKHL 70 152

B

B&Q plc v Liverpool and Lancashire Properties Ltd [2000] EGCS 101 237
Bacchiocci v Academic Agency Ltd [1998] 1 WLR 1313 273
Bairstow Eves (Securities) Ltd v Ripley [1992] 2 EGLR 47 166, 262
Barclays Bank plc v Daejan Investments (Grove Hall) Ltd [1995] 18 EG 117 212
Barnes v City of London Real Property Co; Webster v City of London Real Property Co; Sollas v City of London Real Property Co; Oakley, Sollas & Co v City of London Real Property Co [1918] 2 Ch 18 241
Barrett v Lounova (1982) Ltd [1990] QB 348 238
Barrett v Morgan [2000] 2 AC 264 262
Barth v Pritchard [1990] 1 EGLR 109 281
Bates v Donaldson [1896] 2 QB 241 205
Betty's Cafes Ltd v Phillips Furnishing Stores Ltd [1959] AC 20 281
BHP Great Britain Petroleum Ltd v Chesterfield Properties Ltd [2001] EWCA Civ 1797, [2002] 2 WLR 672 152
Billson v Residential Apartments Ltd [1992] 1 AC 494 264
Blockbuster Entertainment Ltd v Barnsdale Properties Ltd [2003] EWHC 2912 246
Bolton (HL) Engineering Co Ltd v Graham & Sons Ltd [1957] 1 QB 159 283
Booth v Thomas [1926] Ch 397 223
Broadgate Square plc v Lehman Brothers Ltd [1995] 01 EG 111 142
Broadgate Square plc v Lehman Brothers Ltd [1995] 1 EGLR 97 181
Brown & Root Technology v Sun Alliance [1997] 18 EG 123 166
Burt v British Transport Commission (1955) 166 EG 4 257

C

C&A Pension Trustees Ltd v British Vita Investments Ltd [1984] 2 EGLR 75, (1984) 272 EG 63 210
Cambridge Water Company v Eastern Counties Leather plc [1994] 2 AC 264 84
Caparo Industries plc v Dickman [1990] 2 AC 605 115
Central Estates Ltd v Secretary of State for the Environment [1997] 1 EGLR 239 185
Chartered Trust plc v Davies [1997] 49 EG 135 260
Cheryl Investments Ltd v Saldhana [1978] 1 WLR 1329 268
Cheverell Estates Ltd v Harris [1998] 02 EG 127 253
Chiltern Railway Co Ltd (The) v Patel [2008] EWCA Civ 178 272
Circular Facilities (London) Ltd v Sevenoaks District Council [2005] EWHC 865 76, 81
City of London Corporation v Fell [1993] 49 EG 113 153, 272
Claire's Accessories UK Ltd v Kensington High Street Associates [2001] PLSCS 112 166
Clarence House Ltd v National Westminster Bank plc [2009] EWHC 77 (Ch); [2009] EWCA Civ 1311 207
Commercial Union Life Assurance Co v Label Ink Ltd [2001] L & TR 29 193

Connaught Restaurants Ltd v Indoor Leisure Ltd [1993] 46 EG 184 169
Cook v Shoesmith [1951] 1 KB 752 200
Cooper's Lease, Re (1968) 19 P & CR 541 205
Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1997] 23 EG 137 258
Coppin v Bruce-Smith [1998] EGCS 45 281
Credit Suisse v Beegas Nominees Ltd [1994] 11 EG 151 193, 194
Creska Ltd v Hammersmith and Fulham London Borough Council (No 2) (1999) 78 P & CR D46 256
Cricket Ltd v Shaftesbury plc [1999] 3 All ER 283 269
Crown Estate Commissioners v Town Investments Ltd [1992] 08 EG 111 286
Croydon London Borough Council v Gladden [1994] JPL 723, CA 69
Cunliffe v Goodman [1950] 2 KB 237 281

D

D&F Estates Ltd v Church Commissioners for England [1989] AC 177 114
Daiches v Bluelake Investments Ltd [1985] 2 EGLR 67 259
Dennis v Ministry of Defence [2003] Env LR 34 84
Department of the Environment v Allied Freehold Property Trust Ltd [1992] 45 EG 156 279
Doleman v Shaw [2009] EWCA Civ 283 310
Dolgellau Golf Club v Hett [1998] 2 EGLR 75, CA 282
Dong Bang Minerva (UK) Ltd v Davina Ltd [1996] 31 EG 87 246
Donoghue v Stevenson [1932] AC 562 114
Donovan v Secretary of State for the Environment [1988] JPL 118 64

E

Elitestone v Morris [1997] 2 All ER 513 163
English Exporters (London) Ltd v Eldonwall Ltd [1973] Ch 415 279
Envirocor Waste Holdings v Secretary of State for the Environment [1995] EGCS 60, QB 38
Esselte AB v Pearl Assurance plc [1997] 1 WLR 891 273
Essexcrest Ltd v Evenlex Ltd [1988] 1 EGLR 69 270
Esso Petroleum Co Ltd v Fumegrange Ltd [1994] 46 EG 199 134
Esso Petroleum v Southport Corporation [1956] AC 218 85
Expert Clothing Service & Sales Ltd v Hillgate House Ltd [1986] Ch 340 264

F

Family Management v Grey (1979) 253 EG 369 182
Farr v Ginnings (1928) 44 TLR 249 205
Fawke v Viscount Chelsea [1980] QB 441 286
Finchbourne v Rodrigues [1976] 3 All ER 581 241
First Property Growth Partnership v Royal & Sun Alliance Services Ltd [2002] EWHC 305 (Ch), [2002] 22 EG 140 185
Fitzroy House Epworth Street (No 1) v The Financial Times Ltd [2006] EWCA Civ 329 166
Flairline Properties Ltd v Hassan [1997] 1 EGLR 138 268
Fluor Daniel Properties Ltd v Shortlands Investments Ltd [2001] PLCS 10 241
Footwear Corporation Ltd v Amplight Properties Ltd [1999] 1 WLR 551 205, 206
Forbuoys plc v Newport Borough Council [1994] 24 EG 156 286
Friends' Provident Life Office v British Railways Board [1995] 1 All ER 336 153, 158
Fuller v Happy Shopper Markets Ltd [2001] 1 WLR 1681, ChD 254
FW Woolworth v Charlwood Alliance Properties [1987] 1 EGLR 53 205

G

G & K Ladenbau (UK) Ltd v Crawley and de Reya [1978] 1 All ER 682 101
Gateshead Metropolitan Borough Council v Secretary of State for the Environment [1995] JPL 432, CA 38
Go West Ltd v Spigarolo [2003] EWCA Civ 17, [2003] 07 EG 136 246
Goldacre (Offices) Ltd v Nortel Networks (UK) Ltd (in administration) [2009] EWHC 3389 309
Goldmile Properties Ltd v Lechouritis [2003] EWCA Civ 49, [2003] 15 EG 143 223
Good Harvest Partnership LLP v Centaur Services Ltd [2010] EWHC 330 (Ch) 202
Graysim Holdings Ltd v P&O Property Holdings Ltd [1995] 3 WLR 854 268
Great Portland Estates plc v Westminster City Council [1985] AC 661, HL 37
Greenwich London Borough Council v Discreet Selling Estates Ltd [1990] 48 EG 113 263
Gurton v Parrot [1991] 1 EGLR 98 268

H

Hadley v Baxendale (1854) 9 Exch 341 113, 257
Hambleton District Council v Bird [1995] 3 PLR 8 69
Hancock & Willis v GMS Syndicate Ltd (1982) 265 EG 473 268
Harborough District Council v Wheatcroft & Son Ltd [1996] JPL B128 69
Harmer v Jumbil (Nigeria) Tin Areas Ltd [1921] 1 Ch 200 260
Havant International Holdings Ltd v Lionsgate (H) Investments Ltd [1999] EGCS 144 166
Havenridge Ltd v Boston Dyers Ltd [1994] 49 EG 111 228, 241
Hazel v Akhtar [2002] EWCA Civ 1883, [2002] 07 EG 124 280
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 114
Herbert Duncan Ltd v Cluttons [1992] 1 EGLR 101 154, 169, 272
Hills (Patents) Ltd v University College Hospital Board of Governors [1956] 1 QB 90 268
Hindcastle v Barbara Attenborough Associates [1997] AC 70 310
Historic Hotels Ltd v Cadogan Estates [1995] 1 EGLR 117 185
Hockley Engineering Ltd v V & P Midlands Ltd [1993] 1 EGLR 76 265
Holland and Another v Hodgson and Another (1872) LR 7 CP 328 163
Holme v Brunskill (1877) 3 QBD 495 158
Horsey Estate Limited v Steiger [1899] 2 QB 79 198
Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd [1987] 1 AC 99 161
Hunter v Canary Wharf Ltd [1997] 2 WLR 684 84

I

International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [1986] Ch 513, [1986] 1 All ER 321 204, 217

J

Janmohamed v Hassam (1976) 241 EG 609 19
Javad v Aqil [1991] 1 WLR 1007 269
Jolley v Carmel [2000] 43 EG 185 20
Junction Estates Ltd v Cope (1974) 27 P & CR 482 158
Junior Books v Veitchi [1983] 1 AC 520 114

K

Kalford Ltd v Peterborough City Council [2001] EGCS 42 217
Kalra v Secretary of State for the Environment [1996] JPL 850, CA 32
Kataria v Safeland plc [1998] 05 EG 155 263
Khatun v United Kingdom, European Commission of Human Rights, 1 July 1998 84
Kissel v Secretary of State for the Environment and Another [1994] JPL 819 37

L

Lambert v FW Woolworth & Co Ltd (No 2) [1938] 2 All ER 664 217
Lambert v Keymood Ltd [1997] 43 EG 131 227
Landmaster Properties Ltd v Thackeray Property Services [2003] 35 EG 83 256
Laurence v Lexcourt Holdings Ltd [1978] 2 All ER 810 146
Law Land Co Ltd v Consumers Association Ltd (1980) 255 EG 617 211
Lee-Parker and Another v Izzet and Others (No 2) [1972] 2 All ER 800 19
Lee-Parker v Izzet [1971] 1 WLR 1688 259
Lemmerbell Ltd v Britannia LAS Direct Ltd [1998] 3 EGLR 67 166
Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd [1993] 3 WLR 408 117
Lister v Lane & Nesham [1893] 2 QB 212 192
London Baggage Co (Charing Cross) Ltd v Railtrack plc [2000] EGCS 57 269
London Hilton Jewellers Ltd v Hilton International Hotels Ltd [1990] 1 EGLR 112 282
London Residuary Body v Lambeth Borough Council [1990] 2 All ER 309, HL 38
Lurcott v Wakeley & Wheeler [1911] 1 KB 905 192

M

M&P Enterprises (London) Ltd v Norfolk Square Hotels Ltd [1994] 1 EGLR 129 274
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 166, 262
Mark Rowlands Ltd v Berni Inns Ltd [1986] 1 QB 211 227

McCausland v Duncan Lawrie Ltd [1996] 4 All ER 995 137
McCaw City of Westminster Magistrates' Court (D) and Middlesex SARL [2008] EWHC 1504 85
McDougall v Easington DC (1989) 58 P & CR 201, CA 192
Meadfield Properties Ltd v Secretary of State for the Environment [1995] 03 EG 128 165
Metropolitan Properties Co (Regis) Ltd v Bartholomew [1995] 14 EG 143 158
Ministerial Decision [1977] JPL 116 31
Mira v Aylmer Square Investments Ltd [1990] 1 EGLR 45 223
Moat v Martin [1950] 1 KB 175 204
Morcom v Campbell-Johnson [1955] 3 All ER 264 192
Morgan Sindall v Sawston Farms (Cambs) Ltd [1999] 1 EGLR 90 242
Moss Bros Group plc v CSC Properties Ltd [1999] EGCS 47 205
Moule v Garrett and Others (1872) LR 7 Exch 101 154
Mount Eden Land Ltd v Folia Ltd [2003] EWHC 1815 246
Mourant & Co Trustees Ltd v Sixty UK Ltd (in administration) [2010] EWHC 1890 294
Mullaney v Maybourne Grange (Croydon) Ltd [1986] 1 EGLR 70 240
Mumford Hotels Ltd v Wheler and Another [1964] Ch 117 229
Murphy v Brentwood District Council [1990] 2 All ER 908 114

N

National Car Parks Ltd v The Paternoster Consortium Ltd [1990] 15 EG 53 285
National Car Parks Ltd v Trinity Development Co (Banbury) Ltd [2001] EWCA Civ 1686, [2001] 28 EG 144 134
National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675 170, 231
National Grid Co plc v M25 Group Ltd [1999] 08 EG 169 242
National Westminster Bank plc v Arthur Young McClelland Moores & Co [1985] 1 WLR 1123 180
Newbury District Council v Secretary of State for the Environment; Newbury District Council v International Synthetic Rubber Co [1981] AC 578 38
Newham London Borough Council v Thomas-Van Staden [2008] EWCA Civ 1414 270
Next plc v National Farmers Union Mutual Insurance Co Ltd [1997] EGCS 181 246
Nicholas v Kinsey [1994] 16 EG 145 270
Northways Flats Management Co v Wimpey Pension Trustees [1992] 31 EG 65 239
Norwich Union Life Insurance Society v Low Profile Fashions Ltd (1992) 21 EG 104 246
Norwich Union Life Insurance Society v Shopmoor Ltd [1999] 1 WLR 531 205
Nynehead Developments Ltd v RH Fibreboard Containers Ltd and Others [1999] 9 EG 174 260

O

O'May v City of London Real Property Co Ltd [1983] AC 726 286
Oceanic Village Ltd v Shirayama Shokusan Co Ltd [2001] All ER (D) 62 (Feb) 260
Orlando Investments v Grosvenor Estate Belgravia [1989] 2 EGLR 74 205
Owen v Gadd [1956] 2 QB 99 223

P

P&A Swift Investments v Combined English Stores Group plc [1988] 3 WLR 313 152
P&O Property Holdings Ltd v International Computers Ltd [2000] 2 All ER 1015, ChD 144
Palisade Investments Ltd v Secretary of State for the Environment [1995] 69 P & CR 638, CA 33
Payne v Haine (1847) 153 ER 1304 191
Pearson v Alyo [1990] 1 EGLR 114 274
Perry v Stanborough (Developments) Ltd [1978] JPL 36 64
Petra Investments Ltd v Jeffrey Rogers plc [2000] 3 EGLR 120 260
Plinth Property Investments Ltd v Mott, Hay & Anderson [1979] 1 EGLR 17 210
Pointon York Group plc v Poulton [2006] EWCA Civ 1001 268
Ponderosa International Development v Pengap Securities [1986] 1 EGLR 66 205
Port v Griffith [1938] 1 All ER 295 260
Post Office Counters Ltd v Harlow District Council [1991] 2 EGLR 121 211
Post Office v Aquarius Properties Ltd [1987] 1 All ER 1055 190, 191
Price v West London Investment Building Society [1964] 2 All ER 318 276
Proudfoot v Hart (1890) 25 QBD 42 191, 193
Prudential Assurance Co Ltd v Grand Metropolitan Estate Ltd [1993] 32 EG 74 184
Prudential Assurance Co Ltd v London Residuary Body [1992] 3 All ER 504 165
Prudential Assurance Company Ltd & Others v PRG Powerhouse Ltd & Others [2007] EWHC 1002 294

Q

Quick v Taff-Ely Borough Council [1986] QB 809 190

R

R (on the application of Crest Nicholson Residential Ltd) v SSEFRA & Others [2010] EWHC 561 (Admin) 81
R (on the application of Crest Nicholson Residential Ltd) v SSEFRA & Others [2010] EWHC 913 (Admin) 80, 81
R (on the application of National Grid Gas plc) (formerly Transco plc) v Environment Agency [2006] EWHC 1083 81
R v Greenwich London Borough Council, ex p Patel [1985] JPL 851, CA 66
R v Hillingdon London Borough Council, ex p Royco Homes Ltd [1974] 1 QB 720 38
R v Kuxhaus [1988] 2 WLR 1005, [1988] 2 All ER 705, CA 71
R v West Oxfordshire District Council, ex p CH Pearce Homes [1986] JPL 523 40, 43
Railtrack plc v Gojra [1998] 08 EG 158 276
Rainbow Estates Ltd v Tokenhold Ltd [1999] Ch 64 256
Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] QB 12 191, 192
Receiver for Metropolitan Police District v Palacegate Properties Ltd [2001] 2 Ch 131 270
Romulus Trading Co Ltd v Comet Properties Ltd [1996] 2 EGLR 70 260
Romulus Trading Co Ltd v Henry Smith's Charity Trustees [1990] 2 EGLR 75 281
Rose v Gossman (1966) 201 EG 767 218
Royal Bank of Scotland plc v Jennings and Others [1997] 19 EG 152 142
Rushmer v Polsue and Alfieri Ltd [1906] 1 Ch 234 84
Rylands v Fletcher [1868] UKHL 1 85

S

Sabella Ltd v Montgomery [1998] 09 EG 153 274
Scala House & District Property Co Ltd v Forbes [1974] QB 575 264
Scholl Manufacturing Ltd v Clifton (Slim-Line) Ltd [1967] Ch 41 274
Scottish & Newcastle plc v Raguz [2007] EWCA Civ 150 253
Secretary of State for the Environment v Possfund (North West) Ltd [1997] 39 EG 179 243
Shanley v Ward (1913) 29 TLR 714 205
Sight and Sound Education Ltd v Books etc Ltd [1999] 43 EG 61 273
Skilleter v Charles [1992] 13 EG 113 240
Smiley v Townshend [1950] 2 KB 311 255
Smith v Draper [1990] 2 EGLR 69 274
Southport Old Links Ltd v Naylor [1985] 1 EGLR 66 274
Southwark London Borough Council v Mills and Others; Baxter v Camden London Borough Council [1999] 3 WLR 939 223
Sovmots v Secretary of State for the Environment; Brompton Securities Ltd v Secretary of State for the Environment [1977] 1 QB 411 37
Starmark Enterprises Ltd v CPL Distribution Ltd [2001] 32 EG 89 (CS) 185
Sterling Land Office Developments Ltd v Lloyds Bank plc (1984) 271 EG 894 211
Stevens v Bromley London Borough Council [1972] 2 WLR 605, CA 65
Stile Hall Properties Ltd v Gooch [1979] 3 All ER 848 275
Street v Mountford [1985] AC 809, [1985] 2 All ER 289 134, 198
Stringer v Minister of Housing and Local Government [1971] 1 All ER 65 37
Sunberry Properties Limited v Innovate Logistics Ltd (in administration) [2008] EWCA Civ 1261 309
Surrey County Council v Single Horse Properties Ltd [2002] EWCA Civ 367, [2002] 1 WLR 2106 273

T

Thatcher v CH Pearce & Sons (Contractors) Ltd [1968] 1 WLR 748 263
Tidswell v Secretary of State for the Environment [1977] JPL 104 64
Transworld Land Co Ltd v J Sainsbury plc [1990] 2 EGLR 255 257
Tyco Fire & Integrated Solutions (UK) Ltd v Rolls Royce Motor Cars Ltd [2008] EWCA Civ 286 226

U

Ultraworth Ltd v General Accident Fire and Life Assurance Corporation [2000] 2 EGLR 115 255
United Dominion Trust Ltd v Shellpoint Trustees [1993] EGCS 57 266
United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904, [1977] 2 All ER 62 166, 185

W

Wallington v Secretary of State for the Environment [1991] JPL 942, CA 31
Wallis Fashion Group Ltd v General Accident Life Assurance Ltd [2000] EGCS 45 287
Warborough Investments Ltd v Central Midlands Estates Ltd [2006] PLSCS 139 147
Webber (CA) Transport Ltd v Railtrack plc [2004] 1 WLR 320 277
Welsh v Greenwich London Borough Council [2000] PLSCS 149 194
Whiteminster Estates v Hodges Menswear (1974) 232 EG 715 205
Willison v Cheverell Estates Ltd [1996] 26 EG 133 279
Winfrey and Chatterton's Agreement, Re [1921] 2 Ch 7 205

Z

Zarvos v Pradhan [2003] 2 P & CR 9, [2003] EWCA Civ 208 281, 282

Table of Statutes

Agricultural Holdings Act 1986 269
Arbitration Act 1996 120, 186

Climate Change Act 2008 91, 92
Common Law Procedure Act 1852
s 210 263
Companies Act 2006 6
s 172 94, 318
s 860 13, 161
s 1139 276
Contracts (Rights of Third Parties) Act 1999 113, 252, 348, 377, 389
Criminal Law Act 1977
s 6 262

Defective Premises Act 1972 195, 373
Disability Discrimination Act 1995 199, 216, 345
Disability Discrimination Acts 342

Environment Act 1995 77, 100, 144
Environmental Protection Act 1990 77, 97
Pt IIA 77, 78, 82, 83, 86, 87, 91
s 33 88
s 34 88
s 37 96
s 78A(2) 78
s 78A(4A) 78
s 78A(9) 79
s 78B 77
s 78C 79
s 78E 79
s 78F(2) 79
s 78F(4) 79
s 78M 82
s 78M(5) 82
s 78U 83
s 79 85
s 80 85
s 82 85
s 157 77, 82
Sch 2 86
Equality Act 2010 38, 199, 206, 219, 220

Finance Act 1994 351

Health and Safety at Work, etc Act 1974
s 33(1)(c) 96
Highways Act 1980 56
Housing Act 2004 92
Housing Grants, Construction and Regeneration Act 1996 120
Human Rights Act 1998 84, 254, 262

Insolvency Act 1986 159, 291, 294, 297, 298
ss 1–7 294
s 112 299
s 126 307

Insolvency Act 1986 – *continued*
s 130 307
s 145 159
s 178 306, 307, 309
s 178(3) 309
s 178(5) 310
s 238 299
s 239 299
s 241 301
ss 252–263 294
s 284(1) 297
s 285 303
s 285(1) 297
s 285(3) 297
s 315 309
s 316 303
s 316(1) 310
s 339 299
s 340 299
s 342 301
s 347 303
Sch B1
para 43 298

Land Charges Act 1972 278
Land Compensation Act 1973
Pt 3 326, 329
Land Registration Act 2002 142
Sch 3 278
Sch 12 154, 155, 156
Landlord and Tenant Act 1927 195, 216, 220, 256, 276, 353, 367
Pt I 220
s 18 255, 259
s 19(1)(a) 200, 202, 204, 245, 249
s 19(1A) 201, 203, 204, 206, 245, 247, 368
s 19(1C) 201
s 19(2) 217, 218
s 19(3) 212
s 23(1) 276
s 25 268
Landlord and Tenant Act 1954 134, 147, 166, 169, 175, 176, 199, 248, 250, 271, 324, 335, 336, 339, 340, 343, 353, 367, 377, 385
Pt II 129, 134, 147, 153, 165, 166, 167, 198, 205, 232, 250, 261, 262, 266, 267–87, 298
Pt III 220
s 23 268, 269
s 23(1) 267
s 23(1A)–(1B) 268
s 23(3) 270
s 24 108, 153, 158, 169, 267, 272, 275, 322, 324, 327, 330, 377, 379, 387
s 24(2A) 322, 324
s 24(2B) 324
s 24(3) 269
s 24A 144, 154, 169, 175, 272, 278, 279, 322, 327

Landlord and Tenant Act 1954 – *continued*
s 24B 322, 327
s 24C 322, 327
s 24D 322, 327
s 25 273, 274, 275, 276, 277, 278, 279, 281, 283, 284, 321–2, 321–6, 322, 323, 324, 330, 332, 377, 379, 387
s 25(8) 322
s 26 273, 275, 276, 277, 278, 281, 283, 284, 326, 326–9, 327, 330, 377, 379, 387
s 26(6) 330, 332
s 27 273, 330, 377, 379, 387
s 27(1A) 273
s 28 330, 369, 377, 379, 387
s 29A 278, 324, 329
s 29A(2) 277
s 29B 278, 324, 329
s 30 274, 277, 279, 285
s 30(1) 279, 323, 324, 326, 327
s 30(1)(a)–(c) 324, 328
s 30(1)(d) 325, 328
s 30(1)(e) 325, 326, 328
s 30(1)(f)–(g) 166, 325, 326, 328
s 30(1A)–(1B) 325
s 30(2)–(3) 283
s 31A 282, 285, 325
s 34 176, 322, 327
s 34(3) 286
s 35 322, 327
s 37 147, 326, 328, 329
s 38 266
s 38(1) 270
s 38(2) 284
s 38(4) 270
s 38A 248
s 38A(3)(a)–(b) 369, 377, 387
s 40 269, 331, 333
s 40(1) 329, 331
s 40(2) 331
s 40(3) 332, 334
s 40(4) 334
s 40(5) 331, 333, 334
s 40(8) 331, 333
s 40B 331, 334
s 41 268, 283
s 41A 268
s 42 283, 368, 370
s 44 269, 322, 326, 329, 332, 334
s 46 268
s 46(2) 268, 325
s 64 278
s 67 322, 326, 329, 332, 334
Landlord and Tenant Act 1988 203, 206, 213, 245
s 1 245, 249
s 1(3)(b) 206
Landlord and Tenant (Covenants) Act 1995 134, 148, 149, 151, 152, 153, 155, 156, 157, 160, 161, 166, 200, 201, 202, 245, 247, 248, 253, 258, 286, 348, 353, 377, 378, 385, 386
s 5 368
s 6 152
s 8 152
s 11 368, 386
Landlord and Tenant (Covenants) Act 1995 – *continued*
s 17 253, 367
s 18 153, 158, 379, 387
s 24(2) 157
s 25 158
s 28(1) 139
Late Payment of Commercial Debts (Interest) Act 1998 170
Law of Distress Amendment Act 1908 254
s 6 255, 301, 302, 303, 304, 305, 306, 307, 308
Law of Property Act 1925 256, 292, 295
s 44 249
s 61 145
s 62 356
s 77 154, 155, 156
s 101 295
s 141 152
s 141(1) 152
s 142 152
s 142(1) 152
s 144 203, 206
s 146 144, 170, 252, 256, 264, 265, 307, 367
s 146(2) 264
s 146(4) 265, 266
s 147 264, 265, 367
s 150 266
s 196 22, 147, 376
s 196(3)–(4) 147
Law of Property Act 1969 278
Law of Property (Miscellaneous Provisions) Act 1989
s 2 137
Leasehold Property (Repairs) Act 1938 195, 256, 265
Limitation Act 1980 254
Local Government Act 1972
s 250(5) 48

Mental Health Act 1983
s 99 159
Misrepresentation Act 1967
s 3 147

Partnership Act 1890 6
Perpetuities and Accumulations Act 1964
s 1 354
Planning Act 2008 41
Planning and Compensation Act 1991 27
Planning and Compulsory Purchase Act 2004 27, 37, 40
s 43 43
Protection from Eviction Act 1977 263

Race Relations Act 1976 199, 206
Recorded Delivery Service Act 1962 147
Regulatory Enforcement and Sanctions Act 2008 82, 95
Rent Act 1977 331
Rent (Agriculture) Act 1976 331

Senior Courts Act 1981
s 37 259

Sex Discrimination Act 1975 199, 206
Supply of Goods and Services Act 1982 241
s 4 104
s 13 104

Town and Country Planning Act 1990 27, 144
Pt VII 59
s 38(6) 28, 315
s 55 143, 219
s 55(1) 29
s 55(1A) 30
s 55(2) 31
s 55(2)(a) 30
s 55(2)(d)–(f) 31
s 55(2)(g) 30
s 55(3) 31
s 55(5) 31
s 56 41, 315
s 56(4) 58
s 57(1) 29
s 57(2) 33, 35, 40
s 57(3)–(6) 33
ss 59–61 33
ss 62–65 42
s 65(8) 43
ss 66–68 42
s 69 42, 43, 61
s 70(1) 37, 38
s 72(1) 38
s 73 43, 44, 56, 315
s 73A 43, 44, 56, 66
s 75(1) 40
s 78 44
s 97 40
s 106 53, 55
s 106(1) 52, 57
s 106(2) 52
s 106(3) 52
s 106(4) 52
s 106(5) 53
s 106(6) 53
s 106(12) 53
s 106A(3)–(4) 57
s 106B 57
s 171A 59
s 171A(1) 65
s 171B 59, 64
s 171B(4)(b) 60, 64
s 171C 62, 68
s 171C(1) 63
s 171C(5) 63
s 171D 62
s 171D(2)–(6) 63
ss 171E–171G 67
ss 171–196 59
s 172 63, 65, 69
s 172(1) 64
s 173 43, 65
s 173(1) 65
s 173(2) 65, 67
s 173(3)–(9) 65
s 173(11)–(12) 66
s 174 43, 65, 66, 69

Town and Country Planning Act 1990 – *continued*
s 174(1) 70
s 174(2) 69
s 174(2)(a) 68
s 174(3) 70
s 174(3)(b) 70
s 174(4) 70
s 174(6) 70
s 175 43, 65, 69
s 175(5) 70
s 176 43, 65, 69
s 176(1) 70
s 176(2) 66
s 177 43, 65, 69
s 177(5) 70
s 178 43
s 178(1) 67
s 179 43
s 179(1)–(5) 67
s 179(7)–(9) 67
ss 180–182 43
s 183 67
s 183(1)–(3) 68
s 183(6)–(7) 67, 68
s 184 67
s 184(1)–(3) 68
s 184(7) 68
s 185 67
s 186 67
s 187 67
s 187A 63
s 187B 67, 69
s 188 67, 68
s 191 60
s 191(1) 60
s 191(4) 61
s 192 60, 61
s 193(4) 61
s 193(6) 61
s 196A 61
ss 196B–196C 61
s 284 48
s 285(1) 66
s 288 48
s 289 70
s 320 70
s 320(2) 48
s 322 48, 70
s 336(1) 30, 65
Sch 1 28
para 1 28
Tribunals, Courts and Enforcement Act 2007 254

Unfair Contracts Terms Act 1977 147
s 8 147

Value Added Tax Act 1994 353, 367
s 89 126–7

Water Resources Act 1991
s 24 88
s 104 78
Wildlife and Countryside Act 1981 97

International conventions

European Convention on Human Rights
Art 8 84
UN Framework Convention on Climate Change
Kyoto Protocol 1997 73, 89, 90

Table of Secondary Legislation

Statutory instruments

Building Regulations 137
Construction (Design and Management) Regulations 1994 (SI 1994/3140) 105
Construction (Design and Management) Regulations 2007 (SI 2007/320) 105, 341, 350, 373
Contaminated Land (England) Regulations 2006 (SI 2006/1380) 82
Control of Asbestos at Work Regulations 2006 (SI 2006/2739) 95
reg 4 95, 96
reg 4(1) 95
Control of Major Accidents Hazards Regulations 1999 (SI 1999/743) 318
Control of Substances Hazardous to Health Regulations 2002 (SI 2002/2677) 88
Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (SI 2007/991) 92
Pt 4 94
reg 4 93
reg 5 93
reg 8 93
reg 11(3) 93
reg 16 93
Environmental Damage (Prevention and Remediation) Regulations 2009 (SI 2009/153) 74, 86
Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/675) 86
reg 7 87
reg 12 87, 89
reg 12(1) 87
reg 22 89
reg 36 89
reg 37 89
reg 38 87, 89
reg 38(1) 87
reg 57 89
reg 60 89
Sch 3 88
Schs 7–8 86
Sch 9 87, 88
Schs 10–23 87
Environmental Protection Act (Duty of Care) Regulations 1991 (SI 1991/2839) 97
Greenhouse Gas Emissions Trading Scheme Regulations 2005 (SI 2005/925)
Sch 1 90
Insolvency Rules 1986 (SI 1986/1925)
r 6.13 293
Land Registration (Amendment) (No 2) Rules 2003 (SI 2003/1982) 142
Land Registration Rules 2005 (SI 2005/1766) 142
Sch 1A 142
Landlord and Tenant Act 1954 Part II (Notices) (England and Wales) Regulations 2004 (SI 2004/1005) 273, 275
Sch 2 321–2
Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (SI 2007/871) 88
Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096) 267, 277, 324, 327, 331, 332, 333
art 18 278
art 25 273
Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) 120
Town and Country Planning (Appeals) (Written Representations Procedure) Regulations 2009 (SI 2009/452) 46
Town and Country Planning (Applications) Regulations 1988 (SI 1988/1812) 37, 42
reg 3 44
Town and Country Planning (Compensation) (No 3) (England) Regulations 2010 (SI 2010/2135) 36
Town and Country Planning (Determination by Inspectors) (Inquiries Procedure) Rules (England) 2000 (SI 2000/1625) 47
Town and Country Planning (Development Management Procedure) Order 2010 (SI 2010/2184) 48
Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991 (SI 1991/2804)
regs 3–4 65
reg 5 70
Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2010 (SI 2010/567) 45
Town and Country Planning (General Development Procedure) Order 1995 27, 28, 60
art 1(2) 37
art 3 36
art 4 49
art 6 42
art 6(6) 43
art 7 42
art 8 43
art 20 43, 44
art 22 43
art 23 44, 45
art 23(1)(b) 46
art 24 61
art 25(2) 43
Sch 2
Pt 1 42

Town and Country Planning (General Permitted Development) Order 1995 27, 28, 33–6, 42, 48, 315, 316
art 1 36
art 3(5) 35
art 4 36
Sch 2 30, 33, 35
Town and Country Planning (Hearings and Inquiries Procedure) (Amendment) (England) Rules 2009 (SI 2009/455) 47, 48
Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000/1626) 48
Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) 46–7
Town and Country Planning (Use Classes) Order 1987 (SI 1987/764) 27, 28, 31, 32, 33, 34, 179, 211, 351
art 3(6) 32

Value Added Tax (Land) Order 1995 (SI 1995/282) 128

Waste Electrical and Electronic Equipment Regulations 2006 (SI 2006/3289) 88

EU secondary legislation

Directive 2002/91/EC Energy Performance of Buildings 92
Arts 4–9 92
Directive 2003/87/EC Emissions Trading Scheme 90, 91
Directive 2004/35/EC Environmental Liability 86

Circulars

DCLG Circular 11/95 39–40
Annex 39
para 14–42 39–40
DCLG Circular 10/97
Annex 1, Appendix 62
Annex 2, paras 12–13 65
DCLG Circular 5/2005 53, 56, 316
paras B2–B4 53
paras B6–B7 54
DCLG Circular 5/2005 – *continued*
para B8 54
para B9 54, 316
para B12 54
paras B15–B16 54
paras B17–B19 55
para B25 55
para B31 55
paras B46–B49 58
para B51 55, 56
DCLG Circular 3/2009 48
DEFRA Circular 01/2006 77
Annex 2 79
Annex 3 80
DOE Circular 11/1995 52, 55

Codes of Practice

Code for Leasing Business Premises in England and Wales 2007 148–50, 202, 203, 210, 225, 228, 231, 247, 251, 320, 335–45, 347
para 4 175
para 5 203
para 6 243
para 7 194
para 8 210, 220
para 9 225, 233
Code of Practice for Commercial Leases 2002 149
DCLG Model Planning Conditions for Contaminated Land 83
RICS Code of Practice on Service Charges in Commercial Property 2006 150, 243, 336, 340, 344, 347, 353

Planning Policy Guidance

PPG 18 64
para 5 64
PPG 23 83

Planning Policy Statements

PPS 1 29
PPS 10 82
PPS 23 82
Tan 21 (Wales) 82

List of Abbreviations

The following abbreviations are used throughout this book.

AGA	Authorised Guarantee Agreement
BCN	breach of condition notice
CGT	capital gains tax
CIL	Community Infrastructure Levy
CLEUD	certificate of lawful use or development
CLR	contaminated land regime
CRC Scheme	Carbon Reduction Commitment Energy Efficiency Scheme
CVA	company voluntary arrangement
DCLG	Department for Communities and Local Government
DEC	Display Energy Certificate
DEFRA	Department for Environment, Food and Rural Affairs
EA 1995	Environment Act 1995
EPA 1990	Environmental Protection Act 1990
EPC	Energy Performance Certificate
EU ETS	European Union Emission Trading System
GDPO	Town and Country Planning (General Development Procedure) Order 1995
GHG	greenhouse gas
GPDO	Town and Country Planning (General Permitted Development) Order 1995
HMRC	HM Revenue & Customs
IA	Insolvency Act 1986
IVA	individual voluntary arrangement
LDF	local development framework
LDO	local development order
LODAA 1908	Law of Distress Amendment Act 1908
LPA	local planning authority
LPA 1925	Law of Property Act 1925
LP(MP)A 1989	Law of Property (Miscellaneous Provisions) Act 1989
LRA 2002	Land Registration Act 2002
LTA 1927	Landlord and Tenant Act 1927
LTA 1954	Landlord and Tenant Act 1954
LTA 1988	Landlord and Tenant Act 1988
LT(C)A 1995	Landlord and Tenant (Covenants) Act 1995
NPV	net present value
OMR	open market rent
PA 2008	Planning Act 2008
PCA 1991	Planning and Compensation Act 1991
PCN	planning contravention notice
PCPA 2004	Planning and Compulsory Purchase Act 2004
PEA 1977	Protection from Eviction Act 1977
PPGs	planning policy guidance notes
PPS	Planning Policy Statement
RESA 2008	Regulatory Enforcement and Sanctions Act 2008
RICS	Royal Institution of Chartered Surveyors
SCPC	Standard Commercial Property Condition
SDLT	stamp duty land tax
SDO	special development order
SPV	special purpose vehicle

SPZ	simplified planning zone
TCPA 1990	Town and Country Planning Act 1990
UCO	Town and Country Planning (Use Classes) Order 1987
VATA 1994	Value Added Tax Act 1994

Part I
SITE ACQUISITIONS

Chapter 1
The Commercial Context

1.1	What is commercial property?	3
1.2	Who buys commercial property?	3
1.3	Buying commercial property jointly	5
1.4	Methods of structuring a property joint venture	5
Review activity		7

1.1 What is commercial property?

Commercial property is property which is not designed or used for residential purposes or for purposes associated with the primary industries such as agriculture and mining. The three main types of commercial property are offices (single office buildings and business parks), retail (individual shops, shopping centres, retail warehouses and supermarkets) and industrial (factories, warehouses and distribution centres). Together these represent about 80% of the commercial property market. The remaining 20% comprises properties used for leisure (pubs, restaurants and hotels), sport, education, the provision of utilities and healthcare (hospitals and nursing homes).

The commercial property sector is much smaller than the residential sector. At the end of 2009, the value of commercial property on the UK balance sheet was £559.1bn, or 8.5% of all non-financial assets. By contrast, the residential sector was valued at £4,048.3bn, or 58.3% of all non-financial assets. However, 94.5% of this residential property was owned by private householders, so there is not as much scope for residential property investment as there is with commercial property. (The figures quoted are taken from the *United Kingdom National Accounts: The Blue Book 2010*, published by the Office for National Statistics.)

This book will concentrate on two of the main types of commercial property, offices and retail, although most of what is covered in it will also be relevant to the other types of commercial property.

1.2 Who buys commercial property?

1.2.1 Occupiers

About half of all commercial property is bought by occupiers, who need land and buildings from which to conduct their business. Some of these occupiers want to buy a freehold or long leasehold interest in the property because they need certainty and complete freedom to deal with the property as the business dictates, but it does means that a lot of capital is tied up in the building. Other occupiers prefer to take a so-called 'rack rent lease', where the occupation cost is paid, usually quarterly, over the period of the lease by way of rent, rather than all at the beginning. In recent years, particularly among the large food retailers, there has been a move away from freehold ownership through 'sale and leaseback', where the freehold interest in the property is sold to an investor (thus releasing capital for use in the operating part of the business) and the occupier takes a rack rent lease instead.

1.2.2 Investors

The other half of all commercial property is bought by investors, who buy property to let out to others so that they can make an income from the rent and a profit from any increase in the capital value of the property. Although the capital value of commercial property has suffered a

considerable fall in value since 2007, it remains popular with certain types of investor because the average office lease offers an income stream of about seven years (10 years for retail). So, the income return (or 'yield') from commercial property is relatively high (4.9%, as compared to 3.2% for equities and 5.6% for gilts in 2006) and over the 35 years prior to 2006, commercial property produced annualised returns of 12.2%, better than gilts and equities (see Investment Property Forum, *Understanding Commercial Property Investment: A Guide for Financial Advisors 2007*, p 8). Commercial property has tended not to track the performance of gilts and equities particularly closely, so including some commercial property in your investment portfolio is a way of diversifying and spreading risk. Moreover, by good management of tenants and/or refurbishment of a tired building, a property investor may be able to enhance the value of the asset, even in times of economic downturn.

There are two ways to invest in commercial property, directly or indirectly. Direct property investment involves buying a property in your own name or in the name of a group company, letting it out, taking responsibility for managing it and selling it on when you no longer require it. Although you can employ surveyors and other professionals to assist you, this still uses up a considerable amount of time and effort. It also means that you have to find a considerable amount of cash, or a loan, or a combination of both, to fund the initial purchase. An alternative way is to buy shares or units in a company that invests in a range of commercial and residential property, such as a real estate investment trust (REIT) or an offshore property unit trust (PUT). These indirect property investment vehicles offer opportunities for smaller levels of investment, some taxation advantages, less management responsibility and, arguably, greater flexibility as it may be easier to trade units than to sell a property. However, indirect property investment is beyond the scope of this book.

So who invests in commercial property? According to figures published by the Investment Property Forum in 2007, UK insurance companies and pension funds held the largest block of directly-owned investment property (28%); UK listed property companies held 14%; UK private property companies 15%; and overseas investors 15%. Traditional estates and charities and private investors held 5% and 3% respectively. Most of the remainder was held by investors providing indirect investment to others, such as the unit trusts and pooled funds. Some of these units are bought by private individuals, but many are bought by the investors who also buy property directly. For example, if you add together the direct and indirect property holdings of the UK insurance companies and pension funds in 2007, it came to 40%, by value, of the core commercial property investment properties.

1.2.3 Developers

Another way to make a profit from commercial property is to buy a property which is not being used to its full potential, construct some new buildings on the site, let at least some of the new buildings to quality tenants so that there is good income flow, and then sell the completed development to an occupier or an investor at a price greater than you have spent on the purchase and development of the property. Commercial property development stalled after the credit crunch of 2007 because of the difficulties developers experienced in obtaining loans to fund what is still seen as a risky activity, but in times of economic growth, when there is a shortage in the supply of new buildings, commercial property development returns.

Of course, the aims of occupation, investment and development are not mutually exclusive. For example, some larger investors develop property themselves, or participate in joint ventures with developers so as to spread the risks (see **1.3**). Some potential occupiers, particularly those looking for prestige headquarters buildings, may prefer to develop their own building or work alongside a developer in order to achieve a high degree of customisation.

1.3 Buying commercial property jointly

Both property investment and property development involve substantial financial risks. For example, between the summer of 2007 and the autumn of 2008, commercial property lost, on average, about 40% of its value. Property development is particularly risky because the economic conditions can worsen considerably in the months, sometimes years, between the purchase of the site and completion of the development. So, although it is sometimes the case that a developer will purchase a site and develop the site itself, this normally occurs only in the case of small-scale developments. In larger developments it is usual to find that the development will be a joint venture between two or more parties.

Joint ventures enable the cost and potential risks, and profits (if any), of a development scheme to be shared. So a developer might find it easier to obtain funding, and those wishing to invest funds (eg banks, pension funds, etc) can share in the profits of a development rather than just obtaining a fixed return. They may also have more control over the nature of the development.

Joint ventures also enable landowners and those without particular skills in a particular aspect of property development to undertake them competently. So, for example, the cleaning up of a seriously contaminated site would need the involvement of specialists. This service could always be purchased, ie a contractor is employed to clean up the site, but if the landowner/developer does not understand the issues involved it can be very difficult to manage outside contractors properly. If the contractor is involved as a party to the venture, such problems should be avoided.

Property joint ventures are not always carried out purely for profit. For example, a local authority might enter into a joint venture as a way of bringing about urban regeneration or other social benefits. Other landowning public bodies which have historically entered into joint ventures include Transport for London, the National Health Service, Sport England, the Ministry of Defence, housing associations, registered social landlords and the Olympic Delivery Authority. Indeed, the regional development agencies and the Home and Communities Agency were specifically set up to assist these types of landowner to get their surplus or under-utilised land redeveloped.

Before entering into any kind of joint venture, various matters need careful consideration. A detailed business plan will need to be put together, along with possible exit strategies. The duration of the venture will need to be agreed, including terms of dissolution. The arrangements for the management of the venture will also need to be agreed.

The financial credentials of the proposed joint venturers will need to be confirmed. The profit share (or share of the loss) and financial contributions of each party will have to be agreed, along with each party's involvement in the development works themselves. The form which the joint venture will take will also need to be established.

1.4 Methods of structuring a property joint venture

A joint venture set up for development purposes might involve, for example, the landowner, the developer, the funder and the ultimate occupier of the completed development. There are various ways in which such a joint venture can be structured, and the legal documentation setting up the scheme should be in place before the development site is acquired. No one scheme is always appropriate, and the advantages and disadvantages of each option should be considered carefully. Often taxation will be of prime consideration, and specialist advice should be obtained with regard to the tax implications of the chosen scheme.

1.4.1 Contractual joint venture

This, in essence, involves the parties entering into a contract which sets out the terms of their agreement. These will include each party's financial commitment and duties in relation to the

development, so the arrangement is very flexible and responsive to the parties' individual needs. As there is no setting up of a separate legal entity, there is no need to transfer the ownership of the site at the start of the joint venture, so a charge to stamp duty land tax (SDLT) is avoided. The joint venture contract arrangement is 'tax transparent', so each party will be responsible for payment of income tax on its profits and capital gains tax (CGT) on its capital gains, and will get the direct benefit of any tax deductions and reliefs. Moreover, as there is no new legal entity, it is less likely that one party would be liable for the actions of another (subject to the terms of the agreement). On the other hand, as there is no separate legal entity, there will be unlimited liability in relation to any losses. Thus the failure of the joint venture could result in threats to the continued existence of the contracting parties.

1.4.2 Joint venture partnership

In a joint venture partnership, the joint venture partners will enter into a partnership agreement to purchase the property. This agreement will again regulate the way in which risk and profits are shared and the roles and responsibilities of each partner. A joint venture partnership, like the joint venture contract, is very flexible and can be tailored to suit the needs of the partners. However, unlike a joint venture contract, a partnership is a legally recognised structure, governed by a statutory code in the Partnership Act 1890, so there is a default position when unexpected events occur.

The property will be held in the name of the partnership, so a charge to SDLT will arise when the property is transferred from the landowner to the joint venture partners. As the legal interest in property can only be held by up to four people, if there are more than four partners the legal interest will be held in the names of some of those partners, with the beneficial interest vesting in all of the partners, in specified shares.

As far as tax is concerned, a joint venture partnership is tax transparent, so each partner is taxed on its own share of the profits and capital gains separately, and each is able to choose how best to use its tax deductions and reliefs. As a partnership, there is no requirement to file an annual return, and the accounts will remain private.

The main disadvantage is that in the traditional unlimited liability partnership, each partner will be wholly liable for the debts and obligations of the partnership, so the partners have to know and trust each other to a very high degree. Moreover, each partner will have the authority to bind the partnership and its co-partners when dealing with third parties. However, parties can now choose to use a limited liability partnership (LLP). An LLP is a hybrid between a partnership under the Partnership Act 1890 and a limited company under the Companies Act 2006. An LLP shares many of the features of a traditional partnership (including tax transparency), but it also offers reduced personal responsibility for business debts. The LLP is a corporate body with a separate identity from the members, and the LLP itself is responsible for any debts that it incurs, rather than the individual members.

Joint venture partnerships have been commonly used to acquire property and are preferable to a simple contractual relationship where a long-term, complex project is contemplated.

1.4.3 Special purpose vehicle companies

This is a limited company set up for a particular purpose, eg to develop a particular site. The special purpose vehicle company (SPV) may be a subsidiary of just one company, but it can also be a jointly-owned subsidiary of several companies. The companies that set up the SPV are shareholders in it and have all of the usual rights of a shareholder. Different companies can invest different amounts in the property that the SPV purchases and receive differing profit shares. Although certain matters can be customised in a shareholders agreement, in default the arrangements will be governed by company law, which is a tried and tested framework with which the parties are likely to be familiar.

A key advantage of using an SPV is that the SPV will have limited liability. This means that the risk of a particular business venture can be isolated from the other businesses of the companies involved. If the property investment turns out to be a very bad one and the SPV becomes insolvent, the other interests of the shareholding companies are protected.

Another reason for choosing an SPV is that on completion of the development, it is possible to transfer ownership of the property by selling the shares in the SPV company, rather than by transferring the property itself. The benefit of this comes from the way stamp duty is charged. Stamp duty land tax (SDLT) is paid at the rate of 4% of the purchase price for all property costing more than £500,000. However, if you sell shares in a company, stamp duty is paid at the rate of 0.5% on the consideration. There are, however, special anti-avoidance SDLT rules which need to be considered in this context. As always, specialist taxation advice will be needed. Note also that although it is the buyer, rather than the seller, who pays the SDLT and who therefore benefits from the saving, as the buyer will be making an SDLT saving it may be prepared to pay a higher purchase price for the SPV than for the property, so the seller benefits too.

On the other hand, as a limited company governed by the Companies Acts, annual returns must be filed, which will result in administrative expense and a lack of privacy as to the company's structure and finances (LLPs also have to file annual accounts). When the joint venture is formed, the property will be held in the name of the SPV, so a charge to SDLT will arise when the property is transferred from the landowner to the SPV. There are also taxation issues other than SDLT to consider. The SPV itself will be assessed to corporation tax on the rental income and on capital gains from the property held as an investment, and the shareholder companies will pay corporation tax on the dividends issued by the SPV. This is sometimes referred to as 'double taxation'. For this reason, an SPV is perhaps more suited to a development which is to be disposed of within a short period of its completion rather than held as a long-term investment.

Review activity

1. What are the three main types of commercial property?
2. When choosing a commercial property from which to conduct its business, why might a business organisation prefer to rent a property than buy a freehold property?
3. How do investors hope to make a profit from commercial property?
4. How do developers hope to make a profit from commercial property?
5. Why might an investor enter into a joint venture with others to develop a commercial property?
6. Why might a contractual joint venture or a joint venture partnership be more tax-efficient for the parties than an SPV?
7. In terms of reducing financial risk to the joint venture parties, which joint venture structures are most advantageous?
8. Which joint venture structure is most efficient in terms of SDLT?

Chapter 2
Obtaining Property Finance

2.1	Methods of finance	9
2.2	Debt finance	10
Review activity		14

2.1 Methods of finance

One of the first considerations of any buyer of commercial property, whether the buyer is a developer, an institutional investor or simply a company looking to acquire premises from which to operate, is how to fund the acquisition. Even the largest commercial organisation is unlikely to have sufficient funds to buy the property without recourse to outside funding; and even if they do have the funds readily available, it may not make financial sense to use them. There may be tax advantages to borrowing the necessary funds, as discussed at **2.1.4**. There are a number of ways in which a company may finance an acquisition and/or development. These are considered below.

2.1.1 Share capital

Where the buyer is a company, it may consider issuing further shares to raise additional capital to invest in property. This method of raising funds may not be popular with the current shareholders of the company. Depending on the method used, a new issue of shares may result in reduced dividends as a current shareholder's percentage shareholding may be diluted, which will also affect voting power and capital rights. Further, if the company is a publicly listed company there will be additional regulations to consider before any such fund-raising may be considered. Details of these regulations are dealt with in ***Public Companies and Equity Finance.***

2.1.2 Forward funding and equity funding

Institutional investors such as pension and life insurance funds have substantial sums of money at their disposal for investment. These investors will usually invest in property in addition to shares and bonds, in order to maintain a balanced investment portfolio. This investment may take the form of a simple purchase of an established commercial property (an office block or shopping centre) which has been let. The investor will receive the rental income stream from the tenants, and it will also hope that, over time, the capital value of the property will increase.

As an alternative to purchasing a property which has already been let, such investors may also take an active part in the development of suitable property. Examples of ways of doing this are discussed below.

2.1.2.1 Forward funding

In this instance, the institutional investor finances the development from the outset, acquiring the land and paying all the construction costs, including architects' fees, etc. The developer is paid a fee for its work and, once the development has been completed and let, is paid a profit share. The developer may be prepared to accept a lower profit because there is less risk to the developer than if it had developed the property using its own funds. The investor will hope to have paid less for the completed and let property than if it had waited to buy the property until after the developer had built and let it.

2.1.2.2 Equity funding

In the case of equity funding, an investor and a developer will form a joint venture company to acquire the development site and undertake the development. The investor takes preference shares in order to be assured of a priority return on its investment. This way, the investor is participating in the profits and losses of the development.

2.1.3 Sale and leaseback

It is possible for the owner-occupier of a freehold property to raise funds against the value of its property and remain in occupation by entering into a sale and leaseback arrangement. The freehold interest in the property is sold; immediately following completion of the sale, the buyer leases it back to the seller/former owner, usually at a market rent. In this way the former owner can raise capital for whatever purpose it requires, eg working capital to acquire further premises for investment or development, etc. The buyer will see a return on its capital investment in the form of the rent paid by the former owner.

2.1.4 Debt finance

One of the most common ways of raising finance is to borrow, usually from a bank or building society. The attraction of borrowing for UK tax resident corporate borrowers is that they may be entitled to tax relief on any loan interest paid. Further, even if the buyer has sufficient cash to purchase the property without recourse to borrowing, the return it will get by investing the cash will often be higher than the rate of interest it will pay on a loan. The remainder of this chapter will concentrate on debt finance, as this is probably the method you will encounter most often in practice.

2.2 Debt finance

2.2.1 Term sheet

A term sheet is a document which sets out the principal terms on which the lender is prepared to lend. It is produced following initial negotiations between the lender and the borrower, and is not usually intended to be legally binding as it is based on the limited information the lender has about the borrower and the property at this early stage. The term sheet will often be attached to a commitment letter or mandate letter which contains any terms which are intended to be legally binding at that stage, including provisions relating to payment of the lender's fees and expenses. Alternatively, it may be produced as a stand-alone document which clearly states that the parties do not intend the document to bind them legally, save in respect of the payment of fees.

Typically a term sheet will include brief details of the following:

(a) the borrower;
(b) the lender;
(c) the amount of the loan and the period during which the borrower can request release of the loan monies;
(d) any provisions relating to the release of the loan in stage payments, called tranches, which may be the case where the loan is to finance a development project;
(e) the purpose of the loan;
(f) the interest rate;
(g) the date for repayment of the loan and the repayment schedule;
(h) any provisions relating to repayment of the whole or part of the loan prior to the date for repayment (called prepayment);
(i) the security required for the loan;

(j) the conditions precedent which must be satisfied by the borrower prior to the loan being made;

(k) the representations and warranties which the borrower must make as to both its status and the property, many of which will be deemed repeated throughout the period of the loan;

(l) the undertakings and financial covenants to be given by the borrower with which the borrower must comply throughout the period of the loan;

(m) the events which will constitute events of default under the loan agreement;

(n) the costs to be paid by the borrower.

2.2.2 Due diligence

Prior to issuing the term sheet the lender will have undertaken a certain amount of due diligence in respect of the borrower to assess the risk that the borrower will be unable to meet the payments due under the loan. Once the terms of the loan have been accepted by the borrower, by signing and returning either the commitment letter, or the term sheet itself if it has been produced as a stand-alone document, the next phase of the due diligence process can commence. The lender will undertake a more detailed analysis of the borrower, its constitution and powers if it is a corporate borrower, and of the property to be purchased. At this stage the lender will also instruct its solicitors to prepare a first draft of the loan agreement, sometimes referred to as the facility agreement or credit agreement.

2.2.3 Loan agreement

The term sheet and any commitment letter are the starting point for negotiation of the loan agreement. It is not uncommon for the term sheet to use generic language such as 'The Loan Agreement will contain the usual conditions precedent applicable to this type of facility'. The loan agreement will incorporate the provisions outlined in the term sheet, but the brief outline of conditions precedent, representations and warranties, undertakings and financial covenants will become detailed provisions. The precise nature and number of these clauses will depend upon the nature of the borrower and its business, and the extent of any issues identified during the continuing due diligence process.

The borrower needs to consider the provisions in the loan agreement carefully, as it needs to be satisfied that it can comply with the provisions in order to obtain the loan and, further, that any repeating representations and warranties and any undertakings and financial covenants are not drafted in such a way that they restrict the borrower's ability to run its business.

Part of the due diligence process to be undertaken at this stage will be the investigation of title to the property. This will often result either in changes to the terms outlined in the term sheet, or in additional terms.

For example, a satisfactory valuation of the property will generally be a condition precedent which must be satisfied prior to the release of the funds. The lender will have proposed a loan-to-value ratio when negotiating the terms of the loan. If the property is valued at less than anticipated, this can affect the proposed loan. Generally, the property is the principal security for the lender. The lender will need to be satisfied that a sale of the property by the lender as mortgagee, in the event of a default by the borrower, will achieve sufficient funds to repay the loan, any accrued interest, and the legal costs and charges incurred by the lender in recovering the loan. The loan-to-value ratio is intended to ensure that there is a margin by which the value of the property exceeds the loan. The margin should be sufficient to cover accrued interest, etc, and to alleviate the possibility of the lender suffering a shortfall in recovering the loan either due to a decline in property values generally, or due to the property simply being sold for less than anticipated. In order to meet the loan-to-value ratio a lower valuation will result in a reduction in the amount the lender is willing to lend.

In addition to being concerned with the valuation of the property, the lender will also wish to be satisfied that the property has good and marketable title. As mentioned above, on a default by the borrower the lender will wish to sell the property as mortgagee to repay the loan, interest, costs and charges. If there are any defects in the title this could cause a delay in the sale, thereby causing further interest to accrue, or enable a buyer to renegotiate the price. This increases the risk of the lender suffering a shortfall. For example, if investigation of title reveals a subsisting breach of covenant, the lender may require restrictive covenant indemnity insurance to be put in place prior to the release of funds. This would be added as a further condition precedent.

The loan agreement will also include the detail of provisions such as events of default. If a borrower breaches a term of the loan agreement, the lender will want the ability to terminate the loan and demand repayment of all outstanding principal and interest (known as 'acceleration'). The most common events of default are as follows:

(a) failure to pay any capital, interest, fees or expenses;
(b) breach of any representation or warranty, undertaking or covenant in the loan agreement or the security documents;
(c) the insolvency of the borrower;
(d) the borrower becoming involved in any litigation or similar proceedings;
(e) it becomes unlawful for the borrower to continue to perform its obligations under the loan agreement;
(f) a material adverse change in the borrower's position or circumstances;
(g) cross-default if the borrower defaults under another contract, ie another loan agreement in favour of this or any other lender.

Each of the above may be an indication that the borrower is, or may soon be, in some financial difficulty and unable to comply with its obligations under the loan agreement. Once an event of default has occurred, depending on the seriousness of the breach, the lender may decide to accelerate the loan. Alternatively, if the breach is minor or technical in nature, the lender may permit the loan to continue but may take this opportunity to renegotiate the terms of the loan, for example increasing the interest rate to compensate the lender for any increased risk the lender perceives in continuing.

2.2.4 Security

2.2.4.1 Need for security

The loan agreement will provide that prior to the release of any funds, the security specified in the loan agreement must be in place. A loan agreement relating to the acquisition or re-financing of commercial property will generally require the following:

(a) A charge by way of legal mortgage. The lender has the same protection, powers and remedies as if it had a 3,000-year lease (or for a leasehold property a term of one day less than the lease). Any fixtures affixed to the property may be included in this security automatically.
(b) A fixed charge over any plant and machinery which is not affixed to the property.
(c) An assignment of any rental income generated by the property.
(d) A floating charge over all the assets and undertaking of any corporate borrower as a catch-all to cover anything not specifically charged by the security above and incorporating a negative pledge. The importance of a negative pledge is discussed at **2.2.4.2**.

Clearly, the borrower will not be in a position to complete the security prior to acquisition of the property, and cannot complete the acquisition of the property without the release of funds. In a commercial property transaction it is likely that the lender and borrower will be separately

represented. The solicitors acting for the lender will expect to have the security executed, but undated, and in their possession prior to the release of funds. The security will then be completed immediately following completion of the acquisition.

2.2.4.2 Perfection of security

It is essential that any steps required to perfect the security are taken to ensure that the security is valid against third parties and to achieve priority over other security interests.

If the borrower is a company registered in England and Wales, the first step is to register the security at Companies House. The Companies Act 2006, s 860 imposes a duty on the company to register security. Registration of a charge is made using a Form MG01, which must be sent to the Registrar of Companies together with the original charge and the relevant fee within 21 days after the date of creation of the charge.

If the security is not registered at Companies House it will be invalid against any administrator, liquidator and creditors of the borrower, the debt it secures becomes immediately repayable, and the borrower and any defaulting officers will be liable for a fine.

Priority between floating charges is governed by their date of creation if properly registered. However, a charge by way of legal mortgage and a fixed charge will rank in priority to a floating charge. It is for this reason that most lenders will stipulate that a floating charge in the lender's favour must contain a negative pledge on the part of the borrower not to grant any further security and, further, that the negative pledge must be registered at Companies House so that any prospective lender will have notice of it. If the borrower then acts in breach of the negative pledge, this will be an event of default enabling the lender to accelerate the loan. Any subsequent mortgage or charge would be effective security as between the borrower and the subsequent lender, and the security will have priority over the floating charge. However, if the subsequent lender has notice of the negative pledge, it is arguable that the subsequent lender should hold any monies recovered by virtue of its security as constructive trustee for the original lender.

Once registration of the security at Companies House has been completed, any charge by way of legal mortgage must be registered at Land Registry. If the transaction involves an acquisition of land, registered or unregistered, the application for registration of the borrower's title either as a dealing with registered land or as a first registration will also include an application to register the charge. If the transaction involves a re-finance of existing borrowing secured on a registered property, an application will be made to register the discharge of any existing security and registration of the charge. If the transaction involves the re-finance of unregistered land, completion of the charge will trigger first registration of the land.

Where the transaction involves registered land, the application for registration of the dealing must be made on the appropriate application form, accompanied by the correct documentation and fee, and must be received by Land Registry within the priority period afforded by the land registry search made prior to completion of the transaction.

Where the application is for first registration of title, this must be made within two months of the transaction which induces first registration.

Priority of charges relating to registered land is generally governed by the date of registration. First registered in time will rank ahead of charges subsequently registered, irrespective of the date of creation. The order of priority can be altered by the lenders entering into a contractual arrangement called a deed of priority and applying to have this noted on the register.

It is common for the lender to require registration of a restriction on the title at Land Registry providing that no disposition of the property will be registered without a written consent signed by the lender. This restriction prevents the borrower creating a further charge in favour of a subsequent lender without the consent of the original lender. The original lender will have

first-ranking security and, on a sale by a mortgagee in possession, the sale proceeds will first be applied in discharging the original loan. Nevertheless, the lender may prefer that the borrower does not create a subsequent charge. The reason for this is that on completion of a subsequent charge, the lender will lose a degree of control in respect of the property. A subsequent lender may seek to exercise its power of sale on a default by the borrower under the subsequent loan (or on a cross-default), whereas the original lender may not wish to take this step but to give the borrower time. Further, once notice of a subsequent charge has been given, the original lender can make further advances with first-ranking security only if the steps detailed at **2.2.4.3** have been taken.

2.2.4.3 Further advances

Where the loan relates to the acquisition or re-finance of an existing commercial property or a development site, the loan agreement will generally provide for the loan to be released by the lender in one sum, on request, once all conditions precedent have been satisfied.

Where the loan relates to a development project, however, the loan agreement may provide for the loan to be released in tranches, as the development progresses. The loan agreement will usually specify that an architect's certificate, certifying that the development has reached a certain stage, must be produced to the lender prior to the release of the next tranche required to finance the next stage of the development.

The charge by way of legal mortgage will secure the whole loan. However, it is necessary to protect the first-ranking security of the further tranches which will be classed as further advances.

If the property is registered, an application can be made to Land Registry to note the lender's obligation to make further advances, ie release the further tranches. Alternatively, the parties may agree that the original charge secures a maximum amount, and an application can be made to Land Registry to note this on the register. Registration of the obligation or the agreement preserves the priority of the original charge. It puts any subsequent lender on notice that there may be further advances to be released pursuant to the original charge, and those further monies will, on default by the borrower, be repaid to the original lender, together with the original loan, prior to any monies due to the subsequent lender.

If the property is unregistered, any further advance by the original lender will rank ahead of any monies secured by a subsequent charge if the original lender has no notice of the subsequent charge at the time of the further advance or the original charge imposes an obligation to make further advances, in which case the further advances have priority, whether or not the original lender has notice of the subsequent charge.

Review activity

Scenario

Ross Developments (Spice Quay) Limited ('Ross') has negotiated the purchase of a former warehouse building (Unit 3) in Spice Quay, an area adjacent to Canary Wharf, for a sum of £10,000,000. Unit 3 was constructed in 1925, and was used for the storage of spices and fruits until 2005. It has been empty since that date. Ross intends to convert the warehouse into offices, adding a large glass and steel extension in the process, and is in discussion with an institutional investor which has expressed an interest in buying the property once it has been fully developed and let.

Ross is financing the acquisition and development with a loan from Western Bank plc ('Western') and has received a commitment letter and term sheet confirming a proposed loan of £7,000,000 towards the acquisition of Unit 3 and a further £7,000,000 towards the

development costs, to be released in tranches of no less than £1,000,000 against architect's certificates certifying completion of certain stages of the development. The term sheet contains only brief details of the agreed terms.

Western has instructed your firm to act on its behalf in connection with the preparation and perfection of its security. Ross is separately represented.

You have received a copy of the valuation report in respect of Unit 3. The surveyor has noted:

(a) The rear wall of the building is bowing, and there are some diagonal cracks running between the windows on the first and second floors. It is not clear whether these cracks relate to settlement which took place many years ago, or whether any movement is recent.

The solicitors acting for Ross have investigated title to the property and have reported the following issues to you:

(b) The sellers are currently in dispute with the owners of an adjoining property (Unit 4) regarding a right of way over Unit 3 to access Unit 4 (which is also in the course of development). The right of way runs over the proposed site of the extension to Unit 3.

(c) Three years ago Unit 3 and the surrounding area suffered severe flooding.

Question

Western and Ross are negotiating the provisions of the loan agreement. Western is keen to proceed with the loan, but does not want to release the loan if there are any risks in doing so. Explain the risks to Western and, in the light of the issues arising from the valuation and investigation of title, suggest provisions to be included in the loan agreement which will give Western the protection it needs.

Chapter 3
Matters of Contract

3.1	The contract of sale	17
3.2	Different types of contract	18
3.3	Overage	23
Review activity		26

3.1 The contract of sale

As in residential conveyancing, it is the seller's solicitor who will draft the contract of sale for the purchase of a commercial property, in duplicate, for submission to the buyer's solicitor for approval. The seller's solicitor may use the Standard Commercial Property Conditions (SCPC) form of contract and will draft the contract adopting the same drafting principles applicable in residential conveyancing. Further, on the sale of a green field site, where the seller's main interest is in the receipt of money and the buyer's in obtaining vacant possession, he will include clauses similar to those used in residential conveyancing. It is only where matters are complicated (eg by the need to obtain planning permission before completion) that drafting techniques will differ from residential conveyancing. Many solicitors will use their own word-processed form of contract which will incorporate the Standard Commercial Property Conditions.

The following points may be noted in connection with a contract to sell a commercial property:

(a) The seller is likely to insist upon the payment of a full 10% deposit on exchange of contracts and is unlikely to agree to accept a reduced deposit. The buyer, being in business, should be able to meet the demand of the usual contractual deposit, but he is likely to insist that the deposit is to be held by the seller's solicitor as stakeholder, and he may insist that the interest on the deposit (which may itself amount to a sizeable sum) is to be paid to the buyer at completion. However, some larger organisations will be able to agree a reduced deposit, or even to dispense with the payment of a deposit altogether, on the basis that the size and reputation of the organisation is a sufficient guarantee that completion will take place.

(b) It will be very important to the commercial buyer of a development site to ensure that the contract provides for vacant possession of the whole of the site at completion so that the buyer's development plans are not frustrated. In most cases there is an implied term for vacant possession, but for the avoidance of doubt an express term should be included.

(c) Value added tax (VAT) must be dealt with clearly in the agreement. The danger for the buyer is that if the contract is silent as to VAT, and after exchange of contracts the seller (being a person registered for VAT) elects to charge VAT on the purchase price, the buyer will have to add VAT to the purchase price. The buyer may want to ensure that the contract contains an express warranty by the seller that he has not, before exchange, elected to charge VAT on the purchase price, and that he will not do so thereafter, or that the purchase price is paid inclusive of VAT. In any case, the buyer will want to make enquiries of the seller to ascertain his intentions regarding VAT on the purchase price. VAT on property is dealt with more fully at **10.1**.

(d) The seller, having entered into a bargain with a chosen buyer, will usually want to deal with the chosen buyer alone and will, therefore, want to ensure there is a clause in the

contract which prevents the buyer from assigning the benefit of the contract to a third party. Further, the seller will often attempt to prevent the buyer from entering into a sub-sale of the property, by stipulating that the seller cannot be required by the buyer to execute a transfer of the property to anyone other than the buyer. (This last clause does not prevent a sub-sale but makes it less attractive to the buyers, since SDLT will be payable both on the transfer to the buyer and on the buyer's transfer to the sub-buyer.)

(e) Frequently, the seller will deal with the possibility of the buyer becoming bankrupt, or going into liquidation or becoming subject to other insolvency proceedings before completion of the sale, by giving himself the right to rescind the contract upon any such event. This frees the seller to arrange a sale to another buyer without the delay of having to await completion and the expiry of a notice to complete.

(f) If the buyer has agreed to pay all or part of the seller's legal and other expenses in connection with the sale, the contract should so provide.

(g) Express provision should be made, where appropriate, for the grant and reservation of easements and the imposition of covenants. If the seller is retaining some adjoining or neighbouring land, he will be anxious to retain some control over the future development of the property.

(h) Where the property already has the benefit of planning permission obtained by the seller, the benefit of that permission will automatically pass to the buyer, since planning permission enures for the benefit of the land concerned (unless it states otherwise). The buyer will no doubt want to develop in accordance with the plans and specifications upon which the application for permission was based, but copyright in those plans and specifications will be retained by the architect who drew them up in the first place. The buyer should therefore ensure that the contract provides for the seller to assign to him, or procure the grant to him, of a valid licence to use the plans and specifications.

(i) If the land is sold without the benefit of planning permission, the seller may wish to make provision for the payment of 'overage' should planning permission for development be granted in the future. Where land is sold without planning permission for development, the price would have been fixed on the basis of its current use, eg agricultural. If planning permission for development is granted, its value will increase considerably. The seller may wish to share in that increase, and so the contract may provide for the buyer to make an additional payment (the overage payment) should planning permission be granted (see **3.3.3**).

3.2 Different types of contract

Sometimes the sale will be by simple private treaty; sometimes it will be by way of auction or tender; and sometimes the nature of the transaction may justify a departure altogether from the straightforward kind of sale and purchase contract. There are many types of commercial contracts which can be entered into by a seller and buyer of a commercial site, catering for widely different circumstances, and the agreement between the seller and buyer will need to reflect the bargain they have struck. This section of this chapter considers two alternative forms of agreement, although in practice the reader will meet many other forms drafted for use in the particular circumstances of the case at hand.

3.2.1 Conditional agreements

There will be occasions when one of the parties to the contract will be either unable, or unwilling immediately to enter into an unconditional agreement for the sale or purchase of the property, and so arrangements may be made to effect a conditional exchange of contracts. The seller is usually reluctant to agree to a conditional exchange, since what the seller ordinarily seeks is the security of knowing that his buyer is firmly committed to paying over money on a specified date for completion.

A conditional contract rarely serves a useful purpose for the seller. It is normally the buyer who suggests a conditional exchange of contracts, in a situation where the buyer is anxious to avoid losing the property to another buyer but is not yet in a position to commit itself irrevocably to the purchase.

3.2.1.1 Types of conditional agreements

A conditional agreement may be contemplated in the following situations:

(a) where planning permission for development of the site has not yet been obtained;

(b) where the results of the buyer's local search and enquiries of the local authority have not yet been received;

(c) where vacant possession of the site is not yet available owing to the existence of a tenancy agreement in respect of all or part of the site, which the buyer requires to be terminated;

(d) where the property is leasehold, and the consent of the landlord is required but has not yet been obtained for the proposed assignment to the buyer (see also SCPC 10.3), or for alterations to the property, or for a change in the use of the property proposed by the buyer.

Great care must be taken to distinguish between a contract which contains a condition precedent to the formation of the contract itself (in which case no contract exists unless and until the condition is performed) and a contract which contains a condition precedent to performance (in which case a binding contract is immediately created, but if the condition is not fulfilled the contract becomes unenforceable). In drafting the contract, the seller's solicitor should make it expressly clear which type of agreement is intended. If the former type of contract is used then, despite the fact that the parties have entered into a written agreement, effectively they will still be in the same position as if negotiations were continuing since, until the condition has been satisfied, no binding contract exists and either party is free to back out. The condition must be fulfilled if the contract is to come into effect. If the latter type of contract is used (and in order to obtain a degree of certainty and commitment, both of the parties are likely to favour this type), a binding contract immediately comes into effect so that neither party can back out without the other's consent while the condition still remains to be performed. If the condition is not fulfilled, the contract becomes unenforceable, unless the party for whose sole benefit the condition was inserted waives the benefit of the condition and elects to proceed.

3.2.1.2 The condition

Certainty is required with conditional agreements. If the court cannot judge with certainty whether the conditionality of the contract has been removed, the court will reluctantly declare the entire contract void. Hence, in *Lee-Parker and Another v Izzet and Others (No 2)* [1972] 2 All ER 800, a contract which was stated to be conditional upon the buyer obtaining a satisfactory mortgage was held to be void since the concept of a satisfactory mortgage was too vague and indefinite. By way of contrast, in *Janmohamed v Hassam* (1976) 241 EG 609, a contract which was conditional upon the receipt of a mortgage offer satisfactory to the buyer was held to be valid, since the court was prepared to imply an obligation upon the buyer to act reasonably in deciding whether the mortgage offer was satisfactory to him.

In drafting the conditional clause, the seller's solicitor should clearly set out what is required to be done, by whom, and by when, in order for the contract to become unconditional. Consider the following situations by way of example:

(a) If the buyer has not yet received the results of his local search and replies to enquiries of the local authority, the contract can be made conditional upon the buyer receiving what he considers to be satisfactory results and replies, by a stipulated date. The contract should contain an obligation upon the buyer to submit the correct forms to the local

authority and to pay the fees (in case he has not already done so). Upon receipt of the search certificate and replies, the buyer should be obliged to notify the seller of receipt, indicating one of three things:

(i) that the buyer considers the results and replies to be satisfactory, in which case the contract proceeds to completion; or

(ii) that the buyer considers them to be unsatisfactory, in which case the contract becomes unenforceable, and the contract should provide for the return of the deposit to the buyer and of the evidence of title to the seller; or

(iii) that the buyer is prepared to waive the benefit of the condition.

Such a contract is heavily weighted in favour of the buyer, since it is up to him to determine whether or not the condition has been satisfied. A more neutral and objectively based conditional clause could make the contract conditional upon the receipt by the buyer of a set of results and replies to the local search and enquiries which disclose no adverse matters of a kind which would materially affect the value or beneficial use or occupation of the property by the buyer. This type of clause may not be favoured by the buyer since it leaves some scope for argument.

(b) If the buyer is not prepared to complete without the benefit of planning permission for the type of development it proposes to carry out on the property, the contract could be made conditional upon the receipt of an 'acceptable' planning permission by a stipulated date. Again, the buyer should be obliged by the contract to submit a valid planning application without delay, to serve the correct statutory notices, and to pay the fees for the application. Consideration ought to be given as to whether provision should be made so that, upon refusal of permission (which ordinarily would render the contract unenforceable), the buyer may be allowed or, perhaps, obliged to pursue an appeal.

Particular consideration must be given to the definition of an 'acceptable' planning permission. It ought to be one which is granted pursuant to an application, precise details of which are set out in the contract and which is subject only to the usual planning conditions imposed by statute (eg conditions imposing time limits for the commencement of development), or which relate simply to the materials to be used or the provision of works of landscaping, or which are conditions which the buyer should reasonably accept. If this clause appears to be too objectively based for a developer's liking, he can be given control over the conditionality of the contract (in the same way as above) by having a clause which allows him to accept or reject the suitability of the permission, or to waive the benefit of the clause.

3.2.1.3 Time for performance

The condition must be satisfied either by a stipulated date, or, if none is stated, by the contractual completion date or, if neither, within a reasonable time. It is good practice to stipulate in the contract a long-stop date by which the condition must be satisfied. The contract can then provide that if the condition is fulfilled by that date, completion is to take place within 14 or 21 days of the contract becoming unconditional. The contract should be drafted to oblige one party to notify the other that the contract has become unconditional (eg if the buyer receives the outstanding local search then, unless the seller is notified, the seller will not know that the contract has become unconditional and that a completion date has been triggered).

If fulfilment of the condition depends upon action by one of the parties (eg the submission of a local search, or the making of an application for planning permission by the buyer), that party should not be able to rely upon his own inaction to argue that the contract has become unenforceable due to the non-fulfilment of the condition. To avoid this situation arising, the contract should place a contractual obligation upon the party of whom action is required to act with all reasonable speed and endeavours, and to pay the costs of the action required (eg search fees, planning application fees). However, in *Jolley v Carmel* [2000] 43 EG 185, the

Court of Appeal was prepared to adopt a construction of a conditional contract that was commercially realistic and practical, and to imply terms into it to that end. In particular, terms were implied that the buyer would use reasonable efforts to obtain planning permission within a reasonable time. What was reasonable would depend upon the circumstances that actually existed and would not be judged by an objective test. It was also implied that the seller would do nothing to hinder the grant of the planning permission. It was held that the buyer would not be in breach of the implied term to obtain planning permission so long as any delay in obtaining the permission was attributable to causes beyond the buyer's control and so long as the buyer had not acted negligently or unreasonably.

3.2.2 Option agreements

3.2.2.1 Call options

The usual form of option agreement entered into with a landowner (referred to a 'call' option) gives the developer, as grantee of the option, the right within a specified time to serve notice upon the landowner requiring it to transfer the property either at an agreed price, or at the market value of the property at the time the option notice is served. Whilst a conditional agreement is useful to a developer who is trying to commit a landowner to a sale of land at a time when the developer is not able unconditionally to commit himself, call options have many more varying uses for the developer, and are particularly useful in his attempts to piece together a development site. Under a conditional contract, unless the contract is drafted in a manner which favours the developer, the developer is usually obliged to complete the purchase at the contract price once the condition has been fulfilled, even though in the meantime market conditions have caused him to rethink the development. With a call option, the buyer can exercise the option if he wants to, or he can let it lapse if market conditions are no longer in his favour. While this is clearly not ideal for the seller, call options are usually granted for a non-returnable option fee. So the buyer is purchasing the right to require the seller to sell, and is compensating the seller for the uncertainty as to whether the sale will actually proceed and the inconvenience of not being able to dispose of the property elsewhere in the meantime.

Once the call option has been entered into, the grantee acquires an immediate equitable interest in the land which the grantee must protect by registration of a Class C(iv) land charge, in the case of unregistered land, or by a notice, in the case of registered land.

3.2.2.2 Put options

A 'put' option is a contract that enables a landowner to require the potential buyer to buy the property, subject to the terms of the contract as to price, time limits, etc. There is no obligation on the seller to sell. Again, the option is often granted in return for a non-returnable fee, but in the case of a put option, it will be the seller who pays the buyer to take the risk that it may be required to purchase the property. Put options, while offering maximum flexibility to landowners, confer little benefit on developers so are much less common than call options.

Put options do not create an interest in land and so cannot be protected by registration at Land Registry.

3.2.2.3 Uses of options

An option agreement may be contemplated in the following situations:

(a) Where planning permission for development proposed by the developer has not yet been applied for, the developer may consider securing a call option over the land before investing resources into making an application for permission. Once the application succeeds, the call option can be exercised by the developer. This is very similar to a conditional agreement, but with a call option, the developer may be able to delay the exercise of the option until he is prepared to part with his money and commence

development, whereas under a conditional agreement, as soon as the condition has been satisfied, the developer will have to complete.

(b) Moreover, with a call option the developer can decide not to exercise the option at all if economic conditions are no longer right for the development.

(c) Where the land proposed as the site for development is sub-divided amongst landowners and there is no guarantee that all of them will sell, the developer can assemble the development site gradually, by acquiring call options over each parcel of land. Once the entire site is under call option, the developer can then apply for planning permission (it would not make financial sense to do so beforehand), and then once permission has been obtained, he could exercise each call option.

(d) Where a developer developing a site feels that there is some prospect of being able to expand the development at some future date, it may attempt to acquire a call option over adjacent land which can be exercised when the prospect becomes a reality.

A speculator may attempt to acquire call options over land where there is little immediate prospect of obtaining planning permission (eg because the land forms part of the green belt, or is land not allocated for any particular purpose in the local planning authority development plan). The speculator may either adopt a wait-and-see approach in the hope that planning policy in the area changes, or (as is more likely to be the case) it may invest time and resources in seeking to influence planning policy to get the land released for development purposes when the next draft development plan is being prepared. In this way, developers build up considerable land banks to be drawn upon when conditions are right.

3.2.2.4 Terms of an option

An option will grant the one party the right to call for the property, or require the purchase of the property, by serving a written notice on the other within a specified period. Regardless of whether it is a put option or a call option, time limits are construed by the courts to be of the essence of the agreement. The option agreement should set out the correct method of serving the option notice, or alternatively incorporate the provisions of s 196 of the Law of Property Act 1925 (LPA 1925) into the agreement. In specifying a time for the service of the notice, care should be taken to ensure that the grantor has sufficient powers vested in him to grant an option capable of being exercised within the time period proposed.

The option will be granted in consideration of an option fee, which can be nominal but is more likely to be a considerable sum, depending upon the development potential of the land. When the option is exercised, the agreement will usually require the land to be transferred to the buyer for a further consideration (a credit or discount usually being given for the option fee already paid) which may be fixed by the agreement at the outset, or may be determined at the time of the exercise of the option either by reference to the market value of the land at that time or by reference to the development value of the land as ascertained by a valuation formula set out in the agreement. It should be noted that both the option agreement and the subsequent transfer of the land are subject to SDLT. Further, because of the VAT implications of the transaction, the developer should ensure that the agreement clearly states that any option fee it has to pay and the purchase price is inclusive of VAT. There may also be capital gains tax (CGT) implications for the landowner, since an option is treated as an asset for CGT purposes, separate from the land itself, which is disposed of in consideration of the option fee.

Provision should be made in the agreement for the deduction of title and the raising of requisitions on title after the option notice is served, and for the other usual conveyancing steps which need to be taken before completion. It is usual for the option agreement to incorporate a set of conditions of sale (eg, the SCPCs current at the time of the option agreement). In many cases, the developer will want title to be deduced before the option agreement is entered into (requisitions on title then being barred), and it will then require the

seller to enter into a condition in the agreement not to incumber the land any further without the developer's consent.

3.2.3 Pre-emption agreements

A right of pre-emption, sometimes known as a right of 'first refusal', obliges a seller who wishes to sell its property within an agreed pre-emption period to offer it first to the developer. The pre-emption agreement will provide that if the landowner decides to sell the property, it must first serve a notice offering it to the developer. If the developer wishes to buy the property on the terms set out in the landowner's notice, it must serve an acceptance notice, whereupon a binding contract for sale will come into existence. If the developer does not serve an acceptance notice within the agreed timescale then the landowner is free to sell the property to a third party. The key point to note is that unlike a call option (see **3.2.2.1**), a right of pre-emption does not oblige the seller to sell the property to the developer, or indeed to sell it at all.

3.3 Overage

Many contracts for the sale of development land will include provisions with for the possible payment by the buyer of 'overage'. Overage provisions are generally used where a seller wishes to share in any potential development value in a property that might be realised after completion of a sale. So, a seller is likely to require an overage payment from the buyer where there is a reasonable belief that value will be added when the land is redeveloped, or when permission for change of use is granted in the future, or when a proposed development produces more profit than expected due to a rise in sale prices or an increase in the number of units authorised by the planning consent. An overage obligation requires the buyer to make a further payment to the seller, representing a share of the increased market value of the property after the occurrence of an agreed event. The seller can therefore maximise its return from the sale by realising the current market value of the property immediately, without losing out on future increases in value by having sold the property before the full development potential is actually realised.

It is sometimes said that the existence of overage should not affect the initial sale price, but this is not always true. The insistence on overage provisions in a deal may well affect the initial purchase price that the buyer is willing to pay for the land. It will certainly involve more legal work, and the greater costs and potential delays associated with it. It will thus always be a question of judgement of the commercial issues involved as to whether the provision is justified.

3.3.1 'Overage' or 'clawback'?

The terms 'overage' and 'clawback' are often used interchangeably, and there is no generally accepted definition of either term.

The term 'clawback' is generally used in the public sector where land is sold at a discount which the seller is entitled to recover on particular events occurring in the future. For example, if a buyer acquires property at a discount and resells within a stated period (eg a local authority house under the 'right to buy' legislation), the discount might be 'clawed back'. Also, additional payments that become due on the grant of planning permission may be described as 'clawback' in the public sector, rather than 'overage', presumably on the basis that the extra value in some

way really belonged to the public purse all along and it is being 'clawed back' to where it belongs.

The public sector also sometimes draws a distinction between payments representing part of the increase in value of a property due to an event such as the grant of planning permission (which it calls clawback), and payments representing a share in the sale proceeds following completion of the development (which is referred to as overage).

However, in the private sector, both of these types of payment are normally described as overage.

3.3.2 'Positive' or 'negative' overage

Overage provisions are sometimes described as being either positive or negative in character.

'Positive overage' methods involve the seller extracting an express promise from the buyer to make a further payment if a particular specified event (such as redevelopment) should occur in the future. The way in which the payment will be calculated and the trigger event for payment must be carefully defined in advance.

'Negative overage' methods, however, occur when the seller imposes a restrictive covenant, or another mechanism such as retaining a ransom strip, that *prevents* a particular development or change of use from taking place. In such a case there is no need for a specific promise to pay overage, as the seller has control over the situation. The development cannot take place without the seller's consent, and the seller can then require payment of an additional sum in return for the release of the covenant or the sale of the ransom strip.

3.3.3 Drafting considerations

As overage provisions usually reflect complex arrangements, the parties and their solicitors must take particular care to ensure that the documentation reflects precisely what has been agreed. This is obvious, but the problem with overage is that this can be very difficult to achieve. It is not enough just to have an agreement in place which provides for the payment of overage; it is also necessary for the seller's solicitor to ensure that the payment will actually be made – to secure the payment of the amount due. So, as well as setting out how the overage payment is to be calculated and when it is to be payable, both parties' solicitors need to consider carefully all the various combinations of events which might happen over the period of the overage being potentially payable. This can be problematic given the difficulty in predicting future events and the state of the property market over what may be many years. Obviously, issues such as the possible liquidation or insolvency of the buyer must be considered. What if the liquidator then exercises his right to disclaim onerous contracts? How might all these events impact on the payment of the overage? And the more complex the provisions, the greater the risk that mistakes, oversights and omissions will occur.

3.3.3.1 The trigger event

The first thing that will need to be agreed between the parties – and clearly stated in the contract – is precisely when the overage payment will become payable. This 'trigger' event for payment could be, for example:

(a) the grant of planning permission for specified development or change of use;
(b) the implementation of such planning permission;
(c) the practical completion of a development;
(d) the disposal of the property with the benefit of planning permission;
(e) the disposal of the completed development;
(f) the disposal of individual units (eg houses) at more than a stated price;
(g) the amount of profit on the completion of a development exceeding a stated amount.

Ideally, a seller would like the payment to be triggered when the increase in value actually occurs, eg on the grant of planning permission. Equally, a buyer would prefer to have to make the payment only when it has actually realised that increase in value, eg on the sale of the completed development. And often the buyer will wish to impose a time limit on the period during which it is at risk of having to pay overage – five years, 10 years or whatever.

3.3.3.2 The amount of the overage payment

Of equal importance to both seller and buyer is the amount of the payment to be made. This could be, for example:

(a) a percentage of the increase in value of the land;

(b) a percentage of the profit made on the development;

(c) a percentage of the profit made on the development if it exceeds a specified amount;

(d) a percentage of the sale price of units if that exceeds a specified amount.

The amount of negotiation that might be necessary before agreement is reached on precise figures in relation to any of these can well be imagined.

3.3.3.3 Securing the overage payment

It is the seller's solicitor's responsibility to ensure that adequate security is given to the seller to protect the future payment and ensure that it will be made if the appropriate trigger event occurs. Without adequate security, overage provisions may be virtually worthless. In *Akasuc Enterprise Ltd v Farmar & Shirreff* [2003] EWHC 1275 (Ch), the defendant firm failed to incorporate appropriate provisions in an agreement to protect an overage payment. As a result, the claimant lost an opportunity to obtain a further £250,000. The court considered that it was the firm's responsibility to ensure that the documentation contained an appropriate mechanism to secure the overage payment and that it had been negligent.

There are various ways in which overage obligations can be drafted and secured, and the most appropriate method should be chosen to suit the particular circumstances. The methods differ according to whether a negative or positive overage provision has been agreed. Normally, the seller will need recourse in some form or other against either the land itself or the buyer's successors in title. For example:

(a) a positive covenant by the buyer to make a further payment to the seller on the occurrence of a specified event, perhaps supported by a guarantee or bond from a third party, combined with a buyer's covenant to ensure that any successor in title will enter into a similar commitment to the seller;

(b) a legal charge over the property following completion, enabling the seller to sell the land and recover the overage from the sale proceeds if the overage payment is not made as agreed;

(c) a seller's lien over the property for unpaid purchase price, enabling the seller to apply to court for an order of sale if the overage payment is not made as agreed;

(d) a freehold right of re-entry, whereby the property reverts to the seller if the overage payment is not made as agreed;

(e) a restrictive covenant against building on the land or using it for specified purposes, which will be released by the seller only when the overage payment is made;

(f) the seller retains ownership of a piece of land (a 'ransom strip') so that the buyer cannot develop the land until the overage payment is made and the seller sells the ransom strip to the buyer or grants a right of way over it.

These methods are not exhaustive and each has its own advantages and disadvantages which are outside the scope of this book. Further information on overage agreements may be obtained from the Practical Law Company at <http://uk.practicallaw.com/4-200-2514>.

Review activity

1. ABC Developments Ltd ('ABC') is interested in buying a plot of former agricultural land in Dorset which already has the benefit of planning permission for the conversion of three existing barns to light industrial units. However, given the current economic climate, ABC is unlikely to be able to obtain funding for the conversion on acceptable financial terms in the next couple of years. While ABC has been deliberating, the seller has become impatient and is threatening to sell the land to a rival developer.

   What type(s) of contract with the seller would you recommend to ABC in this situation?

2. You act for Mulcaster Borough Council ('MBC') which is looking to dispose of some land that is surplus to requirements since the privatisation of the refuse collection service. Its preferred option is to sell the land to a local housing association which would build much needed social housing, but the housing association is constantly prevaricating whilst it waits to see if its funding will be renewed. In the meantime, a national house building chain has expressed an interest in buying the site for private residential development. MBC would like to give the housing association more time to make a decision, but cannot allow the situation to drag on indefinitely.

   What type(s) of contract with the housing association would you recommend to MBC in this situation?

Chapter 4
Planning Control

4.1	The planning system	27
4.2	When is planning permission needed?	29
4.3	Planning permission	36
4.4	Application to the local planning authority	41
4.5	Appeals against adverse planning determinations	44
4.6	Stop press	48
Review activity		48

4.1 The planning system

The town and country planning system is designed to ensure that land is used in a planned and appropriate manner. It was first introduced by the Town and Country Planning Act 1947. Prior to this, such controls had been sought by local bye-laws and by private arrangements such as the use of restrictive covenants. The system is a creature of statute and as such governed by detailed regulations, but policy, at both the central and local government level, plays an important part. This chapter will begin with an overview of the structure of the town and country planning system. It will then consider the key trigger of the system, namely that for certain kinds of development, planning permission is required before that development can take place. Next it will look at planning permission in its own right, including what types of planning permission can be obtained, what factors influence whether planning permission will be obtained (and on what terms) and the effect of planning permission once obtained. The chapter will conclude by looking at how that permission, if needed, can be obtained either directly from the local planning authority (LPA) or on appeal.

For the sake of brevity, the following abbreviations have been used:

DCLG	Department for Communities and Local Government
GDPO	Town and Country Planning (General Development Procedure) Order 1995
GPDO	Town and Country Planning (General Permitted Development) Order 1995
UCO	Town and Country Planning (Use Classes) Order 1987

Note that the DCLG website (<www.communities.gov.uk>) and the Planning Portal (<www.planningportal.gov.uk>) are useful resources where many of the policy and other documents mentioned below can be found.

4.1.1 Legislation

The principal Act is the Town and Country Planning Act 1990 (TCPA 1990). This has been substantially amended by the Planning and Compensation Act 1991 (PCA 1991), the Planning and Compulsory Purchase Act 2004 (PCPA 2004) and the Planning Act 2008 (PA 2008). All references in this and the following two chapters to 'the Act' are to the 1990 Act as amended, unless the contrary is stated. The Act sets out the main framework of the planning system. The majority of the detail (including procedural rules and regulations, prescribed forms and many more substantive matters) is provided by a vast body of delegated legislation.

4.1.2 Central and local government

4.1.2.1 The Department for Communities and Local Government

The DCLG is the central government department with responsibility for town and country planning. It has three broad classes of function under the Act, namely legislative, administrative and quasi-judicial.

As regards legislative powers, the Act contains many powers for the DCLG to make orders, rules and regulations, usually by statutory instrument. Examples include the UCO 1987, the GDPO 1995 and the GPDO 1995, all of which will be considered below.

The DCLG's administrative powers include the dissemination of policy guidance through a variety of documents such as circulars, planning policy guidance notes (now largely superseded) and planning policy statements. The Secretary of State for the DCLG also has powers to 'call in' a wide variety of matters for his own consideration (such as development plans and applications for planning permission).

Lastly, as regards quasi-judicial powers, the Secretary of State for the DCLG is the person to whom an appeal is made in the first instance against most decisions of a planning authority. In particular, appeals lie to him in respect of a refusal of, or conditions imposed on, a planning permission or the service of an enforcement notice.

4.1.2.2 Local government

Subject to any express provision to the contrary, all references in the Act to an LPA should be construed as a reference to both the relevant county planning authority and district planning authority. The county council is the county planning authority and the district council is the district planning authority. The county planning authority normally has exclusive jurisdiction over mineral planning, and development control and enforcement which relate to 'county matters'. 'County matters' are defined in Sch 1, para 1 to the Act, as being concerned with minerals and operational development falling partly within and partly outside a national park. The district planning authority has exclusive jurisdiction over development control and enforcement which does not concern a county matter, and hazardous substances. Responsibility for the preparation of the development plan is considered below (see **4.1.3**).

Where unitary councils have been established (ie there is just the one tier of local government), those councils will normally be the LPAs for all purposes.

Note that, since devolution, the Welsh Assembly has had responsibility for the overall planning system in Wales. Some differences will therefore arise when dealing with properties in Wales. In London, town and country planning functions are undertaken by the Mayor and the London Assembly.

4.1.3 'The development plan'

4.1.3.1 The importance of the development plan

The development plan sits at the heart of the town and country planning system. When applying for planning permission (and in other instances, such as the service of an enforcement notice – see **6.7**), it is the development plan that is the main document for determining the outcome of the decision. The development plan aims to ensure that land is used in a planned and appropriate fashion by setting out policies to govern development control in a given area. By s 38(6) of the Act,

> where, in making any determination under the Planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.

Policy guidance on the importance of the development plan can be found in Planning Policy Statement 1 at para 10, where the DCLG advises that

> Local planning authorities must determine planning applications in accordance with the statutory Development Plan, unless material considerations indicate otherwise. If the Development Plan contains material policies or proposals and there are no other material considerations, the application should be determined in accordance with the Development Plan. Where there are other material considerations, the Development Plan should be the starting point, and other material considerations should be taken into account in reaching a decision. One such consideration will be whether the plan policies are relevant and up to date.

Developers therefore will need to look very carefully at the development plan as a starting point to see if it contains any policy on the development proposed; if it does so and the proposal is not in accordance with the plan, any planning application is unlikely to succeed in most cases. The development plan is not the sole factor (despite its pre-eminent position): material considerations must also be taken into account and will be considered at **4.3.2** below.

4.1.3.2 Meaning of 'development plan'

Historically, the development plan was made up of two documents: the 'structure plan' (normally prepared by the county planning authority, which detailed the broad, strategic development policy for the regional area); and the 'local' plan' (prepared by the district planning authority, which contained more detailed policies for the specific area of that district). In the case of unitary authorities, the development plan was a single document, the unified development plan, which covered both issues in one document.

The structure plan and local plan system was gradually being replaced by a system of regional spatial strategies (prepared by Regional Development Agencies) and local development frameworks (LDFs) (prepared by the district planning authority). The LDF is a portfolio of documents, including a core strategy and proposals map (essentially the replacement of the old 'local plan') but also documents covering ongoing monitoring of the implementation of the core strategy and other matters. There are detailed transitional provisions, but in essence, pending adoption of the LDF, former local plans were allowed to continue in operation and are referred to as 'saved' plans. Following the 2010 General Election, regional spatial strategies have been abolished (along with the Regional Development Agencies), and it is proposed that they will be replaced by a National Planning Framework.

In short, for the moment, the 'development plan' means the policies in any LDF that has been adopted and, if it is one that has not yet been adopted, any 'saved' plans. Enquiry should be made on a case-by-case basis to determine the current position.

Note that, since devolution, the Welsh Assembly has had responsibility for the overall planning system in Wales. Some differences will therefore arise when dealing with properties in Wales. In the case of London, the London Plan continues to provide the planning framework for London Boroughs.

4.2 When is planning permission needed?

The basic rule is to be found in s 57(1) of the Act, which states that planning permission is required for the carrying out of any 'development' of land. The term development is defined in s 55(1) as

> the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

It is important to realise at the outset that the term 'development' thus has two mutually exclusive parts to it, namely the carrying out of operations and the making of a material change of use.

Note that it is possible to apply to the LPA for certification that any current or proposed use or operation is lawful. This is considered at **6.3**.

4.2.1 Operations

4.2.1.1 Operational development

Operational development is defined in ss 55(1A) and 336(1) of the Act. 'Building operations' include rebuilding, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder. 'Engineering operations' include the formation or laying out of means of access to highways. 'Mining operations' and 'other operations' are not defined in the Act. The demolition of buildings will be considered separately at **4.2.1.2**.

Works for the maintenance, improvement or other alteration of a building which affect only the interior of the building, or which do not materially affect its external appearance, and which do not provide additional space underground do not constitute development (s 55(2)(a)). However, increasing retail floor space by internal works (eg the construction of a mezzanine floor) will require planning permission in England if the increase is more than $200m^2$.

4.2.1.2 Demolition

Demolition falls within the definition of operational development (s 55(1A)), but under 55(2)(g), the DCLG has the power to identify works of demolition to which this will not apply. Such a direction has been made and exempts demolition of the following from being treated as operational development:

(a) listed buildings;
(b) buildings in a conservation area;
(c) scheduled monuments;
(d) buildings other than dwelling houses or buildings adjoining dwelling houses;
(e) buildings not exceeding $50m^3$ in volume.

Note, as regards the first three categories in the above list, that although planning permission is not required for demolition, consents under the legislation dealing with these types of buildings and structures will be needed, eg listed buildings consent.

Thus, the control of demolition will only apply to that of dwelling houses and buildings adjoining dwelling houses. However, demolition of these buildings may be permitted development under the GPDO 1995, Sch 2, Pt 31 (see **4.2.3.2**).

4.2.2 Material change of use

In order to constitute development, a change of use must be material. The Act does not define what is meant by 'material'.

Case law makes it clear that the question as to whether a change of use is material is one of fact and degree in each case. It follows, therefore, that the courts will not normally interfere with a planning decision on the question of the materiality of a particular change of use unless the decision is totally unreasonable on the facts, or the deciding body has misdirected itself as to the relevant law. Note, however, the following general points decided by case law:

(a) It is necessary to look at the change in the use of the relevant 'planning unit'. In many cases this will be the whole of the land concerned, ie the land in the same ownership and occupation. Occasionally, particularly with larger sites, a single unit of occupation may comprise two or more physically distinct and separate areas which are occupied for substantially different and unrelated purposes, in which case each area (with its own

main or primary use) should be considered as a separate planning unit (see *Burdle and Another v Secretary of State for the Environment and Another* [1972] 3 All ER 240 and *Thames Heliport plc v Tower Hamlets LBC* [1997] 2 PLR 72). In a mall-type development, it seems that each shop unit will be a separate planning unit (*Church Commissioners for England v Secretary of State for the Environment* (1995) 7 P & CR 73).

(b) The use of a planning unit may involve various (and possibly fluctuating) ancillary uses which do not need planning permission provided that they remain ancillary to, and retain their connection with, the primary use. For instance, where produce grown on an agricultural unit is sold on a limited scale from the farmhouse, this retail use is ancillary to the primary agricultural use; however, the ancillary status is lost if, for example, produce is subsequently bought in for the purposes of resale (see *Wood v Secretary of State for the Environment* [1973] 1 WLR 707, HL).

As the courts will not normally interfere with decisions on questions of fact and degree, it will therefore be the DCLG or one of its inspectors who will generally be the final arbiter of the question as to whether a particular change of use is material. Thus, their views in similar cases will be important, and guidance may be found in particular in relevant DCLG circulars, planning policy statements and in Ministerial Decisions.

4.2.2.1 Statutory clarifications

For the avoidance of doubt, s 55(3) and (5) of the Act declare the following to be material changes of use:

(a) the use as two or more separate dwelling houses of any building previously used as a single dwelling house; and

(b) (generally) the deposit of refuse or waste materials.

Certain changes of use are also expressly excluded from amounting to development. These are set out in s 55(2) and include the following:

(a) The use of any building or other land within the curtilage of a dwelling house for any purpose incidental to the enjoyment of the dwelling house as such (s 55(2)(d)).

Factors to be considered in deciding whether the use is 'incidental to the enjoyment of the dwelling house as such' include the nature and scale of the use, and whether it is one which could reasonably be expected to be carried out in or around the house for domestic needs or incidental to the personal enjoyment of the house by its occupants: see *Ministerial Decision* [1977] JPL 116. Thus, for example, in *Wallington v Secretary of State for the Environment* [1991] JPL 942, CA, the keeping of 44 dogs as pets was held not to be an incidental use. Note that enjoyment of the dwelling house must be distinguished from the enjoyment of the occupier (ie the test for enjoyment is objective, not subjective).

(b) The use of any land or buildings occupied with it for the purposes of agriculture or forestry (s 55(2)(e)).

(c) In the case of buildings or other land which are used for a purpose of any class specified in the UCO 1987, the use of the buildings or other land for any other purpose of the same class (s 55(2)(f)). This very important exception is now considered in detail.

4.2.2.2 The Town and Country Planning (Use Classes) Order 1987

The UCO 1987 contains a list of use classes for the purposes of s 55(2)(f). Thus, a change of use within any such class does not, prima facie, amount to development (but see the UCO 1987 checklist at **4.2.2.3**). Each use class is identified by a letter and a number (thus A1 and A2 are different use classes).

Nothing in the UCO 1987 permits use as a theatre, amusement arcade, launderette, garage or motor showroom, taxi or hire-car business, hostel, or scrapyard, waste disposal installation,

retail warehouse club, night club or casino (UCO 1987, art 3(6)). Note also that not all uses come within the 1987 Order. The courts have consistently held that there is no justification for stretching the meaning of the wording of the classes and that other uses will therefore be outside the terms of the Order.

The classes are divided into four main groups as follows:

(a) Group A: shopping area uses;
(b) Group B: other business and industrial uses;
(c) Group C: residential uses;
(d) Group D: non-residential uses.

Note in particular the following nine use classes.

Class A1: shops

Use for all or any of the following purposes: retail sale of goods other than hot food; post office; ticket or travel agency; sale of cold food for consumption off the premises; hairdressing; direction of funerals; display of goods for sale; hiring out of domestic or personal goods; washing or cleaning of clothes on the premises; internet cafe. In all cases, however, the sale, display or service must be to visiting members of the public.

Class A2: financial and professional services

Use for the provision of financial services, professional services (other than health or medical services) or any other services (including use as a betting office) which it is appropriate to provide in a shopping area, where the services are provided principally to visiting members of the public. In the case of solicitors' and other professional offices, the crucial question is whether the firm principally serves visiting members of the public. In *Kalra v Secretary of State for the Environment* [1996] JPL 850, CA, the Court of Appeal held that the introduction of an appointment system did not of itself prevent a solicitor's office falling within Class A2.

Class A3: restaurants and cafes

Use for the sale of food and drink for consumption on the premises.

Class A4: drinking establishments

Use as a public house, wine bar or other drinking establishment.

Class A5: hot food takeaways

Use for the sale of hot food for consumption off the premises.

Class B1: business

Use for all or any of the following purposes, namely as an office other than a use within Class A2, for research and development of products or processes, or for any industrial process (being a use which can be carried out in any residential area without detriment to the amenity of that area.)

Class B2: general industrial

Use for the carrying out of an industrial process other than one falling within Class B1.

Class B8: storage or distribution

Use for storage or as a distribution centre.

Class C3: dwelling houses

Use as a dwelling house by a single person or by people living together as a family, or by not more than six residents living together as a single household (including a household where care is provided for residents).

Note that a new use Class C4 has recently been introduced, which covers houses in multiple occupation (such as properties used as bedsits).

Wales

Note that, in Wales, Class A3 covers use for the sale of food and drink for consumption on the premises or of hot food for consumption off the premises. Classes A4 and A5 do not exist. Class B8 in Wales does not include use of a building or land for the storage of, or as a distribution centre for, radioactive material or radioactive waste.

4.2.2.3 UCO 1987 checklist

Although a change of use within a class does not amount to development, it does not necessarily follow that a change of use from one class to another will constitute development. Whether it will depends on the basic rule, ie is that change of use 'material'? However, *Palisade Investments Ltd v Secretary of State for the Environment* [1995] 69 P & CR 638, CA, suggests that it will be extremely rare for this not to be the case.

A change of use within a class may be accompanied by building operations which could amount to development in their own right (remember that development has two parts to it – see **4.2** above).

A change of use within a class may have been validly restricted by a condition attached to a previous planning permission, in which case permission will be needed to change to a use restricted by that condition.

4.2.3 Permitted development

Once it has been established that development is involved, the basic rule is that planning permission will be required. However, it is not always necessary to make an express application for planning permission, for the reasons given below.

4.2.3.1 Resumption of previous use

By s 57(2)–(6), certain changes of use do not require planning permission even though they may amount to development, for example the resumption of a previous lawful use after service of an enforcement notice.

4.2.3.2 The Town and Country Planning (General Permitted Development) Order 1995 (as amended)

By ss 59–61 of the Act, the DCLG may provide by statutory instrument for the automatic grant of planning permission by means of development orders. The most important of these orders is the GPDO 1995. This lists, in Sch 2, numerous categories of development for which planning permission is automatically granted, ie although the activity amounts to development, there is not normally any need to make an express application for planning permission for it (but see the GPDO 1995 checklist at **4.2.3.3**).

Note in particular the following six categories:

Part 1: development within the curtilage of a dwelling house

Part 1 is divided into classes as follows:

- Class A: the enlargement, improvement or other alteration of the dwelling house;

- Classes B and C: additions or alterations to its roof;
- Class D: the erection of a porch;
- Class E: the provision within the curtilage of the dwelling house of any building, enclosure or pool for a purpose incidental to the enjoyment of the dwelling house as such, or the maintenance, improvement or alteration of such a building or enclosure;
- Classes F and G: the provision of a hard surface or a container for the storage of domestic heating oil;
- Class H: the installation, alteration or replacement of a satellite antenna.

All of these classes of permitted development (except for Class F) are, however, subject to certain restrictions, limitations or conditions (see below).

There may occasionally be problems in determining the extent of the 'curtilage' of the dwelling house. It is the small area forming part of the land on which the house stands and used for the purposes of the enjoyment of the house. Its extent is a question of fact and degree in each case. It is not necessarily synonymous with 'garden'.

Restrictions on Class A development (enlargement, improvement, etc) include:

(a) a limit on the increase in the cubic content of the dwelling house;
(b) height;
(c) distance from highway;
(d) the area covered by all the buildings (other than the original dwelling house) within the curtilage must not exceed one half of the area of the curtilage excluding the area of the original dwelling house.

Restrictions on Class E development (the provision of buildings within the curtilage, etc) include restrictions (c) and (d) above. Additional restrictions include:

(a) a height limit; and
(b) a volume and nearness to house restriction.

Note that for a dwelling house on 'article 1(5) land' (ie within a National Park, an area of outstanding natural beauty or conservation area) there are further restrictions.

Restrictions on Class H development (satellite antennae) include dish size, height and siting.

Part 2: minor operations

Part 2 permits:

(a) the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure (Class A);
(b) the construction of a means of access to a highway which is not a trunk or classified road (Class B);
(c) the painting of the exterior of a building (Class C).

In Class A, any gates, fences, etc must be for the purpose of enclosure. They must not exceed 1 metre in height if they adjoin a highway, or 2 metres in any other case.

In Class C, painting of the exterior is not permitted if it is for the purpose of advertisement, announcement or direction.

Part 3: changes of use

Part 3 permits certain changes of use within Classes A and B of the UCO 1987 as follows:

(a) from A3, A4 and A5 (food and drink) to A2 (financial and professional services);
(b) from A2 to A1 (shops), provided the premises have a display window at ground level;

(c) from A3, A4 and A5 directly to A1;
(d) from B8 (storage and distribution) to B1 (business) and vice versa;
(e) from B2 (general industrial) to B8 or B1;
(f) from A4 (drinking establishment) and A5 (hot food takeaways) to A3 (restaurants and cafes).

Note that as from 1 October 2010, the GPDO 1995 will be further amended to allow changes of use from use Class A3 to use Class A4.

Part 4: temporary buildings and uses

Part 4 permits:

(a) the provision of buildings, structures, plant, etc required temporarily in connection with authorised operations (Class A);
(b) the use of open land for any purpose for not more than 28 days in any calendar year of which not more than 14 days may be used for holding a market or motor racing/trials (Class B).

Class A rights are subject to conditions requiring removal of the buildings, etc or reinstatement of land at the end of the operations.

The right to revert to the previous use of the land after the expiry of the temporary use is permitted by s 57(2) (see **4.2.3.1**).

Part 6: agricultural buildings and operations

Part 6 permits, inter alia, the carrying out on agricultural land of certain operations (in particular the erection, extension or alteration of buildings or excavation or engineering operations) which are reasonably necessary for the purposes of agriculture on that unit. These are subject to many exceptions and conditions.

Part 31: demolition of buildings

As has been seen at **4.2.1.2**, the demolition of most kinds of building will not amount to development. As regards those acts of demolition that do amount to development, Part 31 permits any building operation consisting of the demolition of a building except where the building has been made unsafe or uninhabitable by the fault of anyone who owns the relevant land, or where it is practicable to secure health or safety by works of repair or temporary support.

4.2.3.3 GPDO 1995 checklist

If the proposed development is permitted by the GPDO 1995, there should, prima facie, be no need to make an application for planning permission. However, before deciding, the following other matters should also be checked.

Limitations, etc

Confirm that all the limitations, restrictions and conditions imposed by the GPDO 1995 will be complied with. There are two categories of these. First, there is a general one in art 3(5), which applies to all the Parts in Sch 2 and which states that (subject to limited exceptions) the making or altering of an access to a trunk or classified road, or any development which obstructs the view of road users so as to cause them danger, is not permitted. Secondly, there are specific limitations, conditions, etc in almost all of the Parts of Sch 2 which must be observed (see above).

If the limitations, etc are not complied with then, as a general rule, the whole development will be unauthorised and not merely the excess. This, though, is subject to the LPA's power to

under-enforce if it thinks fit (see **Chapter 6** and in particular **6.1**). If the excess is *de minimis* it can be ignored.

Conditions on existing planning permission

Check any existing planning permission to see whether it contains a condition excluding or restricting relevant permitted development rights. Such conditions can be imposed in appropriate cases (see **4.3.3**).

Article 4 direction

Ascertain by means of an appropriate inquiry of the local authority whether an art 4 direction is in force which may affect the proposed development.

Article 4 of the GPDO 1995 empowers the DCLG or an LPA (usually with the DCLG's approval) to make a direction removing from the classes of permitted development under the GPDO 1995 any development specified in the direction as regards the area of land specified in it.

The making of an art 4 direction will not affect the lawfulness of any permitted development commenced before the direction was made.

Compensation may be payable if an LPA introduces an art 4 direction. It should be noted that the Town and Country Planning (Compensation (No 3) (England) Regulations 2010 (SI 2010/2135) will reduce the LPAs' liability to pay compensation in certain circumstances, in particular where 12 months' notice is given in respect of the direction. This order is due in force on 1 October 2010.

Special development orders

Check whether the land is in an area covered by a special development order (SDO).

Some SDOs restrict the provisions of the GPDO 1995 which would otherwise apply in the relevant area; others (especially those made for urban development areas) confer wider permitted development rights. It is therefore important to be aware of what SDOs exist and, where relevant, their provisions.

Local development orders and simplified planning zones

As part of the LDF (see **4.1.3.2**), the LPA is able to introduce local development orders (LDOs) and simplified planning zones (SPZs). Local development orders operate like the GDPO 1995 in giving permitted development rights, but are granted at local rather than central government level. They can apply over the whole or part only of an LPA's geographical area. Evidence suggests that they have been little used.

An SPZ is an area in which a LPA wishes to stimulate development and encourage investment. It operates by granting a specified planning permission in the zone without the need for a formal application or the payment of planning fees.

4.3 Planning permission

4.3.1 Types of planning permission

There are two types of planning permission: full and outline.

By the GDPO 1995, arts 3 and 4, where the application is for permission to erect a building, the applicant may, if he wishes, apply for outline permission. By art 1 of the GDPO 1995, 'building' includes any structure or part of a structure, and 'erection' includes 'extension, alteration or re-erection'.

If the applicant elects to submit an outline application, the application merely has to contain a description of the proposed development sufficient to indicate its major features (eg, for residential developments, the number and type of dwellings). A plan is also required of sufficient detail to identify the boundaries of the site and the nearest classified public highway. However, the application need not contain the considerable amount of detail that is required for a full application for permission.

If outline planning permission is granted, it will be subject to a condition setting out certain matters for which the subsequent approval of the LPA is required. The only matters which can be so specified ('reserved matters') are defined in the GDPO 1995, art 1(2) and the Town and Country Planning (Applications) Regulations 1988 (SI 1988/1812) as those concerned with siting, design, external appearance, means of access and landscaping of the development.

The effect of outline planning permission is that the LPA is committed to allowing the development in principle, subject to approval of any reserved matters. This is because it is the grant of the outline permission which constitutes the grant of planning permission for the proposed development, ie no further planning permission is required. The LPA cannot revoke the outline permission except on payment of compensation (see revocation of planning permissions at **4.3.4.2**), neither can it impose additional conditions subsequently except as regards the reserved matters.

Application for approval of the reserved matters can be made in stages, but must be made within three years of the grant of the original outline permission.

The PCPA 2004 contains proposals which may see the replacement of outline planning consent with 'statements of development principles', which will not amount to planning permission but would be a material consideration in determining any future planning application.

4.3.2 The basis for decision

Application for planning permission is made initially to the LPA. By s 70(1), the LPA may grant planning permission either unconditionally or subject to such conditions as it thinks fit, or it may refuse planning permission.

In reaching its decision the LPA must have regard to the provisions of the development plan, if it is relevant to the application, and to any other material considerations. The importance of this 'plan-led' principle was considered at **4.1.3**, and its importance should be acknowledged, as it is this test which will determine whether planning permission is granted at all and, if so, on what terms.

For such other considerations to be 'material', they must be relevant to the application and be planning considerations, ie relate to the use and development of land (see *Stringer v Minister of Housing and Local Government* [1971] 1 All ER 65). Matters which the courts have held to be capable of being 'material considerations' include:

(a) a development plan which is in the course of preparation (see, eg, *Allen v Corporation of the City of London* [1981] JPL 685 and *Kissel v Secretary of State for the Environment and Another* [1994] JPL 819). The closer the new plan gets to adoption, the greater the weight that should be given to it;

(b) the protection of private interests in a proper case and, in exceptional circumstances, personal hardship (see, eg, *Great Portland Estates plc v Westminster City Council* [1985] AC 661, HL);

(c) financial considerations involved in the proposed development (see, eg, *Sovmots v Secretary of State for the Environment; Brompton Securities Ltd v Secretary of State for the Environment* [1977] 1 QB 411);

(d) planning obligations (see **Chapter 5**);

(e) retention of an existing use (see, eg, *London Residuary Body v Lambeth Borough Council* [1990] 2 All ER 309, HL);

(f) the previous planning history of the site;

(g) a real danger of setting an undesirable precedent (see, eg, *Anglia Building Society v Secretary of State for the Environment and Another* [1984] JPL 175);

(h) planning policies of the DCLG (such as circulars and Planning Policy Statements (PPSs)), of other government departments where relevant (eg, transport, energy, etc) and of the LPA concerned (as evidenced in its own policy statements and non-statutory plans);

(j) environmental considerations. Likely environmental pollution from a proposed development is a material consideration, but it is not the function of the planning system to duplicate statutory pollution controls (see *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1995] JPL 432, CA; and *Envirocor Waste Holdings v Secretary of State for the Environment* [1995] EGCS 60, QB).

Note that discrimination on grounds of race, disability and gender, etc is subject to the provisions of the Equality Act 2010 which will apply to the development control system.

4.3.3 Planning permissions subject to conditions

The power in s 70(1) for an LPA to impose such conditions as it thinks fit (see **4.3.2**) is supplemented by s 72(1), which provides that, without prejudice to the generality of s 70(1), conditions may be imposed on the grant of planning permission for the purpose of:

(a) regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made), or requiring the carrying out of works on any such land, so far as appears to the LPA to be expedient for the purposes of or in connection with the development authorised by the permission; or

(b) requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period.

Whether an applicant has 'control' of the relevant land is a question of fact and degree in each case.

4.3.3.1 Judicial restrictions on the power

The general power to impose conditions in s 70(1) is not as wide or unfettered as it appears, because over the years the courts have imposed restraints on it.

The leading case on judicial control of the power is *Newbury District Council v Secretary of State for the Environment; Newbury District Council v International Synthetic Rubber Co* [1981] AC 578, where Viscount Dilhorne (at p 599) said:

> The conditions imposed must be for a planning purpose and not for any ulterior one and … they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them.

It is important to bear in mind that the majority of conditions imposed by LPAs on planning permissions do not fall foul of the test in *Newbury*. In the very few cases where a condition does fail, it will normally breach more than one of the elements in the test. This is because there are potentially considerable areas of overlap between the three elements in the test.

Planning purpose

There are many cases illustrating the first element of the above test (ie that conditions must be imposed for a planning purpose). For example, in *R v Hillingdon London Borough Council, ex p*

Royco Homes Ltd [1974] 1 QB 720, outline permission for a residential development was granted subject to a condition that the dwellings should first be occupied by persons on the local authority's housing waiting list with security of tenure for 10 years. The court held that the principal purpose of the condition was to require the applicants to assume at their expense a significant part of the authority's statutory duties as a housing authority. The condition was therefore ultra vires.

'Fairly and reasonably related to the development permitted'

The second part of the test in *Newbury* is probably the most difficult one to understand and apply. In *Newbury* the facts were that planning permission was granted for a change of use of aircraft hangers to warehouses, subject to a condition requiring removal of the hangers at the end of 10 years. The House of Lords held that although this condition satisfied the first test, in that the removal of unsightly old buildings was a proper planning purpose, the condition was not sufficiently related to the change of use permitted by the permission and was therefore void.

'Manifestly unreasonable'

The final part of the test in *Newbury* is that the condition must not be manifestly unreasonable in the sense that no reasonable LPA would have imposed the condition in question.

Under this element, a condition may not require the applicant to pay money or provide other consideration for the granting of planning permission (but see **Chapter 5**, where a similar practical result can be achieved by means of a planning obligation). A condition may not require the ceding of land owned by the applicant for public purposes (eg a highway) either, even if the applicant consents.

Severability of void conditions

If the condition in question is fundamental to the permission (ie if the permission would not have been granted without the condition), the court will not sever the offending condition. (Most conditions are considered to be fundamental to their permissions.) Thus, if the condition is quashed, the whole permission will fail, ie the applicant will be left with no permission at all. This is therefore an important point to bear in mind in deciding how to challenge a particular condition's validity (ie by way of application to the High Court for judicial review, or by appeal to the DCLG). In most cases, it will be better to appeal to the DCLG as, unlike the courts, the Secretary of State for the DCLG has power to grant the permission free from the offending condition or conditions if he thinks fit (see **4.5**). In addition, an application for judicial review must be made promptly, and in any event within three months of the decision, whereas an appeal to the DCLG must be made within six months (see **3.7**).

4.3.3.2 Central Government Guidance on the Acceptability of Conditions – Circular 11/95

Circular 11/95 of the DCLG gives detailed guidance to planning authorities on the imposition of conditions.

The main starting point is para 14 of the Annex to the Circular, which sets out six criteria that conditions must satisfy, namely that they should be imposed only where they are:

(a) necessary (see further paras 15–17 of the Annex);
(b) relevant to planning (see paras 20–23);
(c) relevant to the development to be permitted (see paras 24 and 25);
(d) enforceable (see paras 26–29);
(e) precise (see paras 30–33); and
(f) reasonable in all other respects (see paras 34–42).

These basic principles (which are clearly based on the courts' criteria, above) are expanded in paras 15 to 42, following which there are a further 78 paragraphs dealing with particular problem areas. The Circular contains model conditions. In addition, model environmental conditions are available and are contained in a DCLG letter to the Chief Planning Officer dated 30 May 2010.

4.3.4 The effect of planning permission

4.3.4.1 General

By s 75(1) of the Act, without prejudice to the provisions of the Act on duration, revocation or modification (for all of which, see below), planning permission shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it. As a general rule, therefore, the benefit of planning permission runs with the land concerned and, once implemented (see **4.3.4.3**), runs forever. This is (as indicated) subject to contrary conditions in the permission, and it is possible for planning permission to be granted for a limited period or be made personal to the applicant, but this is rare. Once such a permission lapses, the right to revert to the previous use of the land is permitted by s 57(2) (see **4.2.3.1**).

Note that any conditions attached to the planning permission will also run, ie will burden the relevant land.

It follows from the provisions in s 75(1) that the doctrine of abandonment cannot apply to express planning permissions (in other words, once implemented, the permission will not lapse if the activity ceases). Note, however, that once a permission has been fully implemented its effect is spent, ie it does not authorise the re-carrying out of that development.

The grant of planning permission is effective for planning purposes only. It does not confer, for example, listed building consent, building regulation consent or any consent required under any other enactment, neither does it confer the right to break any enforceable covenant affecting the land.

4.3.4.2 Revocation and modification of planning permissions

By s 97, the LPA may, if it thinks it expedient to do so, revoke or modify (to the extent the LPA considers necessary) any planning permission, provided that the LPA does so before the development authorised by the permission is completed.

4.3.4.3 Implementation

Although generally, once implemented, the benefit of a planning permission lasts forever, there are statutory time limits governing implementation itself. If the time limit expires without the development having been started, the permission effectively lapses. Any further development will be unauthorised and subject to possible enforcement proceedings.

For full permissions granted before 24 August 2005, this time limit is five years. For full permissions granted on or after 24 August 2005, the PCPA 2004 has reduced the period to three years. In the case of outline permissions, the time limit for implementation is within two years of approval of the last of the reserved matters (see **4.3.1**).

Note also that the LPA may substitute longer or shorter time limits if it thinks it appropriate on planning grounds. If it does this, however, it must give its reasons for doing so in case the applicant should wish to appeal against this.

The case of *R v West Oxfordshire District Council, ex p CH Pearce Homes* [1986] JPL 523 establishes that the date from which the time limit begins to run is the date which appears on the written notification to the applicant (ie it is not the date on which the decision was made by the LPA).

The Act (s 56) defines what steps must be taken to implement the permission. It provides that development is taken to be begun on the earliest date on which any of the following operations begin to be carried out:

(a) any work of construction in the course of erection of a building;
(b) any work of demolition of a building;
(c) the digging of a trench for the foundations of a building;
(d) the laying of an underground main or pipe to the foundations;
(e) any operation in the course of laying out or constructing a road;
(f) any material change in the use of any land.

4.3.4.4 Renewal of a planning permission

What if a developer cannot start the development within the time limit because of, for instance, financial problems? In such a case, the developer can apply for a renewal of the permission using a simplified procedure, but should make sure it has obtained the renewal before the original permission expires. If it does not, the whole permission will lapse and a fresh application for planning permission will therefore have to be made.

4.3.4.5 Completion notice

What happens if a developer starts the development within the time limit but the time limit subsequently expires without the development having been completed? In such a case, if the LPA is of the opinion that the development will not be completed within a reasonable period, it may serve a completion notice on the owner and any occupier of the land stating that the permission will cease to have effect at the expiration of a further period specified in the notice (being not less than 12 months after the notice takes effect). The notice is subject to confirmation by the DCLG. Any part of the development carried out before a confirmed completion notice takes effect is not affected.

4.4 Application to the local planning authority

Application for planning permission is, in the first instance, made to the LPA. In the case of major infrastructure projects (such as, for example, in respect of power stations or gas pipelines) the Planning Act 2008 provided for the establishment of the Infrastructure Planning Commission to deal with such matters. The Commission began work in early 2010; but following the General Election of 2010 the Commission is being abolished and, instead, applications in respect of such projects are to be made direct to the DCLG. The consideration of major infrastructure projects is outside the scope of this book.

4.4.1 Preliminary steps

It makes sense at this stage in the chapter to consider what steps should be undertaken in advance of applying to the LPA for permission. It is unusual for a solicitor to make this original application, but should the LPA refuse planning permission (or impose adverse conditions), a solicitor may become involved in advising on any appeal. As an appeal takes the form of a total rehearing of the merits of the original application, the solicitor will therefore in effect need to review the matter as if from the outset at the appeal stage instead.

Steps to be taken include the following:

(a) Considering whether planning permission is required at all, ie do the proposals amount to development and, if so, are they permitted development (see **4.2** and **4.3**)?
(b) Undertaking a site visit. A site visit can be very valuable as it may:
    (i) clarify the client's maps, diagrams and plans;
    (ii) provide information about the immediate environment; and
    (iii) alert the solicitor to potential problems with the application.

(c) Obtaining copies of the relevant parts of the development plan and any non-statutory plans which may affect the proposed development. This could be vital in many cases as, for the application to stand a chance of succeeding, the development proposed will usually have to be in accordance with the development plan (see **4.1.3**).

(d) Investigating the title to the land concerned. This is necessary for two main reasons: first, to check whether the proposed development is in breach of an enforceable covenant affecting the land concerned; secondly, to identify any other 'owners' who will need to be given notice of the application (see further **4.4.2**).

(e) Obtaining the relevant application form from the LPA. Note that each LPA produces its own form which can be obtained free of charge.

(f) Considering whether a pre-application discussion with the appropriate case officer might be beneficial. This is encouraged by the DCLG in order to reduce uncertainty and delay in processing applications. Such discussions can be particularly helpful in the case of large-scale or potentially controversial development proposals, to enable the developer to find out in what respects the proposals may not be acceptable and in what ways chances of success can be improved; they also enable the LPA to advise the developer of probable objections to the development which, if remedied, should lead to a quicker determination.

Note that LPAs have no statutory duty to enter into such discussions, although in practice they do so regularly. It follows, therefore, that any advice, etc given in such discussions is merely informal and advisory, and ultimately cannot bind the LPA. Note also that LPAs may not charge a fee for the time taken in such pre-application discussions.

4.4.2 The procedure

Procedure is governed mainly by ss 62 to 69 of the Act, the GDPO 1995 and the Town and Country Planning (Applications) Regulations 1988 (SI 1988/1812).

4.4.2.1 What is submitted to whom?

The application form and such other documents, plans, drawings, etc as are needed to describe the proposed development should be submitted (usually in triplicate) to the district planning authority, London borough or metropolitan district council or unitary council (as the case may be). The application will require the applicant to detail its proposals, and must contain a design and access statement.

The application must be accompanied by the appropriate fee. The fee may vary according to the type of application and the scale of development involved.

The application must also be accompanied by an art 7 certificate and an agricultural holdings certificate. These certificates have to be given to certify compliance with the GDPO 1995, art 6, which requires the applicant, where he is not the sole owner of the land concerned, to notify or try to notify the owners of the land and any relevant agricultural tenant of the fact of the application for planning permission (see **4.4.2.2**).

4.4.2.2 Notification of persons by the applicant

By the GDPO 1995, art 6, where the applicant is not the sole owner of the application site, he must give notice (in the form prescribed in the GDPO 1995, Sch 2, Pt I) to all persons who are 'owners' or 'tenants' of the land.

'Owner' is defined by s 65(8) of the Act as meaning any person who owns the fee simple, or a tenancy granted or extended for a term certain of which not less than seven years remain unexpired.

'Tenant' is defined by the GDPO 1995, art 6(6), as meaning the tenant of an agricultural holding any part of which is comprised in the application site.

4.4.2.3 Action by the LPA

By s 69, the LPA must enter certain particulars of the application in the register that it is required to keep by that section. The register is open to public inspection.

By the GDPO 1995, art 8, the LPA must publicise the application. This publicity may consist of a site notice, notifying neighbours, or a local advertisement, depending upon the type of development proposed.

4.4.2.4 Power to decline to determine applications

Section 43 of the PCPA 2004 (in force 24 August 2005) gives LPAs the power to decline to determine:

(a) repeat planning applications;

(b) overlapping planning applications.

Repeat planning applications are applications that are submitted repeatedly with the intention that, over time, opposition to a controversial proposed development is reduced and permission granted. This process may result in undesirable developments being built.

The new powers are not intended to prevent similar applications from being submitted, such as when a new application is submitted that is similar to an earlier one but altered to address objections raised in relation to the earlier application.

Section 43 allows the LPA to decline to determine an application which is similar to one refused by the authority within the preceding two years.

4.4.2.5 The making of the decision

The decision should be made within eight weeks of the submission of the application or such longer period as may have been agreed in writing with the applicant (GDPO 1995, art 20). However, in the case of major developments, the time limit is 13 weeks, and if an environmental assessment accompanies the application then the period is 16 weeks. If no decision has been made in time, the applicant can appeal to the DCLG.

The LPA should make its decision in line with the plan-led principle (see **4.1.3**).

If the LPA does not make its decision within the relevant time limit, this is treated as a deemed refusal of planning permission and entitles the applicant to appeal.

4.4.2.6 Procedure after the decision

After making the decision, the LPA must register it in its planning register (s 69 of the Act and the GDPO 1995, art 25(2)). In addition, the applicant must be given written notification of the decision and, where the decision is a planning permission subject to conditions or a refusal, written reasons (see the GDPO 1995, art 22). Such written reasons must state clearly and precisely the full reasons for the conditions imposed or the refusal as the case may be. If full reasons are not given this will probably not invalidate the decision itself, although the decision could be challenged by judicial review or dealt with by way of appeal.

It is the written notification which constitutes the grant of planning permission (see *R v West Oxfordshire District Council, ex p CH Pearce Homes* [1986] JPL 523).

4.4.3 Section 73 and section 73A applications

If an LPA imposes conditions, it is open to the applicant to appeal. However, as the appeal takes effect as a total rehearing of the matter, it is possible that the original grant (admittedly

subject to adverse conditions) might be reversed altogether, leaving the appellant worse off. Sections 73 and 73A were introduced to offer an applicant a way of reducing this risk.

4.4.3.1 Section 73

Section 73 entitles a person to apply for planning permission to develop land without complying with conditions subject to which a previous planning permission was granted. Such an application must, however, be made before the previous permission expires.

The application merely has to be made in writing and give sufficient information to enable the LPA to identify the previous grant of planning permission and the condition or conditions in question (Town and Country Planning (Applications) Regulations 1988, reg 3).

The important feature of a s 73 application is that in determining the application, the planning authority may consider only the question of the conditions subject to which the permission should be granted, and thus may only:

(a) grant unconditional permission;

(b) grant permission subject to different conditions; or

(c) refuse the application.

In the first two cases above, the applicant will then have the benefit of two permissions (ie the original one and the one obtained on the s 73 application). In cases (b) and (c), the applicant can appeal to the DCLG in the usual way. Thus, whatever happens on the s 73 application, the applicant will retain the benefit of the original planning permission.

In *Allied London Property Investment Ltd v Secretary of State for the Environment* (1996) 72 P & CR 327, it was held that there is no distinction to be drawn between time and other conditions. Therefore, s 73 could be used to apply for, for example, an extension of time for applying for approval of reserved matters under an outline permission (instead of applying for a renewal of the outline permission, see **4.3.4.4**).

This is the only procedure available for challenging a condition where the time limit for appealing has passed.

4.4.3.2 Section 73A

Section 73 applies only to applications for the removal, etc of a condition before it is breached. However, under s 73A, an application may be made for planning permission for, inter alia, development carried out before the date of the application in breach of a condition subject to which planning permission was previously granted.

Permission for such development may be granted to have effect from the date on which the development was carried out, thereby rendering it retrospectively lawful.

4.5 Appeals against adverse planning determinations

Where an LPA has:

(a) refused to grant planning permission; or

(b) granted planning permission subject to conditions to which the applicant objects; or

(c) refused approval of reserved matters on an outline permission; or

(d) refused an application or granted a permission subject to conditions under s 73 or s 73A; or

(e) failed to notify its decision within the prescribed period (normally eight weeks),

the applicant may appeal to the DCLG within six months of the notice of the decision or failure to determine as the case may be (s 78; GDPO 1995, arts 20 and 23).

A shorter period of 28 days applies to certain, comparatively rare types of appeal (such as an appeal in respect of an application for planning permission where an enforcement notice has been served in respect of that development) (see Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2010 (SI 2010/567)).

4.5.1 Who may appeal?

Only the applicant may appeal; this is so even though the applicant may not be the owner of an interest in the land. Third parties have no right of appeal, and neither does the owner of the freehold have an independent right of appeal.

4.5.2 Initial procedure (GDPO 1995, art 23)

An appeal must be made on the form supplied by the DCLG.

As well as setting out the grounds of appeal, the appellant must indicate whether he would like the appeal to be determined by the written representations procedure, whether he wishes it to be heard by an inspector, or whether he wishes the appeal to be heard at a public inquiry (see **4.5**). Note, however, that it is the Planning Inspectorate that will choose the procedure; it will not necessarily adopt the method desired by the appellant. The LPA's views as to the choice of procedure will also be taken into account. The Planning Inspectorate's decision will be made in the light of published criteria approved by Ministers. These are as follows:

Criteria for Determining the Procedure for Planning Appeals

Written representations

If your appeal meets the following criteria, the most appropriate procedure would be written representations:

1. the grounds of appeal and issues raised can be clearly understood from the appeal documents plus a site inspection; and/or
2. the Inspector should not need to test the evidence by questioning or to clarify any other matters; and/or
3. an environmental impact assessment (EIA) is either not required or the EIA is not in dispute.

Hearing

If the criteria for written representations are not met because questions need to be asked, for example where any of the following apply:

- the status of the appellant is at issue, eg Gypsy/Traveller;
- the need for the proposal is at issue, eg agricultural worker's dwelling; Gypsy/Traveller site;
- the personal circumstances of the appellant are at issue, eg people with disabilities or other special needs;

the most appropriate procedure would be a hearing if:

1. there is no need for evidence to be tested by formal cross-examination; and
2. the issues are straightforward (and do not require legal or other submissions to be made) and you should be able to present your own case (although you can choose to be represented if you wish); and
3. your case and that of the LPA and interested persons is unlikely to take more than one day to be heard.

Inquiry

If the criteria for written representations and hearings are not met because the evidence needs to be tested and/or questions need to be asked, as above, the most appropriate procedure would be a local inquiry if:

1. the issues are complex and likely to need evidence to be given by expert witnesses; and/or
2. you are likely to need to be represented by an advocate, such as a lawyer or other professional expert because material facts and/or matters of expert opinion are in dispute and formal cross-examination of witnesses is required; and/or

3. legal submissions may need to be made.

NOTE: Where proposals are controversial and have generated significant local interest, they may not be suitable for the written representation procedure. We consider that the LPA is in the best position to indicate that a hearing or inquiry may be required in such circumstances.

There is also an expedited process based on written representations where a householder is appealing through the Householder Appeals Service. This is dealt with on an electronic basis and covers appeals in relation to minor developments affecting existing dwellings, eg extensions, garages, etc.

The completed form, together with all relevant documents, must be sent to the Planning Inspectorate to reach it within the time limit. Copies of the form must also be sent to the LPA, together with copies of any documents sent to the Inspectorate which the LPA has not yet seen (GDPO 1995, art 23(1)(b)).

4.5.3 Types of appeal

4.5.3.1 Written representations

Under the written representations procedure the appeal is decided, as its name suggests, almost entirely on the basis of written representations submitted to the Inspectorate by the appellant, the LPA and any other interested parties. No oral evidence is permitted, and that includes evidence by way of video or audio tape; maps, plans and photographs are acceptable, however, and in many cases will be necessary. At some point before a decision is made, the inspector will visit the site either unaccompanied, if the site can be seen sufficiently well from a public road or place, or accompanied by the appellant or his representative and a representative from the LPA.

The procedure is governed by the Town and Country Planning (Appeals) (Written Representations Procedure) Regulations 2009 (SI 2009/452). It is speedy and cost-effective, and is recommended by the DCLG for the simpler or non-controversial cases. It is by far the most common appeal procedure, accounting for about 80% of current appeals. Because of its nature, it also offers less scope for third parties to influence the eventual decision.

Statement of case

The appellant's statement of case must be set out in the appeal form. As a general guide, the statement should:

(a) start with quotations from the development plan, planning policy statements and DCLG circulars which support the appellant's case;

(b) consider each of the reasons given (where relevant) for the refusal, etc, and analyse and refute them by logical argument. In this part, any precedent (ie showing that the LPA has granted a similar application) should be mentioned, as should any policies of the LPA which contradict the LPA's reasons;

(c) justify the appellant's case. Here there should be a brief description of the development proposed, together with additional plans, photographs, etc if desired. The local environment may be described (although the inspector will visit the site). Any policies from the structure or local plans which support the appellant's case should be referred to. Any material considerations and special circumstances should be set out and any objections from third parties should be addressed.

(d) conclude (optional) with a general policy statement in support of the appellant's case.

4.5.3.2 Inquiry

This is the most formal of the appeal procedures and is reserved for larger and more controversial developments. Inquiries are usually held in LPA offices, village halls or community centres. The procedure is governed by the Town and Country Planning (Inquiries

Procedure) (England) Rules 2000 (SI 2000/1624) and the Town and Country Planning (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000/1625) as amended by the Town and Country Planning (Hearings and Inquiries Procedure) (Amendment) (England) Rules 2009 (SI 2009/455). Guidance as to the procedure to be followed can be found on the Planning Inspectorate website or on the Government Planning Portal (<www.planningportal.gov.uk>).

These are often cases where expert evidence is presented and witnesses are cross-examined. An inquiry may last for several days, or even weeks. It is not a court of law, but the proceedings will often seem to be quite similar, and the appellant and the LPA usually have legal representatives. It is thus a much slower and more costly procedure.

The Planning Inspectorate sets out the following guidance in its 'Guide to taking part in enforcement appeals proceeding by an inquiry' (July 2009):

> Inquiries are open to members of the public, and although there is no legal right to speak the Inspector will normally allow [local people to take part in the inquiry process]. Local knowledge and opinion can often be a valuable addition to the more formal evidence given by the appellant and the LPA.
>
> …
>
> At the inquiry opening, the Inspector will go through some routine matters, including asking who will be taking part in the inquiry. This is often called 'taking the appearances'. When the appellant and the LPA have given their details, the Inspector will ask if anyone else wants to speak. …
>
> …
>
> The appellant will usually be asked to make a brief opening statement first, to set the scene [and describe the nature of the proposal]. The LPA will then make their opening statement. Their witnesses will then give their evidence and the appellant can cross-examine them. After that the Inspector will normally ask if anyone who supports the proposal has any questions to put to the witnesses.
>
> The appellant will then call their witnesses, and the LPA can cross-examine them. After that the Inspector will normally ask if anyone who objects to the proposal has any questions to put to the witnesses.
>
> …
>
> The inquiry ends with closing speeches by those who have spoken at the inquiry, followed by the LPA and finally the appellant. This is normally followed by the Inspector visiting the appeal site. Because the inquiry is over, there can be no further discussion about the case during that visit.
>
> At the discretion of the Inspector, video, audio cassette, CD/DVD or electronic media files may be played at the inquiry. … The recording will become part of the inquiry evidence and will be retained.

The appeal form

In the appeal form, it is not necessary or desirable to give a full statement of case. Full grounds of appeal must, however, be included. Thus, the appellant must, as before, consider each of the LPA's reasons and analyse and refute them briefly. The entire case should be summarised by describing the development proposed, the environment and any special needs or circumstances, and by referring to any appropriate parts of the structure and local plans and government policies. Any relevant previous decisions (whether by the LPA or on appeal) should be set out as being 'material considerations', and potential planning gain to the LPA should also be outlined.

It is important that the full grounds of appeal are stated and that nothing is omitted, as the appellant or his representative at the appeal will largely be bound by the grounds, and any omissions may cause adjournments and may have financial consequences (see **3.9**).

4.5.3.3 Hearing

This is less formal than a public inquiry. The hearing is an inquisitorial process led by the Inspector, who identifies the issues for discussion based on the evidence submitted and any representations made. The hearing may include a discussion at the site, or the site may be inspected, without discussion, on an accompanied or unaccompanied basis.

The procedure is governed by the Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000/1626) as amended by the Town and Country Planning (Hearings and Inquiries Procedure) (Amendment) Rules 2009 (SI 2009/455). The procedure is intended to save time and money for the parties. In essence, it will be an informal hearing before an inspector, who will try to stimulate a discussion on the main issues between the parties. It is not appropriate for complex or controversial appeals, but where it is appropriate it is quicker and more cost-effective than an inquiry.

4.5.4 Costs in appeals

By ss 320(2) and 322 of the Act, the DCLG is given the powers under s 250(5) of the Local Government Act 1972 to award costs in planning appeals. Inspectors may now exercise the DCLG's powers. There is power to make an award in all cases, irrespective of the procedure for deciding the appeal.

Detailed guidance on the exercise of power to award costs is contained in Circular 03/09. The basic principle is that, unlike in civil cases, costs do not 'follow the event', ie normally, each party will bear its own costs. Costs may be awarded against one party in favour of another, however, where:

(a) a party has sought an award at the appropriate stage of the proceedings; and
(b) the party against whom costs are sought has behaved unreasonably; and
(c) this has caused the party seeking costs to incur or waste expense unnecessarily.

4.5.5 Challenging the appeal decision

By s 284, the validity of an appeal decision may not be challenged in any legal proceedings. However, by s 288, a 'person aggrieved' may question the decision by appeal to the High Court if the decision was not within the powers of the Act, or if any relevant procedural requirements have not been complied with.

In certain limited cases, a challenge may alternatively be mounted by way of judicial review.

4.6 Stop press

The DCLG has announced the introduction of the Town and Country Planning (Development Management Procedure) Order 2010 (SI 2010/2184), due to come into force on 1 October 2010. Subject to one minor change, this is a consolidation of the GDPO 1995. It has been too late to incorporate these changes into this chapter, but a letter to the Chief Planning Officer dated 9 September 2010 summarises the detail and contains a useful Table of Destinations. This can be found on the DCLG website under 'Planning, building and the environment': 'Circulars and official letters'.

Review activity

1. 'When determining an application for planning permission, there are no criteria with which LPAs are required to comply.'
   Do you agree with this statement?

2. An individual has bought a house for investment purposes. He plans to sub-divide the building and create three self-contained flats which he will then sell. The exterior of the building will be unaffected apart from the installation of a window in the roof (which is permitted by the GPDO).

   'He will not need planning permission for his proposals.'

   Do you agree with this statement?
3. Would change of use from a clothing store to a bookshop require planning permission (ignore any building works that might need to be undertaken)?
4. What is the effect of an Article 4 Direction?
5. Does the GPDO give an individual who currently has permission for use of premises under use class A2 an unqualified right to change to a use under use class A1?
6. 'The longest an outline planning permission can last before implementation is three years.'

   Do you agree with this statement?
7. A full planning permission has been granted for the erection of an office block. Is there a time limit within which the office block must be completed?
8. On appeal against an adverse planning decision by an LPA, what is the basis on which the matter is heard?
9. What is the time limit within which an appeal against an adverse planning decision by an LPA must be made?
10. A farmer plans to convert a disused barn into a row of cottages. The LPA has granted planning permission has imposed conditions limiting occupation to agricultural workers only. In the farmer's opinion, this outcome is better than nothing, but he would like to challenge the decision.

    How would you advise the farmer?

Chapter 5
Planning Obligations

5.1	Introduction	51
5.2	Fundamentals	52
5.3	Government policy	53
5.4	Practical points	55
5.5	Modification and discharge of planning obligations	57
5.6	Unilateral undertakings	57
Review activity		58

5.1 Introduction

The limitations discussed in **Chapter 4** (see **4.3.3**) on what matters can be dealt with by way of a condition attached to a planning permission provide certainty and clarity. There will, however, be situations where these limitations prove problematic. An example might be where a development proposal gives rise to the need for additional infrastructure provision (such as roads or schools). A condition cannot be imposed requiring the developer to make a contribution towards this. Planning obligations (and their predecessors, such as s 52 agreements) have been developed to address this problem.

In simple terms, a planning obligation is a separate document that runs alongside the planning permission and which can be used to deal with issues (such as contributions to infrastructure costs) that cannot be dealt with in the planning permission itself. The planning obligation will be treated as a 'material consideration' in determining whether the planning permission should be granted and on what terms (see **4.3.2**). The use of planning obligations thus allows the essential certainty and clarity regarding conditions to remain, but allows flexibility, where appropriate, within the overall framework of the development control system.

Planning obligations have, however, been the subject of criticism. First, there is an apparent lack of transparency (in a worst case scenario there is the fear that developers could simply 'buy' planning permission by offering generous terms in the obligation). Secondly, the case-by-case nature of planning obligations makes it more difficult for LPAs to manage their infrastructure spending strategically. Thirdly, costs can fall disproportionately on developers promoting major projects.

Various proposals for reform have been considered, and on 6 April 2010 regulations were introduced to pave the way for the Community Infrastructure Levy (CIL), which is in essence a form of local taxation on development. The regulations set out a procedure for LPAs to determine a tariff and then charge developers a levy based on that tariff in the light of the size of the relevant development. It was envisaged that the CIL would become the main source of infrastructure funding but that planning obligations would still be needed to address site-specific issues.

With the change of government following the 2101 General Election, it would appear that CIL will not now be pursued, and this chapter will proceed on the basis that this will remain the case. As such, the law and policy governing s 106 agreements remains (subject to one qualification – see **5.2.1**) essentially the same as it was before the CIL regulations were introduced.

The terms of each planning obligation will depend on the individual needs of the development proposal, but a model form of planning obligation (which can be accessed at <www.communities.gov.uk> and on the Law Society's website) is available as a starting point.

5.2 Fundamentals

Meaning of 'planning obligation'

Any person interested in land in the area of an LPA may, by agreement or otherwise, enter into a planning obligation which may:

(a) restrict the development or use of the land in a specified way; or
(b) require specified operations or activities to be carried out in, on, over or under the land; or
(c) require the land to be used in a specified way; or
(d) require money to be paid to the LPA on a specified date or dates, or periodically (TCPA 1990, s 106(1); unless stated otherwise, all references in this chapter are to the 1990 Act).

Note the following points:

(a) 'Person interested in land' means a person with a legal estate or interest in the land concerned and not, for example, a developer who merely has an option to purchase the land at the time the obligation is entered into.
(b) 'Agreement or otherwise' indicates that a planning obligation may be created either by agreement between the LPA and the developer, or by means of a unilateral undertaking offered by the developer or a combination of both (as to the potential use of unilateral undertakings, see **5.6**).
(c) A planning obligation may impose both restrictive covenants (eg restricting the development or use of the land) and positive ones (eg requiring works to be done or money to be paid). These covenants will then be enforceable against successors in title of the developer (see **5.2.4**).
(d) A planning obligation may be unconditional or subject to conditions, and may impose its restrictions and requirements either indefinitely or for a specified period. It may also provide that a person will be bound by the obligation only while he has an interest in the land (s 106(2) and (4)).

5.2.1 When can a planning obligation be used?

A planning obligation can be used only if it is:

(a) necessary to make a proposal acceptable in planning terms;
(b) directly related to the proposed development; and
(c) fairly and reasonably related in scale and kind to the proposed development.

This test was introduced in the CIL regulations. It replaces a broadly similar test previously found in Circular 11/95 and puts the test of when a planning obligation can be used on a statutory footing. It may be that this provision will remain even if CIL and associated regulations are otherwise abandoned.

5.2.2 Formalities

A planning obligation must be made by a deed which states that it is a planning obligation for the purposes of s 106, and identifies the land and the parties concerned (including the interest of the developer). It is registrable by the LPA as a local land charge.

5.2.3 Enforceability

By s 106(3) and (4), a planning obligation is enforceable by the LPA against the original person interested (the 'developer') and any person deriving title from him, but subject to the terms of the obligation.

Note the following points:

(a) The obligation will bind only the interest or estate of the developer and those deriving title from him. It cannot bind a superior title. Thus, for example, if a tenant enters into a planning obligation, it cannot bind the landlord of that tenant.

(b) A planning obligation cannot bind parties who have rights in the land existing at the time the obligation is entered into unless they consent to be bound by it. Thus, for example, existing mortgagees of the land will not be bound (unless they consent), so that if they subsequently sell under their statutory power, the purchaser will take the land free from the obligation which will be enforceable only against the original covenantor.

5.2.4 Enforcement by the LPA

Section 106 provides three main methods of enforcement, as follows:

(a) Injunction to restrain a breach of any restrictive covenant in the obligation (s 106(5)).

(b) By s 106(6), where there is a failure to carry out any operations required by a planning obligation, the LPA may enter upon the land, carry out the operations and recover its expenses from the person or persons against whom the obligation is enforceable (see **5.2.3**).

(c) Any sums due under the planning obligation (including any expenses recoverable under s 106(6) above) may be charged on the land in accordance with regulations yet to be made (s 106(12)). Until regulations have been made, it is unclear whether such a charge will be registrable as a local land charge or as a private charge (and therefore registrable as a land charge or by notice, etc on the register of title).

5.3 Government policy

Government policy on planning obligations is set out in Circular 05/05, and had the CIL proposal been pursued, the Circular would have needed major revision. As it is, subject to the new statutory test for when a planning obligation can be used in the first place (see **5.2.1**), the guidance contained in the Circular remains applicable and the following are key elements:

B2. In dealing with planning applications, local planning authorities consider each on its merits and reach a decision based on whether the application accords with the relevant development plan, unless material considerations indicate otherwise. Where applications do not meet these requirements, they may be refused. However, in some instances, it may be possible to make acceptable development proposals which might otherwise be unacceptable, through the use of planning conditions … or, where this is not possible, through planning obligations. (Where there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition is preferable …)

B3. Planning obligations (or 's 106 agreements') are … intended to make acceptable development which would otherwise be unacceptable in planning terms. Obligations can also be secured through unilateral undertakings by developers. For example, planning obligations might be used to prescribe the nature of a development (eg by requiring that a given proportion of housing is affordable); or to secure a contribution from a developer to compensate for loss or damage created by a development (eg loss of open space); or to mitigate a development's impact (eg through increased public transport provision). The outcome of all three of these uses of planning obligations should be that the proposed development concerned is made to accord with published local, regional or national planning policies.

B4. Planning obligations are unlikely to be required for all developments but should be used whenever appropriate according to the Secretary of State's policy set out in this Circular …

B6. The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms …

B7. Similarly, planning obligations should never be used purely as a means of securing for the local community a share in the profits of development, ie as a means of securing a 'betterment levy'.

B8. As summarised above, it will in general be reasonable to seek, or take account of, a planning obligation if what is sought or offered is necessary from a planning point of view, ie in order to bring a development in line with the objectives of sustainable development as articulated through the relevant local, regional or national planning policies … Obligations must also be so directly related to proposed developments that the development ought not to be permitted without them – for example, there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution.

B9. Within these categories of acceptable obligations, what is sought must also be fairly and reasonably related in scale and kind to the proposed development and reasonable in all other respects. For example, developers may reasonably be expected to pay for or contribute to the cost of all, or that part of, additional infrastructure provision which would not have been necessary but for their development. The effect of the infrastructure investment may be to confer some wider benefit on the community but payments should be directly related in scale to the impact which the proposed development will make. Planning obligations should not be used solely to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives that are not necessary to allow consent to be given for a particular development.

B12. Planning obligations can be used to secure the implementation of a planning policy in order to make acceptable a development proposal that would otherwise be unacceptable in planning terms. For example, where not possible through a planning condition, planning obligations can be used to secure the inclusion of an element of affordable housing in a residential or mixed-use development where there is a residential component.

B15. Where a proposed development would, if implemented, create a need for a particular facility that is relevant to planning but cannot be required through the use of planning conditions, it will usually be reasonable for planning obligations to be secured to meet this need. For example, where a proposed development is not acceptable in planning terms due to inadequate access or public transport provision, planning obligations might be used to secure contributions towards a new access road or provision of a bus service, perhaps co-ordinated through a Travel Plan. Similarly, if a proposed development would give rise to the need for additional or expanded community infrastructure, for example, a new school classroom, which is necessary in planning terms and not provided for in an application, it might be acceptable for contributions to be sought towards this additional provision through a planning obligation.

B16. Planning obligations might be used, when appropriate, to offset through substitution, replacement or regeneration the loss of, or damage to, a feature or resource present or nearby, for example, a landscape feature of biodiversity value, open space or right of way. It may not be necessary to provide an exact substitute of the item lost, but there should be some relationship between what is lost and what is to be offered. A reasonable obligation will seek to restore facilities, resources and amenities to a quality equivalent to that existing before the development.

B17. Contributions may either be in kind or in the form of a financial contribution. In the case of financial contributions, payments can be made in the form of a lump sum or an endowment, or, if beneficial to all parties and not unduly complex, as phased payments over a period of time, related to defined dates, events and triggers. Policies on types of payment, including pooling and maintenance payments, should be set out in Local Development Frameworks. The local authority's generic policies on payment types should be contained in Development Plan Documents, and the details of their application in Supplementary Planning Documents.

B18. Where contributions are secured through planning obligations towards the provision of facilities which are predominantly for the benefit of the users of the associated development, it may be appropriate for the developer to make provision for subsequent maintenance (ie physical upkeep). Such provision may be required in perpetuity.

B19. As a general rule, however, where an asset is intended for wider public use, the costs of subsequent maintenance and other recurrent expenditure associated with the developer's contributions should normally be borne by the body or authority in which the asset is to be vested. Where contributions to the initial support ('pump priming') of new facilities are necessary, these should reflect the time lag between the provision of the new facility and its inclusion in public sector funding streams, or its ability to recover its own costs in the case of privately-run bus services, for example. Pump priming maintenance payments should be time limited and not be required in perpetuity by planning obligations.

B25. In order to allow developers to predict as accurately as possible the likely contributions they will be asked to make through planning obligations and therefore anticipate the financial implications for development projects, local authorities should seek to include as much information as possible in their published documents in the Local Development Framework. In line with previous advice in Circular 1/97, local planning authorities should include in their new-style Development Plan Documents general policies about the principles and use of planning obligations …

B31. It is important that the negotiation of planning obligations does not unnecessarily delay the planning process, thereby holding up development. It is therefore essential that all parties proceed as quickly as possible towards the resolution of obligations in parallel to planning applications (including through pre-application discussions where appropriate) and in a spirit of early warning and co-operation, with deadlines and working practices agreed in advance as far as possible.

B51. It is important to recognise that, if there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition which satisfies the policy tests of Department of the Environment Circular 11/95 is preferable because it enables a developer to appeal to the Secretary of State regarding the imposition of the condition … The terms of conditions imposed on a planning permission should not be re-stated in a planning obligation; that is to say, an obligation should not be entered into which requires compliance with the conditions imposed on a planning permission. Such obligations entail unnecessary duplication and could frustrate a developer's right of appeal. Further, as per the guidance in Department of the Environment Circular 11/95, permission cannot be granted subject to a condition that the developer enters into a planning obligation under section 106 of the Act or an agreement under other powers.

5.4 Practical points

In view of the law and guidance above, the following points should be borne in mind when drafting and negotiating a planning obligation.

5.4.1 By the LPA

(a) It is important that the title to the land is thoroughly investigated before the LPA enters into the planning obligation. All parties with a legal interest in the land should be made parties to it, including any persons with existing interests (such as a prior mortgagee); otherwise the obligation may not be enforceable against a successor in title to that interest.

(b) The future exercise of any of the LPA's statutory powers should not be fettered by the obligation. If this does occur and the obligation is later challenged in court, it could invalidate the planning obligation (see *Royal Borough of Windsor and Maidenhead v Brandrose Investments* [1983] 1 WLR 509, CA).

(c) The planning obligation should be executed either before, or simultaneously with, the grant of the planning permission, otherwise the developer may have the benefit of the permission without being bound by the obligation.

(d) The timing of related infrastructure agreements should be considered carefully. It will normally be preferable, where possible, to have all related agreements (eg agreements under the Highways Act 1980) executed at the same time as the planning obligation.

(e) Consideration should be given as to whether the obligation ought, in the circumstances of the case, to provide that liability under the obligation will cease once the owner of the interest parts with it. In the absence of such a provision, liability will continue not only against the original covenantor(s), but also against all subsequent successors in title to him (them).

(f) If there is a disagreement about the inclusion of a particular term in the planning obligation, the LPA should consider whether it is within the guidance contained in Circular 5/05. If it is doubtful, or may be considered excessive, the LPA may find that the developer will appeal and offer a unilateral undertaking on the appeal (see further **5.6**).

(g) Consideration should also be given as to whether a clause should be included providing for payment of the LPA's costs in connection with the negotiation, drafting and execution of the planning obligation. If there is no such clause, the LPA will have to bear its own costs.

5.4.2 By the developer

(a) The draft planning permission should be included in one of the schedules to the obligation so that it is clear from the terms of the obligation what conditions, etc will be attached to the planning permission.

(b) The developer should try to ensure that the terms of the obligation do not continue to bind after he has sold his interest to a successor. This is particularly important where positive covenants in the obligation are likely to continue well into the future.

(c) For the same reasons as for the LPA (see **5.4.1** at (b)), it is important for the developer that the LPA does not fetter its statutory powers in the obligation. If there is such a fetter, the planning obligation may be challenged later by a third party.

(d) The developer should attempt to have a clause inserted to the effect that the planning obligation will be discharged or cease to have effect if the planning permission expires or is revoked, or if planning permission is later granted for some other development which is incompatible with that originally granted.

(e) The obligation should not contain a covenant to comply with the conditions attached to the related planning permission (see para B51 of Circular 5/05 quoted at **5.3**). If there is such a covenant and the conditions on the planning permission are subsequently varied (under s 73 or s 73A, see **4.4.3**), or the permission lapses or is revoked, the conditions will continue to bind the land by virtue of the covenant in the planning obligation. (As an alternative, the obligation could contain a covenant to comply with the conditions originally imposed or as subsequently varied or removed, and only in so far as the planning permission remains in effect.)

(f) Covenants should be avoided which impose obligations (in particular, positive ones) which take effect as soon as the planning obligation is executed (as opposed to when the planning permission is implemented). There may be a gap of quite a few months, if not a few years, between the developer obtaining the permission and being in a position to implement it.

5.5 Modification and discharge of planning obligations

5.5.1 The power to modify or discharge

A planning obligation may be modified or discharged either by agreement between the LPA and the person(s) against whom it is then enforceable, or by application by such person to the LPA or by appeal to the DCLG.

5.5.2 Application for modification or discharge

A person against whom a planning obligation is enforceable may, at any time after the expiry of five years from the date of the planning obligation, apply to the LPA for the obligation to have effect, subject to such modifications as may be specified in the application, or to be discharged (s 106A(3)–(4)).

5.5.3 Determination of application by the LPA

The LPA must notify the applicant of its decision within eight weeks or such longer period as may be agreed in writing between the parties. Where the application is refused, the notification must state clearly and precisely the LPA's full reasons for its decision and tell the applicant of his rights of appeal (see **5.5.4** below).

5.5.4 Appeal against determination (s 106B)

Where the LPA fails to reach a decision in the eight-week period or determine that the planning obligation shall continue to have effect without modification, the applicant may appeal to the DCLG within six months of the date of the notice or deemed refusal, or such longer period as the DCLG may allow.

The appeal procedure is closely modelled on that for ordinary planning appeals (see **Chapter 4**).

5.6 Unilateral undertakings

5.6.1 Introduction

By s 106(1), planning obligations may be entered into 'by agreement or otherwise'; 'or otherwise' indicates that a fully enforceable obligation may be offered unilaterally by the developer. The rules as to the contents and formalities of such 'unilateral undertakings' are the same as those that apply to ordinary planning obligations entered into by agreement, except that the agreement of the LPA is not needed. They are also binding and enforceable in the same way.

The unilateral undertaking is designed to deal with the situation where the LPA and developer do not agree as to what should be covered by way of a planning obligation, and allows a developer to break the deadlock by offering what it believes to be acceptable terms in a unilateral undertaking. If the LPA refuses the developer's application, the developer can then appeal to the DCLG against the refusal or deemed refusal of planning permission. At the appeal the unilateral undertaking will be taken into consideration by the inspector which, if he considers it appropriate, may result in the developer obtaining planning permission. Indeed, a unilateral undertaking (if given at the time of the original planning application) may dissuade the LPA from refusing planning permission in the first place.

5.6.2 DCLG guidance

The DCLG's guidance to LPAs on the use of unilateral undertakings is contained in paras B46 to B49 of Circular 5/05, which state:

B46. In most cases, it is expected that local planning authorities and developers will finalise planning obligations by *agreement*. However, where there is difficulty reaching a negotiated agreement, a developer may offer unilaterally to enter into a planning obligation.

B47. Further, there may be circumstances where local planning authorities may wish to encourage developers to submit unilateral undertakings with their planning application (if possible based on a standard document) in the interest of speed. These circumstances may arise where: a) only the developer needs to be bound by the agreement with no reciprocal commitments by the local planning authority (so long as the authority by whom the obligation is enforceable is identified within the deed); and b) it is possible to ascertain the likely requirements in advance, due to the presence of detailed policies, particularly those based on formulae and standard charges or following pre-application discussions.

B48. Unilateral undertakings, like other planning obligations, are usually drafted so that they come into effect at a time when planning permission is granted and provide that, unless the developer implements the permission (by carrying out a material operation as defined in section 56(4) of the 1990 Act), he is under no obligation to comply with the relevant obligations.

B49. Unilateral undertakings are commonly used at planning appeals or call-ins where there are planning objections that only a planning obligation can resolve. Where a unilateral undertaking is offered, it will be referred to the local planning authority to seek their views. Undertakings should be consistent with the policies set out in this Circular and when completed should be submitted with the appeal or call-in.

Review activity

1. An LPA intends to require a developer to contribute to the construction costs of a new roundabout that will be needed as a result of the developer's proposals. Could the LPA do this by way of a condition attached to the planning permission?
2. Assume that the LPA intends instead to embody the obligation to contribute towards the cost of the roundabout mentioned in Question 1 in a planning obligation. Would the fact that the obligation would be positive in nature mean that it would not run with the land?
3. Do you think the LPA would be acting reasonably if the background to the situation in Question 1 is that local traffic is already busy and the roundabout is already really needed: the developer's proposal has merely made the need particularly pressing.
4. The developer mentioned in Question 1 currently has an option to buy the land it wishes to develop. Does this mean that there needs to be another party to the planning obligation?
5. What steps would you take to protect any additional party identified in answer to Question 4 in respect of the obligation to contribute towards the costs of the roundabout?

Chapter 6
Enforcement of Planning Control

6.1	Introduction	59
6.2	Definitions and time limits	59
6.3	Certificates of lawful use or development (ss 191–192)	60
6.4	Right of entry for enforcement purposes (ss 196A–196C)	61
6.5	Planning contravention notice (ss 171C–171D)	62
6.6	Breach of condition notice (s 187A)	63
6.7	Enforcement notice (ss 172–182)	63
6.8	Stop notice and temporary stop notice (ss 183–187 and ss 171E–G)	67
6.9	Injunctions (s 187B)	69
6.10	Appeals against enforcement notices (ss 174–177)	69
Review activity		71

6.1 Introduction

It is not generally an offence in itself to be in breach of planning control. It is only if an LPA takes enforcement action that an offence arises. There are exceptions to this rule, for instance, where unauthorised works are done to a listed building or where there is a breach of a tree preservation order. Even if an LPA becomes aware of a breach, it has discretion whether to act: it may choose not to do so. If it does, Pt VII of the TCPA 1990 (ss 171–196) gives wide powers as follows:

(a) a right of entry;
(b) service of a planning contravention notice;
(c) service of a breach of condition notice;
(d) service of an enforcement notice;
(e) service of a stop notice; and
(f) injunction.

Each of these powers will be considered in turn, but first it is necessary to set out some basic definitions and time limits which apply to enforcement generally, and to consider certificates of lawful use or development which can provide proof of immunity from enforcement action. (Unless stated otherwise, references in this chapter are to the TCPA 1990.)

6.2 Definitions and time limits

6.2.1 Definitions (s 171A)

For the purposes of the Act:

(a) a 'breach of planning control' occurs when development is carried out without the requisite planning permission, or when any condition or limitation attached to a permission is not complied with;
(b) 'taking enforcement action' means the issue of an enforcement notice or the service of a breach of condition notice.

6.2.2 Time limits (s 171B)

The LPA can take enforcement action only if it does so within the appropriate time limits. There are two of these:

(a) Where the breach of planning control consists of:
   (i) operational development carried out without planning permission; or
   (ii) a change of use of any building to use as a single dwelling house;
   the LPA must take enforcement action within four years from the date on which the operations were substantially completed or the change of use occurred (as the case may be).

(b) With all other breaches (ie any material change of use other than to use as a single dwelling house and any breach of condition or limitation attached to a planning permission) no enforcement action may be brought after the expiry of 10 years from the date of the breach.

As regards both of the above time limits, see the provisions of s 171B(4)(b) at **6.7.3.**

6.3 Certificates of lawful use or development (ss 191–192)

Historically, expiry of the time limit for enforcement rendered the breach of planning control immune from enforcement, but it did not make the development 'lawful'. This meant that rights (such as those given by the GPDO 1995) that depend on lawfulness (as opposed to mere immunity) could not be enjoyed. It is now provided that breaches become lawful if:

(a) the relevant time limit for enforcement has passed; and

(b) the use, operation or breach of condition is not being carried on in contravention of a current enforcement notice.

It will make a property more marketable if a seller is able to provide proof of such lawfulness to a buyer, and such proof can indeed be obtained from the LPA. The Act also provides a mechanism to obtain proof that a proposed use or development is lawful, and this will be considered as well at this stage.

6.3.1 Existing development (s 191)

'Any person' (which could include a prospective buyer) who wishes to ascertain the lawfulness of any existing use, operation or breach of a condition or limitation may apply to the LPA specifying the land and describing the use, operations or other matter (s 191(1)) in question. The certificate is often referred to as a 'certificate of lawful use or development' (CLEUD).

6.3.1.1 Onus of proof

The onus of proof is on the applicant, who must prove the lawfulness on a balance of probabilities. The planning merits of the case (ie whether or not the development is desirable) are irrelevant; the sole question in issue is whether or not the matters described in the application are lawful.

6.3.1.2 Issue of CLEUD

If the LPA is satisfied of the lawfulness at the time of the application of the use, etc, it must issue a certificate. In any other case it must refuse one; note, though, that a refusal merely indicates that the matter has not been proved on a balance of probabilities.

6.3.1.3 Effect of CLEUD

The lawfulness of any use, operations, etc for which a certificate is in force shall be conclusively presumed. Thus, no enforcement action may be brought in respect of the matters stated as lawful in the certificate.

6.3.2 Proposed development (s 192)

Any person who wishes to ascertain the lawfulness of any proposed use or operational development of land can apply to the LPA, specifying the land and describing the use or operations in question.

The lawfulness of any use or operations stated in the certificate shall be conclusively presumed unless there is a material change, before the proposed use or operations are started, in any of the matters relevant to the determination.

6.3.3 General provisions applying to certificates of lawful use or development

A certificate may be issued in respect of part only of the land or just some of the matters specified in the application (s 193(4)), or, with existing development, may be issued in terms which differ from those specified in the application (s 191(4)).

The LPA must enter prescribed details of any applications and decisions in its s 69 register (s 193(6)), and must notify the applicant of its decision within eight weeks or such longer period as may be agreed in writing between the parties (GDPO 1995, art 24).

6.3.3.1 Appeals

The applicant can appeal to the DCLG against a refusal, a refusal in part or a deemed refusal (ie where the LPA fails to determine the application within the relevant time). The time limit is six months from the date of notification of the decision or the deemed refusal.

Further appeal lies to the High Court within six weeks of the decision of the DCLG.

6.3.3.2 Offences

It is an offence for any person to procure a particular decision on an application by knowingly or recklessly making a statement which is misleading or false in a material particular, or (with intent to deceive) using a document which is false or misleading in a material particular or withholding any material information.

If a statement was made or a document was used which was false or misleading in a material particular, or if any material information was withheld (whether or not this was done knowingly or recklessly or with intent to deceive), the LPA may revoke the certificate.

6.4 Right of entry for enforcement purposes (ss 196A–196C)

6.4.1 Right of entry without a warrant

Any person duly authorised in writing by the LPA may enter any land at any reasonable hour without a warrant to:

(a) ascertain whether there is or has been any breach of planning control on that or any other land; or

(b) determine whether any enforcement power should be exercised and, if so, how; or

(c) ascertain whether there has been compliance with any enforcement power that has been exercised.

There must, however, be 'reasonable grounds' for doing so, ie entry must be the logical means of obtaining the information in question.

In the case of a dwelling house (which includes any residential accommodation in, say, a commercial building), 24 hours' notice of the intended entry must be given to the occupier. This requirement does not apply, however, to land or outbuildings in the curtilage of the house.

6.4.2 Power to enter under a warrant

A justice of the peace may issue a warrant to any person duly authorised as stated at **6.4.1** for any of the purposes listed above, if he is satisfied on sworn information in writing that:

(a) there are reasonable grounds for entering for the purpose in question; and

(b) admission has been refused, or it is reasonably apprehended that it will be refused, or it is an urgent case. Entry is deemed to be refused if no reply is received within a reasonable time to a request for admission.

Entry under a warrant must be at a reasonable hour (except in cases of urgency) and must be within one month from the date of issue of the warrant. Each warrant authorises one entry only.

6.4.3 Restrictions and offences

The person entering the land must produce his authority and state the purpose of his entry, if requested, and may take with him such other persons as may be necessary (eg policeman, expert, etc). On leaving the land, if the owner or occupier is not then present, he must ensure that the land is as secured against trespassers as when he entered.

Anyone who wilfully obstructs a person exercising a lawful right of entry is guilty of an offence.

6.5 Planning contravention notice (ss 171C–171D)

A planning contravention notice (PCN) (rather than the power of entry) is the principal power available to an LPA for obtaining information needed for enforcement purposes.

6.5.1 Contents of a PCN

There is no prescribed form of PCN, although a model is suggested in the Appendix to Annex 1 of DCLG Circular 10/97.

Section 171C states that a PCN may require the person on whom it is served to give any information specified in the notice in respect of any operations, use or activities being carried out on the land and any matter relating to conditions or limitations attached to an existing permission. In particular, it may require the person served, so far as he is able, to:

(a) state whether the land is being used as alleged in the notice, or whether alleged operations or activities are or have been carried out;

(b) state when any use, operation or activity began;

(c) give particulars of any person known to use or have used the land for any purpose, or to be carrying out or have carried out any operations or activities;

(d) give any information he holds about any relevant planning permission, or to state why planning permission is not required;

(e) state his interest (if any) in the land and the name and address of any person he knows to have an interest in the land.

A PCN may also give notice of a time and place at which the LPA will consider:

(a) any offer from the person served to apply for planning permission, or to refrain from operations or activities, or to undertake remedial work; and

(b) any representations he may wish to make about the notice.

If the notice states this, the LPA must give him the opportunity to make the offer or representations at that time and place.

By s 171C(5), a PCN must warn the person served that if he fails to reply, enforcement action may be taken and he may be deprived of compensation if a stop notice is served.

6.5.2 The person served

A PCN may be served on anyone who is the owner or occupier of the land to which the notice relates, or who has any other interest in it, or on anyone who is carrying out operations on the land or using it for any purpose (s 171C(1)).

It is an offence for any person served with a PCN to fail to reply to it within 21 days unless he has a reasonable excuse. The offence is a continuing one, even after conviction (s 171D(2)–(4)).

It is also an offence knowingly or recklessly to make a statement in a purported reply which is false or misleading in a material particular (s 171D(5)–(6)).

6.5.3 Effect of a PCN

Apart from the consequences mentioned above, service of a PCN does not affect the exercise of any other enforcement power available to the LPA.

6.6 Breach of condition notice (s 187A)

A breach of condition notice (BCN) is primarily intended as an alternative remedy to an enforcement notice where the LPA desires to secure compliance with conditions or limitations attached to an existing planning permission. It has the big advantage that, unlike an enforcement notice, there is no right of appeal against the service of such a notice (see **6.7.1**).

6.6.1 When and on whom a BCN may be served

Where there has been a breach of condition or limitation attached to an existing permission, the LPA may serve a BCN on any person who is carrying out or has carried out the development, or on any person having control of the land.

6.6.2 Contents of a BCN

The BCN must specify the steps which the LPA considers ought to be taken or the activities which ought to cease in order to secure compliance with the conditions, etc specified in the notice. Where, however, a notice is served on a person who has control of the land but who is not carrying (or has not carried) out the development, it can only require compliance with any conditions regulating the use of the land.

The notice must also specify a period for compliance, which must not be less than 28 days from the date of service of the notice.

6.6.3 Effect of a BCN

Unlike an enforcement notice, there is no right of appeal against service of a BCN.

If the person served has not remedied the breach by the time specified in the notice (or by the time specified in any further notice served by the LPA), he is guilty of an offence: the offence is a continuing one. It is a defence, however, for the person served to prove that he took all reasonable measures to ensure compliance with the notice or, if he was served as the person having control of the land, that he did not have control at the time he was served.

6.7 Enforcement notice (ss 172–182)

6.7.1 Introduction

The enforcement notice was intended as the primary method of enforcement of breaches of planning control, and it is the most flexible in that it can be used to address any kind of breach.

It is possible to appeal against the service of an enforcement notice, the detail of which is considered at the end of this chapter. For the moment it should be noted that if an enforcement notice is appealed, it ceases to be effective until the appeal is determined.

6.7.2 Issue of enforcement notice

By s 172(1), an LPA may issue an enforcement notice where it appears to the LPA that there has been a breach of planning control and that it is expedient to issue the notice having regard to the provisions of its development plan and any other material considerations. Issue of an enforcement notice is the most commonly used method of enforcement.

6.7.2.1 Prerequisites to issue

There must be an apparent breach of planning control and it must be expedient to issue an enforcement notice.

Apparent breach of planning control

There is no duty on the LPA to satisfy itself that there is a breach (see, eg, *Tidswell v Secretary of State for the Environment* [1977] JPL 104), although with the powers now available, in particular the right to serve a PCN (see **6.5**), it may be required to do some preliminary research before issuing an enforcement notice.

It must be expedient to issue an enforcement notice

The LPA should not automatically issue an enforcement notice whenever there appears to be a breach of planning control. It must consider its development plan and any other material considerations (which will include advice in circulars and planning policy statements).

In PPG 18 the DCLG gives detailed guidance to LPAs on this matter. For example, in para 5, it states that enforcement action should always be commensurate with the breach to which it relates; thus, it will usually be inappropriate to take enforcement action against a trivial or technical breach which causes no harm to amenity in the locality. Another factor to consider is whether planning permission, if applied for, would be granted for the unauthorised development in question.

The decisive issue, therefore, is whether the breach would unacceptably affect public amenity or the existing use of the land which merits protection in the public interest.

6.7.2.2 Challenging the issue or failure to issue

A decision to issue an enforcement notice cannot be challenged unless the decision was arbitrary or capricious (see, eg, *Donovan v Secretary of State for the Environment* [1988] JPL 118).

Equally, a decision not to issue an enforcement notice is not challengeable unless the decision is arbitrary or capricious (see *Perry v Stanborough (Developments) Ltd* [1978] JPL 36).

6.7.3 Time limits

An enforcement notice must be issued (though not necessarily served) within the relevant time limit as defined in s 171B (see **6.2.2**). Failure to do so will render the breach lawful.

However, by s 171B(4)(b), an LPA is not prevented from taking further enforcement action in respect of a breach of planning control if, during the four years prior to the new action being taken, the LPA has taken or purported to take enforcement action in respect of that breach. This would enable an LPA, for example, to serve another enforcement notice within four years of one which had been withdrawn or set aside on an appeal (see **6.7.8** and **6.10**).

6.7.4 Contents of an enforcement notice (s 173)

No statutory form is prescribed, but the notice must comply with the following:

(a) it must state the matters alleged to constitute the breach of planning control in such a way as to enable the person served to know what those matters are, and must state the paragraph of s 171A(1) (development without permission or breach of condition/limitation – see **6.2.1**) within which, in the opinion of the LPA, the breach falls (s 173(1) and (2));

(b) it must specify the steps to be taken or the activities to be discontinued in order to achieve wholly or partly the remedying of the breach or of any injury to amenity caused by the breach (s 173(3) and (4)). Examples of requirements that may be included are given in s 173(5)–(7) and include:

  (i) alteration or removal of buildings or works,

  (ii) carrying out of any building or other operations,

  (iii) cessation of any activity except to the extent permitted by the notice,

  (iv) modification of the contour of any deposit of refuse or waste,

  (v) construction of a replacement building after unauthorised demolition;

(c) it must state the calendar date on which the notice is to take effect, which must be at least 28 days from service of the notice (s 173(8));

(d) it must state the period within which any steps specified in the notice are to be taken and may specify different periods for different steps (s 173(9));

(e) it must state such additional matters as may be prescribed. These are set out in the Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991 (SI 1991/2804), regs 3 and 4, which require that the notice:

  (i) states the reasons why the LPA considered it expedient to issue the enforcement notice. This is intended to enable appellants to direct their minds to relevant issues (see Circular 10/971, Annex 2, para 12),

  (ii) defines the precise boundaries of the site by reference to a plan or otherwise (Circular 10/971, Annex 2, para 13),

  (iii) is accompanied by a copy or summary of ss 172–177, the booklet *Enforcement Notice Appeals – A Guide to Procedure* and a copy of the recommended appeal form.

6.7.5 Service

6.7.5.1 Persons to be served

The enforcement notice must be served on:

(a) the owner – this term is defined in s 336(1) as being the person (other than a mortgagee not in possession) who is entitled to receive a rack (ie full) rent, or who would be so entitled if the land were let; and

(b) the occupier – this includes any person occupying by virtue of a lease or tenancy, but may also extend to licensees if their occupation resembles that of a tenant (see *Stevens v Bromley London Borough Council* [1972] 2 WLR 605, CA); and

(c) any other person having an interest in the land, being an interest which, in the opinion of the LPA, is likely to be materially affected by the notice – this would include, in particular, known mortgagees.

6.7.5.2 Time for service

The notice must be served not more than 28 days after its issue and not less than 28 days before the date specified in the notice as the date on which it is to take effect. Failure to comply with these provisions is a ground for appeal to the DCLG and, in general, is challengeable only

in that way (s 285(1) and see *R v Greenwich London Borough Council, ex p Patel* [1985] JPL 851, CA; see also **6.10**).

6.7.6 Validity of notice

An error or defect in an enforcement notice may render it either a nullity or invalid.

6.7.6.1 Nullity

The notice will be a nullity only where there is a major defect on the face of it, for example where it does not state what the alleged breach is, what must be done to put it right or on what date the notice takes effect. The notice will also be a nullity if it does not fairly and reasonably tell the recipient what he must do to remedy the breach.

If the notice is a nullity it is of no effect. This is therefore a complete defence to any prosecution brought for non-compliance with it. In addition, there is technically no right of appeal to the DCLG under s 174, although in practice, an appeal will normally be made at which the DCLG may find as a preliminary issue that the notice is a nullity and that he therefore has no jurisdiction to hear the appeal. Any such finding may be challenged by the LPA by way of judicial review.

6.7.6.2 Invalidity

Other defects, errors or misdescriptions in an enforcement notice do not render it a nullity. In such a case, it can be challenged only by way of appeal under s 174 (see s 285 and **6.10**).

On a s 174 appeal, the DCLG may correct such defects, etc, or vary the terms of the notice if satisfied that this will not cause injustice to either the appellant or the LPA (s 176(2)).

6.7.7 Effect of enforcement notice

An enforcement notice does not have to require restoration of the status quo, ie under-enforcement is possible. Where a notice could have required buildings or works to be removed or an activity to cease but does not do so, and the notice is complied with, then planning permission is deemed to have been given under s 73A (see **4.4.3**) for those buildings, works or activities (s 173(11)).

Similarly, where an enforcement notice requires construction of a replacement building and is complied with, planning permission is deemed to have been given (s 173(12)).

Where a notice has become effective and has not been complied with, the then owner is guilty of an offence. In addition, the LPA may enter the land and take the steps required by the notice, and recover its expenses of so doing.

6.7.8 Variation and withdrawal

The LPA may withdraw, or waive or relax any requirement of an enforcement notice whether or not it has become effective. If it does so, it must immediately notify everyone who was served with the enforcement notice, or who would have been served if it had been re-issued.

Note that the withdrawal of the notice (but not the waiver or relaxation of any requirement in it) does not affect the power of the LPA to issue a further enforcement notice in respect of the same breach.

6.7.9 Non-compliance with notice

6.7.9.1 Offences

Where the notice has become effective and any step required by the notice has not been taken or any activity required to cease is being carried on, the then owner is in breach and is liable on summary conviction to a fine of up to £20,000 or, on indictment, an unlimited amount. The

court in assessing any fine must take into account any financial benefit or potential benefit accruing or likely to accrue as a result of the offence (s 179(1), (2), (8) and (9)). Note that the burden of proving ownership is on the prosecutor.

Any person (other than the owner) who has control of, or an interest in, the land must not carry on, or permit to be carried on, any activity required by the notice to cease. If he does so, he is guilty of an offence (s 179(4) and (5)).

6.7.9.2 Defences

It is a defence for the owner to show that he did everything he could be expected to do to secure compliance (s 179(3)).

It is also a defence for the person charged to show that he was not served with the enforcement notice, and that it was not entered in the s 188 register (in which LPAs are required to note all enforcement and stop notices) and that he did not know of the existence of the notice (s 179(7)).

It is no defence to show that the notice was defective because it failed to comply with s 173(2) (see **6.7.4**), although it would be a defence to show that the notice was a nullity (see **6.7.6.1**) or that the LPA exceeded its powers.

6.7.9.3 Action by the LPA

After any period for compliance with an enforcement notice has passed and the notice has not been fully complied with, the LPA, in addition to prosecuting, may enter the land and take any steps required by the notice. It may then recover any reasonable expenses incurred from the owner of the land at that time (s 178(1)).

Where the breach is a continuing one, the LPA may seek an injunction, whether or not after any conviction (s 187B, see **6.9**).

6.8 Stop notice and temporary stop notice (ss 183–187 and ss 171E–G)

6.8.1 Introduction

An enforcement notice cannot become effective earlier than 28 days after service, and its effect is suspended until final determination of any appeal (but subject to any court order to the contrary). As such, it may be many months before the LPA can take steps to enforce it other than by way of an injunction. In the meantime, local amenity may suffer detriment because of the continuing breach. Accordingly, the Act provides for the possibility of a stop notice to be served, to bring activities in breach of planning control to an end before the enforcement notice takes effect.

A stop notice cannot be served as a method of enforcement action in its own right, which effectively forces an LPA to serve an enforcement notice before doing so. The temporary stop notice procedure was introduced to deal with this issue. It is a free-standing form of stop notice but it lasts for no more than 28 days. This will give the LPA time to investigate the matter further and decide what, if any, action it wishes to take.

Stop notices and temporary stop notices will be considered in turn, but in both cases it should be noted that they cannot be used to stop use as a dwelling house or any activity that has been carried out for a period of more than four years at the date of the service of the notice.

6.8.2 Stop notice

6.8.2.1 General

Where an LPA considers it expedient to prevent, before the expiry of the period for compliance, any activity specified in the enforcement notice, it may serve a stop notice

(s 183(1) and (2)). Details of this should be entered in the register of enforcement and stop notices kept under s 188.

6.8.2.2 Contents

The stop notice must refer to the enforcement notice and must have a copy of it annexed. It must also state the date on which it will take effect, being at least three days and not more than 28 days after service of the notice. An earlier date may be specified if the LPA considers that there are special reasons and a statement of those reasons is served with the notice (s 184(1)–(3)).

6.8.2.3 Service

A stop notice may be served with the enforcement notice or subsequently, but must be served before the enforcement notice takes effect (s 183(1) and (3)).

It must be served on any person who appears to have an interest in the land or to be engaged in any activity prohibited by the enforcement notice (s 183(6)).

Where a stop notice has been served, the LPA may also display a 'site notice' on the land concerned, stating that a stop notice has been served, giving its details and stating that any person contravening it may be prosecuted.

6.8.2.4 Offences

Any person who contravenes a stop notice (or causes or permits its contravention) after a site notice has been displayed or after he has been served with the stop notice is guilty of an offence which is punishable in the same way as for enforcement notices (including the taking into account of any financial benefit, see **6.7.9.1**).

It is a defence to prove that the stop notice was not served on him and that he did not know, and could not reasonably be expected to know, of its existence.

6.8.2.5 Withdrawal

By ss 183(7) and 184(7), the LPA may at any time withdraw a stop notice without prejudice to its power to serve another one. If it does withdraw a stop notice, it must serve notice of this on everyone who was served with the original stop notice and, if a site notice was displayed, display a notice of withdrawal in place of the site notice. Compensation may then become payable (see **6.8.2.6**).

6.8.2.6 Compensation

The LPA is liable to pay compensation in respect of any prohibition in a stop notice if:

(a) the enforcement notice is quashed on any ground other than that in s 174(2)(a) (see **6.10.1**); or

(b) the enforcement notice is varied other than under s 174(2)(a) so that the activity would no longer have fallen within the stop notice; or

(c) the enforcement notice is withdrawn otherwise than in consequence of a grant of planning permission or of permission to retain or continue the development without complying with a condition or limitation attached to a previous permission; or

(d) the stop notice is withdrawn.

No compensation is payable:

(a) if the enforcement notice is quashed or varied on the ground in s 174(2)(a); or

(b) in respect of any activity which, when the stop notice was in effect, constituted or contributed to a breach of planning control; or

(c) in respect of any loss or damage which could have been avoided if the claimant had provided the information when required to do so under s 171C (ie a PCN, see **6.5**).

Compensation is payable to the person who, when the stop notice was first served, had an interest in or occupied the relevant land. The amount payable is that loss or damage which is directly attributable to the prohibition in the notice, and can include any sum payable for breach of contract caused by compliance with the stop notice.

Any claim must be made within 12 months of the date compensation became payable (ie the date on which the enforcement notice was quashed, varied, etc). In the event of a dispute as to the amount, the matter must be referred to the Lands Tribunal.

6.8.3 Temporary stop notice

A temporary stop notice may be served where the LPA thinks there has been a breach of planning control and that it is expedient that the activity or any part of it should be stopped immediately. Any person who contravenes a stop notice (or causes or permits its contravention) after a site notice has been displayed or after he has been served with the stop notice is guilty of an offence which is punishable in the same way as for enforcement notices (including the taking into account of any financial benefit, see **6.7.9.1**).

Compensation is payable by the LPA if a temporary stop notice is served in respect of any activity which is authorised by a planning permission or development order, or in respect of which a CLEUD (see **6.3**) is issued or if the LPA withdraws the notice. The latter is not available if the LPA grants planning permission in respect of the alleged breach.

6.9 Injunctions (s 187B)

An LPA may apply to the High Court or county court for an injunction if it considers it necessary or expedient to restrain an actual or apprehended breach of planning control. It may do this whether or not it has used, or proposes to use, any of its other enforcement powers under the Act.

Whether an injunction is granted and, if so, its terms are entirely a matter for the discretion of the court as the remedy is an equitable one. Thus, an LPA will need to show not only that the remedy is expedient and necessary, but also that it has taken into account all relevant considerations in coming to that decision, that there is a clear breach or a clear likelihood of a breach, and that the remedy is the most appropriate one in the circumstances of the case. (For good illustrations, see *Croydon London Borough Council v Gladden* [1994] JPL 723, CA, at 729ff; *Harborough District Council v Wheatcroft & Son Ltd* [1996] JPL B128; and *Hambleton District Council v Bird* [1995] 3 PLR 8.)

6.10 Appeals against enforcement notices (ss 174–177)

6.10.1 Grounds of appeal

Section 174(2) lists seven grounds of appeal, as follows:

(a) Planning permission ought to be granted, or any condition or limitation attached to an existing permission ought to be discharged (as the case may be) in respect of the matters alleged to be a breach of planning control in the enforcement notice.

(b) The matters alleged have not occurred.

(c) The matters, if they occurred, do not amount to a breach of planning control.

(d) No enforcement action could be taken at the date the notice was issued as regards the matters alleged in it (ie the LPA was out of time, see **6.2.2**).

(e) Copies of the enforcement notice were not served as required by s 172 (see **6.7.5**).

(f) The steps required by the notice or the activities required to cease exceed what is necessary to remedy any breach of planning control or injury to amenity (as the case may be).

(g) The period specified in the notice for the taking of steps, etc falls short of what should reasonably be allowed.

Note also the following points:

(a) Whether or not ground (a) is expressly made a ground of appeal, there is a deemed application for planning permission when a notice of appeal is lodged (s 177(5)).

(b) As regards ground (e), the DCLG may disregard failure to serve any person if that failure has not caused substantial prejudice to that person or to the appellant (s 175(5)).

(c) Grounds (f) and (g) do not go to the validity of the enforcement notice and the DCLG may vary the requirements of the original notice (s 176(1)).

6.10.2 Time limit (s 174(3))

Written notice of appeal (which can be by letter, although the standard form supplied by the DCLG is normally used) must be given to the DCLG before the date on which the enforcement notice takes effect. There is no power for the DCLG or the court to extend the time limit for appealing.

Note that if the notice is sent to the proper address by pre-paid post at such time that, in the ordinary course of post (two working days in the case of first-class post), it would have been delivered before the enforcement notice takes effect, the appeal will be in time even if it is delayed in the post (s 174(3)(b)).

6.10.3 Who may appeal? (s 174(1) and (6))

Any person having an interest in the land (whether served with the enforcement notice or not) may appeal, as may any person who was occupying the land under a licence at the time the notice was issued and continues to occupy the land when the appeal is brought.

6.10.4 Procedure

6.10.4.1 Documentation and fees to be submitted

By s 174(4), and reg 5 of the Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991 (SI 1991/2804), the applicant may submit with the notice of appeal a statement in writing specifying the grounds on which he is appealing and stating briefly the facts in support of those grounds. If he does not submit this with the appeal, he must do so within 14 days of being required to do so by notice from the DCLG. It is important for the appellant to specify all the grounds on which he wishes to rely as amendments adding additional grounds are unlikely to be allowed subsequently.

As there is a deemed application for planning permission, whether or not the applicant also specifies ground (a), a fee is payable.

The fee is refundable in certain circumstances (eg if the appeal is allowed on grounds (b) to (e), or if the enforcement notice is quashed or found to be invalid).

6.10.4.2 Appeal forum

There are three possible procedures for the determination of an appeal: written representations, hearings and inquiries. The Planning Inspectorate will decide which procedure an appeal should follow, but will take into account the views of the appellant and the LPA. Its decision will be based on indicative criteria issued by the DCLG.

6.10.4.3 Effect of appeal

Until the final determination or withdrawal of the appeal, the enforcement notice is of no effect. According to the Court of Appeal in *R v Kuxhaus* [1988] 2 WLR 1005, [1988] 2 All ER 705, CA, 'final determination' means when all rights of appeal have been exhausted, including appeals to the High Court under s 289.

6.10.4.4 Written representations and informal hearings

As mentioned above, the DCLG may suggest these alternatives in appropriate cases, but they can be used only with the consent of both parties.

6.10.5 Costs

The DCLG or its inspector has power to award costs in all cases, even where the appeal was by way of written representations or even where the inquiry was not held (ss 320 and 322).

6.10.6 Further appeals (s 289)

Further appeal to the High Court, but on a point of law only, lies against any decision made by the DCLG in proceedings on an enforcement appeal. No such appeal lies, though, under s 289 if the DCLG declined to entertain the appeal or set the enforcement notice aside as being a nullity; in these cases the appropriate way to proceed is by way of judicial review.

Review activity

1. An individual has completed building an extension on the rear of his house. Has he committed an offence under the law governing planning control?
2. Assuming the same facts as Question 1, does the LPA have an automatic right to issue an enforcement notice in respect of any breach?
3. Assuming the same facts as Question 1, how long would the individual have to respond to any planning contravention served by the LPA investigating the matter?
4. Would your answer to Question 1 differ if the individual had completed the work five years ago?
5. Assuming the same facts as in Question 4, how would you advise the individual should he decide to sell the house given that he is concerned that any breach of planning control might deter a purchaser?
6. You are a planning enforcement officer at an LPA. You have received a report that a coffee shop has started operating as a wine bar. How might you confirm whether this is the case?
7. It turns out that the coffee shop considered in Question 6 is indeed operating as a wine bar. There is a planning permission allowing the property to be used as a shop within use class A1 but it is subject to a condition that no alcohol be served. What enforcement options are available?
8. Assuming the same facts as for Questions 6 and 7. Why cannot you just serve a stop notice to force the owner to stop its activities?
9. What is the time limit for appealing against the service of an enforcement notice?
10. A firm of accountants is operating in a property that has planning permission for any use within use class A2. The property is in an area identified in the Local Development Framework as one where mixed retail and business use should be encouraged. An enforcement notice has been issued requiring the firm to cease trading within six weeks. What grounds of appeal do you think the firm could rely on should it decide to challenge the service of the enforcement notice?

Chapter 7
Environmental Issues

7.1	Introduction to environmental law	73
7.2	Environmental risk management	74
7.3	Contaminated land	76
7.4	Nuisance	84
7.5	Environmental Damage Regulations	86
7.6	Environmental permitting and regulation	86
7.7	Climate change law and energy performance	89
7.8	Regulatory Enforcement and Sanctions Act 2008	95
7.9	Asbestos	95
7.10	Japanese knotweed	96
Review activity		97

7.1 Introduction to environmental law

Environmental issues have become front-page news across the world. This is mostly due to climate change: its visible and rapid impacts have entered mainstream consciousness, such that most of us are familiar with images of melting polar icecaps, have heard of the Kyoto Protocol, and know of the concepts of carbon footprints and offsetting. However, there is a much broader wealth of environmental laws and issues in practice and academia. That breadth now incorporates human rights, development issues, wild law, energy, health and safety, planning and construction, and climate change. Environmental law is perhaps the single fastest-growing area of law.

This chapter focuses on the main environmental issues of which every property lawyer should be aware, namely:

(a) *Environmental risk management* (see **7.2**). While some tools are universal, such as enquiries of the seller, contractual warranties and indemnities, there are others, such as environmental desktop studies, Phase I and II Reports, and environmental insurance, which are peculiar to this area of practice.

(b) *Contaminated land* (see **7.3**). The Contaminated Land Regime (CLR) is based on 'the polluter pays' principle and imposes retrospective liability. It remains the single biggest concern in property acquisition, particularly as an *innocent owner or occupier of contaminated land may be liable* if the original polluter cannot be found.

(c) *Nuisance* (see **7.4**). Anything emanating from land may cause a nuisance – from methane emissions to oil spills – and liability may arise in tort, statute or under the rule in *Rylands v Fletcher*.

(d) *Environmental regulation and permitting* (see **7.6**). Most non-residential properties will require an environmental permit or exemption of some sort, whether this is for the discharge of waste from a restaurant or of industrial pollutants from a factory. Failure to comply is strictly enforced, and of course can lead to other liabilities.

(e) *Climate change and energy performance* (see **7.7**). This area represents the legal and practical ramifications of the universal drive towards reducing greenhouse gas (GHG) emissions. It includes the Carbon Reduction Commitment Energy Efficiency Scheme, Energy Performance Certificates and Green Leases.

(f) *Asbestos* (see **7.9**). Responsible for more cancer-related deaths than any product in history (so far), asbestos could be present in any UK building built before 2000. The

responsible person (who could be the owner or occupier) must monitor and manage its existence.

This chapter also briefly discusses the Environmental Damage Regulations 2008 (see **7.5**), the Regulatory Enforcement and Sanctions Act 2008 (see **7.8**), and Japanese knotweed (see **7.10**). It concludes with some review activities addressing the main environmental issues along with some related areas of property law.

Lastly, the author recently conducted a survey with the top dozen firms practising environmental law in England (as ranked by Legal 500), enquiring as to their current core practices and predictions for growth. The results are summarised in **Table 7.1** below. The last question in the table highlights the importance of good, fundamental practical legal research and reasoning skills. In such a dynamic area as environmental law, it is a challenge to keep abreast of all developments. However, the core principles of *sustainable development* and *the polluter pays* informs all of the law discussed below, and should be kept in mind while considering any advice on environmental liabilities, regulation or development.

Table 7.1 Environmental law: private practice survey

Main practice areas identified (in descending order):
(1) Transactional due diligence/risk management
(2) Contaminated land
(3) Waste
(4) Environmental regulation/permitting
(5) Emissions trading
Number one predicted growth area:
(1) Carbon/climate change
What partners look for in new recruits:
(1) Analytical skills
(2) Commercial acumen
(3) Communication skills
(4) Knowledge

7.2 Environmental risk management

7.2.1 Introduction

As noted in **Table 7.1**, this remains the bread and butter of most environmental practices: transactional, environmental risk management.

The first step in determining any environmental risks in a property deal is to make enquiries of the seller and the local authority (the latter using Standard Form CON29, see **8.1**). A prudent buyer would almost always commission a desktop study as well, particularly for commercial properties. Depending on the results, it may then consider a Phase I Report (including a site visit), or even a Phase II Report (including full testing of the soil, underground waters, etc) (see **7.2.3** below).

If risks or existing issues are identified, the buyer may then consider a variety of tools to limit its potential liability. These may include, particularly for contingent risks:

(a) warranties, eg that the land is free of such risks;

(b) indemnities, ie that should a risk eventuate, the seller will pay for the resulting liability;

(c) agreement on liabilities;

(d) environmental insurance, which *may* still be available for a known risk.

In addition, where the risk is more certain, the following methods may be pursued:

(e) positive obligations on either party (to address matters such as clean-up);
(f) carving out the land, so as to purchase only the 'non-risky' section;
(g) negotiate a price reduction;
(h) in the worst case scenario, decline the deal.

We shall look at enquiries, studies, reports, warranties, indemnities and insurance further below.

7.2.2 Enquiries of the seller

In addition to the standard queries made in a property transaction, a buyer should always request specific environmental information from the seller, such as details of any:

(a) historical, present or potential pollution incidents, hazardous substances, enforcement actions, or complaints by third parties in relation to environmental matters at the property; and
(b) environmental permits, licences, consents held or required for the property, or any activity at the property.

A good lawyer will always tailor such generic questions to the specific transaction. Precedent questions are usually adopted from firm databases or legal research/support providers.

7.2.3 Enquiries of consultants

Almost every commercial property acquisition should include a desktop study. As the name suggests, this does not entail a physical inspection but a trawl through databases of present and historical land use, incidents, enforcement and neighbouring uses, amongst other things. Specialist environmental consultants such as Argyll and WSP provide basic desktop studies for around £150 (depending on the size of the property) – the turnaround time can be a matter of hours.

Based on the results of the desktop study, a party may want to commission two further (though much more expensive) reports from environmental consultants, known as Phase I (incorporating a physical site inspection) and Phase II (a full site inspection with testing and analysis of the soil, water, etc). The results of the desktop study and the reports should clarify and quantify any concerns flagged by the enquiries or desktop study.

If a major issue is identified at any stage, it may become a bargaining point or remedial condition of the transaction. Remediation may also be statutorily required (see **7.3.4**).

7.2.4 Warranties

In addition to standard transactional warranties, a buyer may wish to include specific promises from the seller in regard to environmental issues, such as:

> So far as the Seller is aware there are no known or likely hazardous substances present at the property, which are harmful to human health, the environment or would give rise to a nuisance claim.
>
> So far as the Seller is aware, in the last five years there have been no claims, litigation, or threatened actions in regard to environmental matters at the property.

Breach of such a warranty is actionable in contract law; the normal remedy would be damages. Again, the above are merely examples, which would be far more specific in practice and then hotly negotiated. If enquiries or reports showed a minor gap in information, a buyer might feel comfortable with a warranty alone.

7.2.5 Indemnities

Where the risk is higher, a buyer may try to extract an indemnity from the seller. Compared to a breach of warranty, an indemnity is effectively a safety net that if something happens – like regulatory action – the seller *will* cover all costs and indemnify the buyer (or vice versa). For example, an indemnity in regard to land where there were previously gas works might state:

The Seller agrees to indemnify the Buyer for all losses incurred as a result of any enforcement action or individual claim in regard to contaminated land or hazardous substances at, in, under or emanating from the property.

Understandably these are very hotly contested.

An option occupying the middle ground could be an agreement on liabilities (as provided for in the Contaminated Land Regime, see below at **7.3**), which requires even more sophisticated drafting.

7.2.6 Insurance

Environmental insurance in the UK has grown from a nascent to a competitive market in 20 years. There are several providers, which generally offer the following coverage, geared mostly towards contaminated land protection:

- up to £20 million protection
- up to 10 years
- for historical contamination and ongoing operations
- for remediation costs overrun (known as costcap/step loss policies)
- for contractors working on third-party sites.

Environmental insurance will usually cover on-site and off-site clean-up costs to the extent *required* by environmental law, as well as property damage. Typically the insurer will exclude cover for losses arising from known pollution conditions, though this is negotiable depending on the likelihood of enforcement action.

As this market develops, environmental insurance is increasingly seen as a valuable tool in risk management, for both buyer and seller. It can often be the last 'comfort' required for a risky site transfer.

7.3 Contaminated land

7.3.1 Introduction

Contaminated land remains the single biggest environmental issue facing property lawyers in the UK. This is due to centuries of environmentally harmful progress: a legacy of the Industrial Revolution and often unsound agricultural, construction and development practices.

Conservative estimates suggest that 25% of land in the UK is contaminated (R Pearman, 'Site remediation costs may fall to developers' *Contract Journal*, 12 July 2006). The degree of contamination may vary, but at its core the statutory definition of 'contaminated land' is that it poses a significant risk of harm to humans or the environment. This can severely impact an acquisition of property, as liability for contamination can be extremely costly in many ways.

7.3.2 The risks in summary: legal and practical

Like most environmental liability, the core intention of the law is that 'the polluter pays'. The clean-up bill for dealing with something seemingly as innocuous as waste vegetables (causing methane emissions) could amount to millions of pounds (*Circular Facilities (London) Ltd v Sevenoaks District Council* [2005] EWHC 865).

The worrying addition of the Contaminated Land Regime (in force since 2000) is that if the original polluter cannot be found (or is excluded: see **7.3.3.3**), the incumbent owner or occupier may be liable. Liability is strict and retrospective. Furthermore, s 157 of the Environmental Protection Act 1990 (EPA 1990) provides that where a company commits an offence with the consent, connivance or neglect of a director, secretary or similar officer, that person will also be personally liable.

Despite the headline issues, most contaminated land is dealt with by the planning regime, rather than by Pt IIA of the EPA 1990 (see **7.3.3**) (and to an even lesser degree, upon the relinquishment of environmental permits, see **7.6**). However, a client should be warned of the risks in any case. In 2000, given the risks of contaminated land, the Law Society sought fit to issue a (rare) Warning Card setting out what it regards as 'best practice' for solicitors in conveyancing transactions. The Warning Card states that, in relation to purchases, mortgages and leases, solicitors should advise the client of:

(a) the potential liabilities associated with contaminated land; and
(b) the steps that can be taken to assess and reduce the risk.

7.3.3 The Contaminated Land Regime

The Environment Act 1995 amended the EPA 1990 and introduced a new Pt IIA, dealing with contamination. In summary, Pt IIA requires local authorities to identify contaminated land and then require the responsible party to clean it up. A variety of exclusion and apportionment tests apply if there is more than one responsible person. In practice, cleanup is likely to result from voluntary action rather than the imposition of a remediation notice.

Circular 01/2006, *Environmental Protection Act 1990: Part 2A Contaminated Land* ('the Circular'), issued by the Department for Environment, Food and Rural Affairs (DEFRA), provides extensive statutory guidance, and should be consulted for more detail. DEFRA has announced that revised statutory guidance will be available from October 2010.

7.3.3.1 Local authority: duty to investigate and require remediation

Local authorities have a duty to investigate land in their area for contamination, and to notify the 'appropriate person' and any owners or occupiers (EPA 1990, s 78B).

With limited resources at councils' disposal, many have prioritised higher-risk sites, and most have used the planning regime rather than Pt IIA to ensure remediation. This is because development proposals will often require an environmental assessment, and then possibly a remediation scheme for any identified contamination, to ensure the property is suitable for the proposed use.

7.3.3.2 Contaminated land: significant harm and a pollution linkage

Overview

To determine whether land is contaminated, the local authority must undertake a two-step process to determine:

(a) Is there significant harm, or a significant possibility of such harm?
(b) Is there a pollution linkage (a contaminant, a pathway and a receptor)?

Both must exist before Pt IIA of the EPA 1990 is engaged, and the definition of both concepts is comprehensive.

Significant harm

There are four core definitions under Pt 2A. The specificity of these definitions is of paramount importance; any italicised words appearing below were added by the author for emphasis:

(a) 'Contaminated land' is defined in s 78A(2) of the EPA 1990 as:

any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that *(a) significant harm* is being caused *or* there is a *significant possibility of such harm* being caused; or *(b) pollution of controlled waters is being, or is likely to be, caused*

(b) 'Harm' is defined (EPA 1990, s 78A(4A)) as:

harm to the *health of living organisms* or other interference with the *ecological systems* of which they form part, and in the case of man, includes harm to his *property*.

The Circular (p 94) specifies that 'harm' to:

(i) *human beings* includes death, disease, serious injury, genetic mutation, birth defects or the impairment of reproductive functions;

(ii) *ecological systems* includes irreversible adverse change, or some other substantial adverse change, in the functioning of the ecological system. However, ecological systems comprise only recognised protected nature areas, eg Sites of Special Scientific Interest, National Nature Reserves, or Marine Nature Reserves;

(iii) *property* includes crops, livestock and buildings, and includes substantial damage, disease and diminution in yield or value to these.

(c) '*Significant possibility of such harm*' is defined as an unacceptable risk, or more likely than not to occur (Circular, p 96).

(d) '*Pollution of controlled waters*' is defined in s 78A of the EPA 1990 to mean 'the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter'. '*Controlled waters*' takes the meaning from s 104 of the Water Resources Act 1991, namely all ground waters, inland waters and coastal waters (to three nautical miles).

Pollution linkage

A pollution linkage requires a contaminant, a pathway and a receptor. For example:

(a) rotting vegetation (a *contaminant* by methane emissions);

(b) building construction (creating drains and soil *pathways* for the contaminant); and

(c) housing residents (*receptors* who become ill due to the emissions).

These were the elements of the first major case under Pt IIA of the EPA 1990 (*Sevenoaks* – see **7.3.2** above).

The EA reports that the most prevalent *contaminants* in identified sites are:

(a) metals and metalloids;

(b) organic and inorganic compounds;

(c) ash (particularly in Wales).

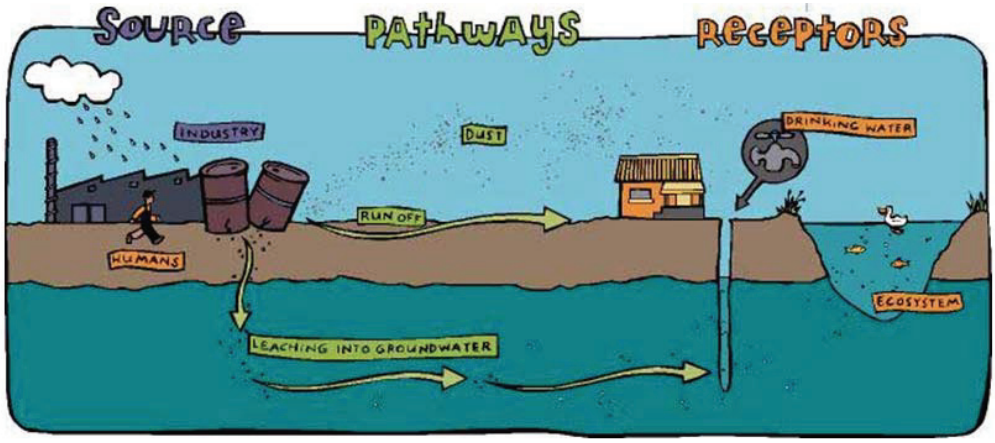
The energy and waste industries are cited as the biggest sources of contamination (Reporting the Evidence, *Dealing with contaminated land in England and Wales: A review of progress from 2000–2007 with Part 2A of the Environmental Protection Act*, Environment Agency 2007 ('the Report')).

Pathways, on the other hand, can be as simple as the air, earth, soil water table, or rivers and streams.

The main *receptor* concern is human beings, but note that it could also include buildings and livestock, or protected areas.

Figure 7.1 below illustrates some typical pollution linkages. Note that the term 'source' is often used instead of 'contaminant'. Removing one of the elements would break the chain, such that the land would no longer come under Pt IIA of the 1990 Act.

Figure 7.1 Pollution linkages



(*Source*: Canterbury Regional Council, New Zealand)

Special Sites and further guidance

The authorities may also identify Special Sites (EPA 1990, s 78C) which, because of the level of harm or risk thereof, require notice to the Secretary of State and then regulation by the Environment Agency. The regime for dealing with such sites is not substantially different.

Note that within all these definitions there is often much data that must be scientifically assessed. The Circular and further DEFRA and EA reports provide some certainty for this with the likes of Soil Guideline Values and Contaminated Land Exposure Assessment Models, from which consultants can make meaningful evaluations of risk. However, that is beyond the scope of this book.

7.3.3.3 Who is liable? Responsibility, exclusion and apportionment

Ultimately, if there is a risk of significant harm and a pollution linkage, the relevant enforcing authority has a *duty* to require remediation (EPA 1990, s 78E).

Responsibility

While the local authority must notify all 'interested persons' (such as the site owner) of any contamination, s 78E also requires the local authority to identify and serve a *remediation notice* on each '*appropriate person*', specifying what that person must do and the timeframe. Primarily this would cover the original polluter (a 'Class A' person). If the original polluter cannot be found then the present owner or occupier (a 'Class B' person) would be the appropriate person. It is this element which understandably causes most concern.

A 'Class A' person is defined as:

> the person, or any of the persons, who *caused or knowingly permitted* the substance, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land. (EPA 1990, s 78F(2))

The phrase 'knowingly permitted' requires both *knowledge* of substances and the possession of the *power to prevent* such substances being there (Circular, Annex 2).

A 'Class B' person is defined as 'the *owner or occupier* of the land for the time being' (EPA 1990, s 78F(4)). An '*owner*' means:

> a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land, or, where the land is not let at a rack rent, would be so entitled if it were so let. (EPA 1990, s 78A(9))

Hence this would cover a lessor.

Exclusion tests

Where two or more 'appropriate persons' have been identified, they may be able to take advantage of one of the following exclusion tests, provided for in the Circular. This is a very important area of the regime, and a client should be well advised. But note that a person will not be excluded if the effect is to exclude everyone from liability (Circular, Annex 3). Only a summary of the tests is given below – see the Circular for more detail.

Class A person exclusion tests

A Class A person will be excluded from liability in the following circumstances:

(a) *Excluded activities*

The person's *advisory* role is of such limited responsibility that even if the person could be said to have caused or knowingly permitted contamination, he should still be excluded. The activities include lending, insuring, advising, licensing and even consenting to activities or leasing land to the polluter.

(b) *Payments made for remediation*

The person made a sufficient payment for remediation to a responsible party, but remediation is not carried out properly or at all. A reduction in the purchase price due to estimated remediation costs could constitute such a payment.

(c) *Sold with information*

The person sold the land at arm's length and provided sufficient information to enable the buyer to be aware of the risk. Note that this was not successful in the case of *R (on the application of Crest Nicholson Residential Ltd) v SSEFRA & Others* [2010] EWHC 913 (Admin), which indicated that disclosure has to be full and exact.

(d) *Changes to substances*

The person deposited a substance, A, which when later combined with another, introduced substance, B, became a pollutant. In such cases, the depositor of substance B is liable instead. This requires that the first party could not reasonably foresee that substance B would be introduced, or that it would cause a chemical reaction.

(e) *Escaped substances*

The person deposited substances which later escape due to intervention. In such cases, the intervener becomes liable.

(f) *Introduction of pathways or receptors*

The person deposited substances which later become a risk due to the introduction of a pathway or receptor. In those cases, the introducer of the pathway will become liable. These were the facts of the *Sevenoaks* case (see **7.3.2**).

Class B person exclusion tests

A Class B person will be excluded from liability if:

(a) he occupies the land under a licence with no marketable value; or

(b) he pays a market rent with no beneficial ownership other than the tenancy itself.

The latter will normally exclude a tenant.

Apportionment of liability

If there is more than one appropriate person within a class, liability is apportioned between them (Circular, Annex 3).

For *Class A appropriate persons*, liability is shared in this group according to:

(a) the proportion of contamination caused by each member of the group (if that can be identified);

(b) their respective activities and site areas; or

(c) their relative periods of control, and the means and opportunities to carry out action.

For *Class B appropriate persons*, liability is apportioned within this group:

(a) where the whole or part of the remediation action clearly relates to a particular area of land owned or occupied by a Class B member;

(b) according to the capital values of the respective Class B members, if a single Class B member cannot be identified; or

(c) equally, if capital values of the Class B members cannot be ascertained.

7.3.3.4 Case law

Application of the provisions of the Contaminated Land Regime is not an exact science, as case law suggests. The three cases discussed below constitute appeals of a remediation notice, including one judicial review application. Despite the overriding policy that the 'original polluter pays', it appears that the definitions, exclusion and apportionment tests can obfuscate the identity of the polluter.

In the first appeal of a remediation notice under the new Pt IIA, *Circular Facilities (London) Ltd v Sevenoaks District Council* [2005] EWHC 865, the previous owner had filled in clay pits with biodegradable waste, which created methane and carbon dioxide. Later a developer (Circular Facilities) redeveloped the site into a housing estate. The court held that this created the pollution linkage (construction pathways/human receptors) and so held the developer liable as the appropriate person. The matter was ultimately settled out of court, supposedly due to the costs already incurred by the Council.

In the second appeal case of *R (on the application of National Grid Gas plc) (formerly Transco plc) v Environment Agency* [2006] EWHC 1083, a former gasworks operator (Transco) left black coal tar pits on a site which was later redeveloped into a housing estate. However, in this case the High Court imposed liability on the statutory successor (National Grid Gas) of the original gas company. This is despite the fact that again it was the developer who introduced the pathways and receptors.

Finally, in the recently dismissed judicial review application of two related remediation notices, *R* (*on the application of Crest Nicholson Residential Ltd) v SSEFRA & Others* [2010] EWHC 561 (Admin) and *R* (*on the application of Crest Nicholson Residential Ltd) v SSEFRA & Others* [2010] EWHC 913 (Admin), Redland Minerals had operated a chemical production site from the 1950s to 1980, and then sold the site to a developer, Crest Nicholson, which undertook some testing and later attempted remediation. Redland argued that it should be excluded as it has sold the site to Crest *with information* (as to the presence of bromides on the land), but lost this point as the court found that Crest did not know about bromides which had already leached into groundwater. Secondly, in regard to apportionment, Redland had caused all the bromide and bromate to be on the land in the first place (and allowed them to filter to the lower strata). Crest brought no contaminants onto the site but accelerated their infiltration. The Secretary of State identified no simple quantitative causative mechanism to measure apportionment, and instead adopted a broad *evaluative judgement* as used by the inspector. This was upheld by the Administrative Court.

These cases demonstrate the complexity of Pt IIA. Arguably the last two cases do indeed at least make the original polluter pay, and in *National Grid* the full extent of the retrospective aspect is evident. However, it is clearly a matter of the facts in each case, and it seems irreconcilable that Circular Facilities had to foot the bill when it was not the original polluter. It is to be hoped that the upcoming updated Guidance will shed some light on this rubbish area.

7.3.3.5 Enforcement

Very few remediation notices have been served (only a dozen to date), as most contaminated land is addressed voluntarily or though planning permission. The regulator may also carry out works itself, at the expense of the 'appropriate person'.

Remediation notice

A remediation notice cannot be served in a number of circumstances, including the following:

(a) the contamination is being or will be remediated voluntarily, and the enforcing authority is satisfied that this approach will adequately deal with the problem;
(b) the act causing the contamination is licensed under another regime;
(c) if the enforcing authority were to do the works itself, it would not recover the costs from the person concerned on grounds of hardship.

If none of these circumstances applies then the enforcing authority *must* serve a remediation notice on the appropriate person(s).

A remediation notice must specify what the recipient must do and the periods within which the work must be carried out.

Sanctions

Failure to comply with a remediation notice is an offence (EPA 1990, s 78M). The level of fine depends on whether an offender is an individual or a corporate entity. In the case of a company, the offender is liable in the magistrates' court to a fine not exceeding £20,000 and a further sum equal to one-tenth of the fine for each day after conviction. More importantly, the enforcing authority may seek an injunction in the High Court to secure compliance (EPA 1990, s 78M(5)). If an order is obtained and breached, the company and its officers may be held personally criminally liable (EPA 1990, s 157).

The Regulatory Enforcement and Sanctions Act 2008 (see **7.8**) may prove helpful to the regulator in decreasing the costs of enforcement.

Appeals

A person who has been served with a remediation notice may appeal to the magistrates' court (if the local authority is the enforcing authority) or to the Secretary of State (if the Environment Agency is the enforcing authority). The Contaminated Land (England) Regulations 2006 (SI 2006/1380) identify the grounds for appeal, which, along with other matters, include:

(a) the enforcing authority failed to comply with the guidance notes (Circular);
(b) the enforcing authority acted unreasonably in determining that the appellant was an appropriate person;
(c) disagreement with the requirements of what is to be done by way of remediation.

7.3.4 Planning and contaminated land

Despite the detail of Pt IIA, Planning Policy Statements 23 and 10 (and Tan 21 (Wales)) make clear that the main tool for dealing with contaminated land is the planning regime.

In fact, by 2007, local authorities estimated that approximately only 10% of contaminated sites were dealt with by Pt IIA (Report, p 3). Furthermore, a lack of resources meant that most local authorities had inspected less than 10% of their areas for contaminated land.

Most contaminated land is instead identified as a consequence of development or redevelopment. In such a case, when the developer applies for planning permission, it will find conditions attached requiring remediation of any contamination.

The Department for Communities and Local Government (DCLG) issued Model Planning Conditions for Contaminated Land in 2008 (effectively updating PPS 23), which require the developer to undertake and submit the following:

(a) site investigation and risk assessment;
(b) proposed remediation scheme;
(c) remediation;
(d) reporting of unexpected contamination;
(e) long-term monitoring.

Development cannot take place until conditions (a) to (d) are satisfied.

7.3.5 Landlord and tenant issues

Landlords will be anxious to ensure that the tenant will be responsible for the clean-up of any pollution discovered during the term of the lease. It is doubtful whether clean-up works would fall within the tenant's general repairing covenant unless the pollution caused some physical damage to the building. Most modern commercial leases, however, deal expressly with environmental issues. Also, the tenant's covenant to comply with all statutory obligations may be broad enough to extend to requirements under environmental law. Furthermore, if there is a service charge in the lease, the landlord may be able to recover sums expended on the necessary clean-up. Even if this is not expressly mentioned in the list of services to be provided, the 'sweeping-up' clause may be wide enough to embrace such work.

7.3.6 Report: Review of the Contaminated Land Regime

The Environment Agency is under a statutory duty to provide 'from time to time … a report on the state of contaminated land in England and Wales' (EPA 1990, s 78U). The most recent Report covered the period from 2000 to 2007, and some of its findings are summarised in **Table 7.2** below, as at March 2007. The last two statistics in the table again highlight what for many has become the core concern of the Regime.

Overall, rather than be burdened with a remediation notice, it is of course advisable to enter into a dialogue with the regulator and, if necessary, pursue voluntary remediation.

Table 7.2 Environment Agency: Summary of findings

Environment Agency, *Dealing with contaminated land in England and Wales: A review of progress from 2000–2007 with Part 2A of the Environment Protection Act*

- Seven hundred and eighty-one sites had been determined under Pt 2A, including 35 Special Sites.
- Fewer than 150 had been completely remediated in that time (this usually consists of excavation and off-site disposal of the contamination, although containment is also used often).
- Remediation, backdated from initial identification, typically took months to years (typically many years), and often costs millions of pounds.
- Twelve remediation notices have been served since the legislation was introduced (10 in England, including one for a Special Site, and two in Wales). Of those in England, there have been appeals against five.
- Conversely 281 remediation statements (which state what needs to be or has been done) were issued, demonstrating the high number of voluntary and planning-related options for dealing with contamination.
- Over 90% of contaminated land in England and Wales had housing on it when the site was inspected.

Environment Agency, *Dealing with contaminated land in England and Wales: A review of progress from 2000–2007 with Part 2A of the Environment Protection Act*

- *In the majority of sites, where appropriate persons were identified, it was the Class B owner or occupier who was ultimately liable.*

7.4 Nuisance

7.4.1 Introduction

Private nuisance, public nuisance, statutory nuisance and the rule in *Rylands v Fletcher* combine to provide a wide ambit of potential liability for interference with land, people's enjoyment of it, or people's health. Liability is strict in each case; there is no requirement to establish carelessness on the part of the defendant. Remedies may lie in damages or injunction.

7.4.2 Private nuisance

7.4.2.1 Introduction

Private nuisance is the 'unlawful interference with a person's use or enjoyment of land, or of some right over or in connection with that land'. Private nuisance may cover anything from:

(a) aircraft noise and turbulence affecting nearby residents (*Dennis v Ministry of Defence* [2003] Env LR 34); to

(b) a particularly loud printing press affecting residents on Fleet Street (*Rushmer v Polsue and Alfieri Ltd* [1906] 1 Ch 234); to

(c) solvents from a leather works seeping into an aquifer (*Cambridge Water Company v Eastern Counties Leather plc* [1994] 2 AC 264). (Though note, in this case, that this was found not to be nuisance, as the claimant's case rested on changes to drinking water regulations which came into force long after the defendant's practices stopped. The claimants were successful under *Rylands v Fletcher*, though (see **7.4.5**).)

7.4.2.2 Standing

In *Hunter v Canary Wharf Ltd* [1997] 2 WLR 684, the House of Lords confirmed that only people with rights to the land affected have standing to bring a private nuisance action. In that case, the tenants and freehold owners in London's Docklands successfully sued the developers of Canary Wharf and the London Docklands Development Corporation in nuisance for dust from construction work and interference with television signals from the Canary Wharf Tower. However, some claimants (on behalf of children in the Docklands area) also took their case to the European Commission of Human Rights, claiming a breach of Article 8 of the European Convention on Human Rights (ECHR) (*Khatun v United Kingdom*, European Commission of Human Rights, 1 July 1998). The Commission held that Article 8 applied to all the claimants, whether they had property rights or not, and so would include the Docklands' children. Consequently, such people may have standing to bring claims in future cases, in light of the Human Rights Act 1998.

Many environmental matters, particularly emissions, can be the source of a nuisance claim, and so the breadth of legitimate claimants may be increased.

7.4.3 Public nuisance

Historically, public nuisance included a wide range of activities, from dumping sewage into a river to playing loud music in a public park. Although an established common law offence, it is used sparingly now. This is because most public nuisance activities are now addressed by statute. Furthermore, while the 'public' can mean a class of Her Majesty's subjects, in *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, a case on dust and tremor nuisance by a quarry, Denning LJ also stated (at 191) that

> a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

Consequently, such a claim would need both a large number of people to be affected and the omission of relevant statutory liability, which is unlikely in environmental law.

7.4.4 Statutory nuisance

7.4.4.1 Introduction

In statutory nuisance, the claimant does not need to have a property interest. Statutory nuisance is actionable pursuant to s 79 of the EPA 1990 and includes smoke, fumes, gases, dust, odours, insects, artificial light and noise emitted from premises which are 'prejudicial to health or a nuisance'. 'Nuisance' is given either its private or public nuisance meaning, whereas 'prejudicial to health' is assessed objectively, ie one would substitute the health of the average traveller on the Clapham omnibus.

7.4.4.2 Enforcement

Local authorities are under an express duty to inspect their areas periodically for statutory nuisance (EPA 1990, ss 79–80), and must serve an abatement notice on the person responsible for it. As in the Contaminated Land Regime, if that person cannot be found, the abatement notice will be served on the owner or occupier of the relevant premises. Otherwise, an aggrieved individual may seek an abatement order through the courts (EPA 1990, s 82) (see *McCaw City of Westminster Magistrates' Court (D) and Middlesex SARL* [2008] EWHC 1504).

There is a defence of 'best practicable means' for some of the categories of public nuisance. Essentially this relies on the defendant showing that it did what is currently best practice (having regard to the local circumstances, current technical knowledge, and financial means) to prevent or counteract the nuisance.

7.4.5 The Rule in *Rylands v Fletcher*

The rule in *Rylands v Fletcher* [1868] UKHL 1 is essentially a subspecies of nuisance. As reformulated in *Cambridge Water* (see **7.4.2.**1), the elements of liability are that:

(a) the defendant brings onto its land something of 'non-natural use';

(c) that something must escape and affect the claimant's land; and

(d) the harm suffered must be a reasonably foreseeable consequence of the escape.

Traditionally the hardest element to satisfy was 'non-natural use'. However, in *Cambridge Water*, Lord Goff stated (at 157) that

> the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use; and I find it very difficult to think that it should be thought objectionable to impose strict liability for damage caused in the event of their escape.

In light of this judgment, and considering the range of non-natural uses to be found on a given property (from solvents to industrial cleaning agents), the rule in *Rylands v Fletcher* continues to threaten a potential environmental liability.

7.4.6 Trespass

Trespass requires an intentional or a negligent act which interferes directly with a person or his rights in land. The emphasis is on direct interference. In the case of *Esso Petroleum v Southport Corporation* [1956] AC 218, the defendant's tanker jettisoned oil into an estuary; the oil eventually polluted the foreshore. This was not an actionable trespass as there was no certainty the oil would end up on the foreshore – it was indirect. As with nuisance and the rule in *Rylands v Fletcher*, trespass is also a potential claim for environmental incidents.

7.5 Environmental Damage Regulations

The Environmental Damage (Prevention and Remediation) Regulations 2009 (SI 2009/153) implement Council Directive 2004/35/EC ([2004] OJ L143/56) on Environmental Liability. The Regulations created the first ever duty to take *preventative* measures in the face of imminent environmental harm. The two main duties are listed below:

> **13 Preventing environmental damage**
>
> (1) An operator of an activity that causes an imminent threat of environmental damage, or an imminent threat of damage which there are reasonable grounds to believe will become environmental damage, must immediately—
>
> (a) take all practicable steps to prevent the damage; and
>
> (b) (unless the threat has been eliminated) notify all relevant details to the enforcing authority appearing to be the appropriate one.
>
> **14 Preventing further environmental damage**
>
> (1) An operator of an activity that has caused environmental damage, or has caused damage where there are reasonable grounds to believe that the damage is or will become environmental damage, must immediately—
>
> (a) take all practicable steps to prevent further damage; and
>
> (b) notify all relevant details to the enforcing authority appearing to be the appropriate one.

Failure to comply with either duty is an offence.

The Regulations are based on the 'polluter pays' principle but are not retrospective (unlike Pt IIA of the EPA 1990) and apply only to operators of intensive environmental activities (listed in Sch 2), typically those requiring an environmental permit (see **7.6**), in addition to waste, mining and transport activities.

'Environmental damage' is specifically defined as damage to:

> (a) protected species or natural habitats, or a site of special scientific interest,
>
> (b) surface water or groundwater, or
>
> (c) land,
>
> …

Environmental damage to land means 'contamination of land by substances, preparations, organisms or micro-organisms that results in a significant risk of adverse effects on human health'.

The emphasis is on the 'operator' identifying when there is an imminent threat or actual damage and taking immediate action. The operator will also be responsible for any remediation. This additional environmental duty on operators of industry could be seen as the prospective equivalent of Pt IIA of the EPA 1990.

7.6 Environmental permitting and regulation

7.6.1 Introduction

This is a vast area, covering permits and regulations for activities ranging from running a dry cleaners to operating a nuclear facility.

The recent Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/675) (EPR 2010) bring all the licences previously managed under the main regulatory regimes (water discharges, waste, mining waste, radioactive substances, industries and installations) under the one system. Previously this constituted 41 different statutory instruments. These regimes now appear as schedules to the Regulations:

(a) Sch 7 (Part A installations and Part A mobile plant);

(b) Sch 8 (Part B installations and Part B mobile plant);

(c) Sch 9 (waste operations);
(d) Sch 10 (landfill);
(e) Sch 11 (waste motor vehicles);
(f) Sch 12 (waste electrical and electronic equipment);
(g) Sch 13 (waste incineration);
(h) Sch 14 (SED installations);
(i) Sch 15 (large combustion plants);
(j) Sch 16 (asbestos);
(k) Sch 17 (titanium dioxide);
(l) Sch 18 (petrol vapour recovery);
(m) Sch 19 (waste batteries and accumulators);
(n) Sch 20 (mining waste operations);
(o) Sch 21 (water discharge activities);
(p) Sch 22 (groundwater activities);
(q) Sch 23 (radioactive substances activities).

7.6.2 Permit requirement

Principally, reg 12 of the EPR 2010 requires the following:

> (1) A person must not, except under and to the extent authorised by an environmental permit—
>
> (a) operate a regulated facility; or
>
> (b) cause or knowingly permit a water discharge activity or groundwater activity.

Regulation 7 defines 'operate a regulated facility' as to:

> (a) operate an installation or mobile plant, or
>
> (b) carry on a waste operation, mining waste operation, radioactive substances activity, water discharge activity or groundwater activity;
>
> ...

Table 7.3 below summarises the more common issues involving permitting and regulation.

Where possible, the regulator must enforce action under the Regulations, rather than under Pt IIA of the EPA 1990.

Table 7.3 Common offences and duties in environmental permitting and regulation

Industry and installations
Pollution prevention
It is an offence to operate a heavy industrial installation or listed activity without a licence (EPR 2010, regs 12 and 38). These include energy, mining, chemical or waste industries *and* lighter industries where emissions may be harmful. Together these are referred to as Part A(1) (regulated by the Environment Agency) and Part A(2) and Part B activities (regulated by local authorities). There are thresholds of activity before a permit is required.
Water
(1) *Pollution*
It is an offence, except pursuant to an environmental permit, to 'cause or knowingly permit a water discharge activity or groundwater activity' (EPR 2010, regs 12(1) and 38(1)).
A 'water discharge activity' includes the discharge or entry into inland freshwaters, coastal waters or territorial waters of any: (i) poisonous, noxious or polluting matter, (ii) waste matter, or (iii) trade effluent or sewage effluent (Sch 21). A 'groundwater activity' includes the discharge of pollutants into groundwater (Sch 22).

(2) *Abstraction*

It is an offence to abstract water without a permit or in contravention of one (Water Resources Act 1991, s 24).

Waste

(1) *Keeping or disposing*

Pursuant to s 33 of the EPA 1990, it is an offence to treat, keep, or dispose of waste except in accordance with a permit (or pursuant to a permit holder's powers).

'Waste' is widely defined and includes batteries, residues from industrial processes, and oils.

(2) *Waste operations and exemptions*

Recycling centres, scrap metal and waste transfer sites and so on will need an environmental permit for their waste operations (EPR 2010). Other non-waste businesses, may need to register an exemption where they use or store waste below thresholds (EPR 2010, Schs 3 and 9).

(3) *Duty of care*

Section 34 of the EPA 1990 imposes a general statutory duty of care regarding waste. This includes preventing its escape and ensuring its transfer only to an authorised person (the fly-tipping offence).

(4) *Electricals*

The Waste Electrical and Electronic Equipment Regulations 2006 (SI 2006/3289) impose a duty on producers, distributors and exporters of electrical and electronic equipment to reduce pollutants in and finance the collection, treatment and recovery of electrical equipment.

(5) *Recycling*

The Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (SI 2007/871) create an obligation to recycle and recover for businesses that handle more than 50t of packaging waste and have a turnover of more than £2,000,000 pa.

Hazardous substances

These include corrosive, toxic and irritant substances, and biological agents as defined in the Control of Substances Hazardous to Health Regulations 2002 (SI 2002/2677) (COSHH 2002).

(1) *Storage*

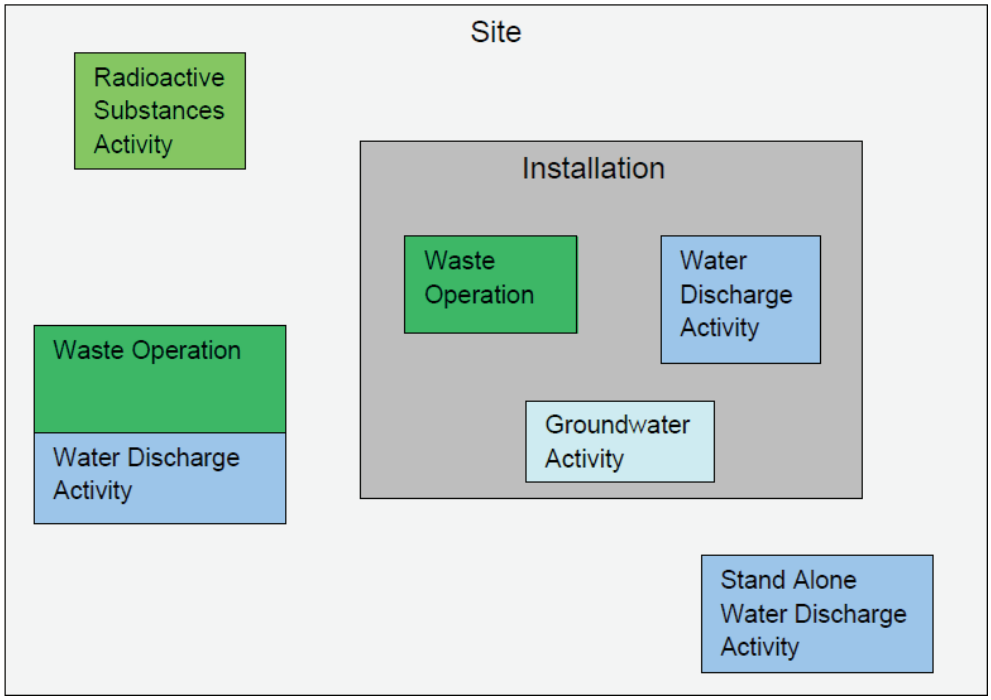
Holding hazardous substances above prescribed control quantities without or in contravention of a consent is an offence (Planning (Hazardous Substances) Act 1990).

(2) *Exposure*

The COSSH 2002 impose a general duty, whereby failure to control or prevent exposure to such substances at work is an offence.

Figure 7.2 below reproduces an example provided by DEFRA of the number of regulated facilities that may be carried on at a given site.

Figure 7.2 Regulated facilities on a site



(*Source*: DEFRA Core Environmental Permitting Guidance 2010)

7.6.3 Enforcement

The main offence under the EPR 2010 is similar to all environmental regulation and focuses on failing to hold or comply with an environmental permit where needed (regs 12 and 36). Under the EPR 2010 the regulator can also issue any of the following:

(a) a revocation notice (reg 22);
(b) an enforcement notice (reg 36);
(c) a suspension notice, for serious pollution risks (reg 37);
(d) a remediation notice, of any pollution or contamination (reg 57);
(e) an information requirement notice (reg 60).

Failure to comply with any of the above is an offence (reg 38), punishable by an unlimited fine and up to five-years' imprisonment on indictment.

Water pollution is a particular concern, and the enforcing authorities vigorously pursue offences, averaging more than 200 prosecutions a year in England and Wales (DEFRA, *Water Pollution Prosecutions 1990–2005*).

7.7 Climate change law and energy performance

7.7.1 Introduction

This area of environmental law could be construed simply as part of environmental permitting and regulation (see **7.6** above). However, given the independent focus on climate change and energy efficiency, this chapter specifically discusses below the Kyoto Protocol, emissions trading and the UK's Carbon Reduction Commitment Energy Efficiency Scheme, all of which cover the UK's biggest polluters. In addition, the practical implication of the drive towards zero-carbon buildings is addressed by way of Energy Performance Certificates (EPCs) and green leases.

7.7.2 Kyoto Protocol

Global warming has gradually become a well-recognised and regulated issue. The 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change set the world's first binding agreement on reducing carbon dioxide (and other harmful gases) emissions. The UK is bound to reduce its emissions by 12.5% below 1990 levels by 2012. The UK plans to do this is by a combination of encouraging and requiring energy efficiency, and reduced emissions.

The EU as a whole (under the EC Bubble), is committed to reducing its emissions by 8%. There are three 'flexible mechanisms' under the Kyoto Protocol for this purpose: joint implementation, the clean development mechanism (CDM), and emissions trading. The CDM essentially encourages developing nations to 'leapfrog' harmful industrial energy practices by benefitting from cleaner technology investment from industrialised nations ('Annex I' countries) which receive a 'credit' towards their own targets. These credits help fuel a carbon market for emissions trading. The best established market is the European Union Emissions Trading System (EU ETS).

7.7.3 EU ETS

7.7.3.1 Overview

The EU ETS (under Council Directive 2003/87/EC ([2003] OJ L275/32) establishing a scheme for greenhouse gas emission allowance trading) is integrated with the Kyoto Protocol and is now the world's largest greenhouse gas (GHG) emissions trading scheme. Under the scheme, which began in January 2005, large emitters of GHGs in the EU must monitor and report their emissions. The scheme covers around 11,000 installations accounting for 45% of the EU's carbon dioxide emissions. These include energy activities, the production and processing of ferrous metals, mineral industries, and pulp and paper industries.

Each year, emitters are obliged to submit carbon allowances equivalent to their emissions. Allowances are allocated through permitting, or are bought on the carbon market.

There was an over-allocation of allowances in Phase I, which effectively nullified the price of carbon and meant that compliance was not difficult. The scheme is currently in Phase II (2008–12). Aviation will be in included in Phase III as of 2012, and the emissions cap will be reduced.

7.7.3.2 UK involvement: GHG permits

In the UK, the EU ETS targets the biggest polluters listed in Sch 1 to the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (SI 2005/925). These include:

(a) combustion installations in excess of 20 MW;
(b) mineral oil refineries;
(c) steel production;
(d) glass manufacture in excess of 20t/day melting.

A Greenhouse Gas Permit is required for those caught by the Regulations.

The UK (as a Member State) determines the emissions cap for all installations covered by the scheme. If a permit holder exceeds its allowance, it will incur a penalty. However if it improves its efficiency, it may have a surplus of allowances which can be sold on the carbon market to other permit holders. This is meant to incentivise cleaner technology and greater energy efficiency.

7.7.3.3 Enforcement

There are civil penalties for failure to surrender sufficient allowances each year. The penalty is set by the EU ETS Directive, and is implemented across every Member State. Currently the penalty is set at €100 for every tonne of carbon dioxide in excess of allowances. The regulator can also issue surrender and revocation notices for those in breach.

7.7.4 Climate Change Act 2008

7.7.4.1 Introduction

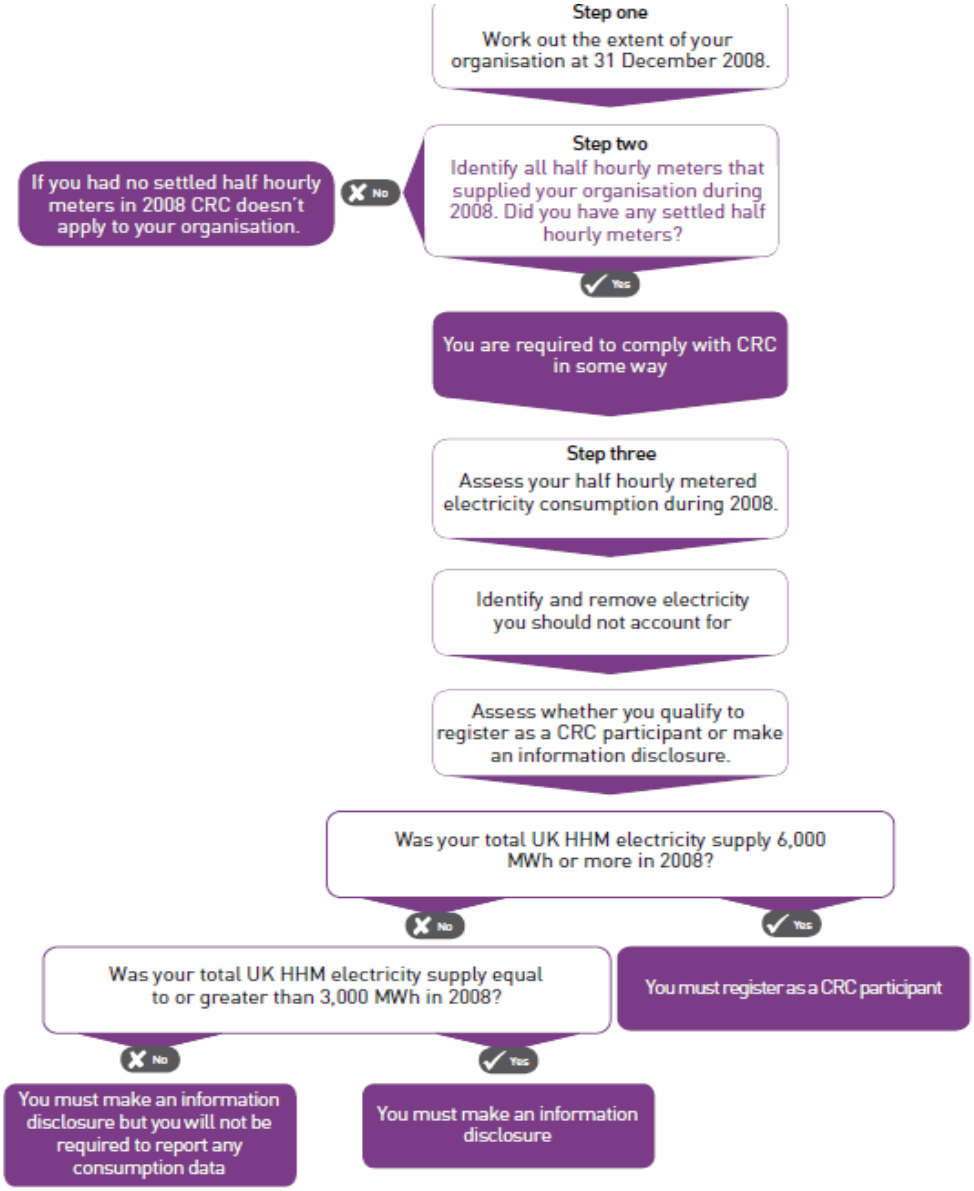
The Climate Change Act 2008 made the UK the first country in the world to have a legally-binding, long-term framework to cut GHG emissions. The target is at least an 80% reduction of GHG emissions below 1990 levels by 2050.

The Act enables a vast range of measures to accomplish this, including a carbon-budgeting system (tied in with the EU ETS – see **7.7.3**), use of biofuels, tackling household waste and domestic energy emissions schemes. The first of the last is the Carbon Reduction Commitment Energy Efficiency Scheme (CRC Scheme).

7.7.4.2 CRC Scheme

The CRC Scheme is the UK's mandatory scheme to monitor and reduce energy usage by large organisations, as opposed to industry emissions. Criteria is based on energy usage in 2008 (though this will be reviewed for 2011–12), and **Figure 7.3** below indicates the various requirements, dependent on use.

Figure 7.3 CRC Energy Efficieny Scheme, 'Am I in?' (Environment Agency)



The Scheme began in April 2010, as a central aspect of the Climate Change Act 2008. Organisations that exceed their allowances will need to purchase credits from the Government or a trader, per t/CO_2.

The Government anticipates that while approximately 20,000 organisations will have to participate in the Scheme, at least by periodically disclosing their energy usage, some 5,000 of those organisations (public and private) will need to acquire necessary allowances – primarily those with annual electricity bills in excess of £500,000. This will include:

- NHS Trusts and hospitals;
- schools and universities;
- central government departments and local authorities;
- large retailers (such as shopping centres and supermarkets);
- hotel chains;
- large offices (such as banks, accountants and law firms);
- joint ventures (JVs), private finance initiatives (PFIs) and public private partnerships (PPPs);
- franchises;
- utility companies (such as water companies).

(See PLC, *CRC Energy Efficiency Scheme: in a nutshell.*)

7.7.5 Energy performance and green leases

7.7.5.1 Introduction

While around half the UK's CO_2 emissions come from industry, commerce and the transportation of goods (National Energy Foundation), the other half comes from buildings – mostly homes (Department of Communities and Local Government, *Building a Greener Future*, July 2007).

Council Directive 2002/91 ([2002] OJ L001) on the Energy Performance of Buildings aims to improve the performance of both commercial and residential buildings in the EU. The principal requirements of the Directive are that:

(a) Member States must set minimum energy performance requirements for buildings (Article 4);

(b) new buildings and large buildings subject to major renovations must meet the minimum energy performance requirements (Articles 5 and 6);

(c) Energy Performance Certificates (EPCs) must be made available to prospective buyers and tenants whenever a building is constructed, sold or rented (Article 7);

(d) Display Energy Certificates (DECs) must be displayed in large buildings occupied by public authorities (Article 7);

(e) boilers and air conditioning systems in buildings must be inspected on a regular basis (Articles 8 and 9).

These requirements are transposed in the UK by the Housing Act 2004 and the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (SI 2007/991) (EPB Regulations 2007).

The Government wants to achieve an overall zero-carbon building requirement goal in three steps:

(a) In 2010, a 25% improvement in the energy/carbon performance set in the Building Regulations 2000 (SI 2000/2531).

(b) By 2013, a 44% improvement.

(c) Finally, in 2016, a zero-carbon requirement.

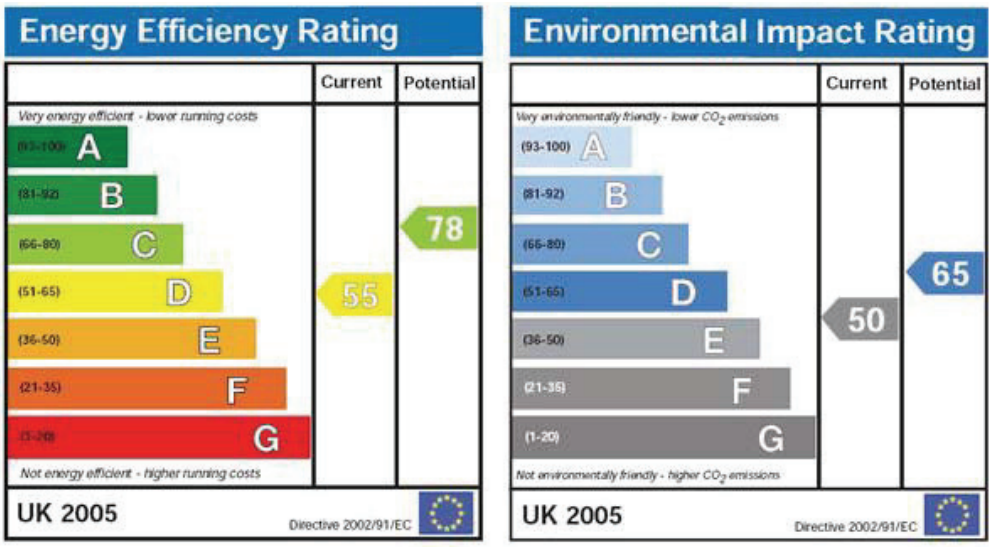
7.7.5.2 Energy Performance Certificates

An EPC provides the asset rating of a building, from A to G, measuring its construction and services (by examining its insulation, boilers, radiators, glazing, etc). It also includes a recommendation report for energy efficiency improvement. An EPC must be supplied at the construction, sale or rental of any property (EPB Regulations 2007, regs 5 and 8). There are some exempt buildings though, eg places of worship and agricultural greenhouses with low energy use (reg 4).

If an EPC is not provided by the developer, the building control inspector cannot issue a completion certificate for the works.

Certificates are valid for 10 years (reg 11(3)). See **Figure 7.4** below.

Figure 7.4 Energy Performance Certificate



The energy efficiency rating is a measure of the overall efficiency of a home. The higher the rating the more energy efficient the home is and the lower the fuel bills will be.

The environmental impact rating is a measure of this home's impact on the environment. The higher the rating the less impact it has on the environment.

7.7.5.3 Display Energy Certificates

Public authority buildings in England and Wales with a floor area over 1,000m^2 also need a DEC (EPB Regulations 2007, reg 16). This shows the *actual* energy use of the building (taken from meter readings), as well as its asset rating, and is valid for one year.

DEC Guidance lists the following bodies as being within the definition of 'public authorities':

- Central and local government
- NHS trusts
- Schools (maintained and community)
- Police
- Courts
- Prisons
- Ministry of Defence
- Army
- Executive agencies
- Statutory regulatory bodies.

7.7.5.4 Inspection of air-conditioning systems

Part 4 of the EPB Regulations 2007 imposes an obligation on those who have control of air-conditioning systems (with a maximum calorific output of more than 12kw) to ensure that the system is inspected at least every five years by an energy assessor.

The energy assessor must provide a written report of the inspection as soon as practicable after the inspection.

7.7.5.5 Enforcement and practical effect

Failure to comply with the Regulations can result in a penalty charge notice and a fine of up to £5,000.

The Government hopes that EPCs will encourage businesses and investors to support more energy-efficient construction and usage. Arguably, that will happen only if the market recognises that a more energy-efficient property should command a higher price or rent.

However, given the rise of corporate social responsibility and public scrutiny of major organisations' environmental impact, improved energy efficiency is arguably also just good practice now. Furthermore, company directors are statutorily required to promote the success of the company, and in doing so 'must have regard to the impact of the company's operations on the community and the environment' (Companies Act 2006, s 172). Hence, there are ethical, financial and fiduciary motivations to be more 'green' with energy usage.

7.7.5.6 Green leases

With the ever-increasing awareness of environmental matters, some landlords and tenants are keen to enter into leases that actively promote a reduction in the building's impact on the environment.

Both landlord and tenant will enter into obligations to achieve this. For example, the landlord will covenant to:

(a) achieve a specific energy rating throughout the term, with the tenant perhaps paying a reduced rent if that rating is not met;
(b) for multi-let buildings, separately meter the water and electricity consumption of each tenant;
(c) repair/modify buildings, plant and equipment so as to improve energy efficiency and to produce lower operating costs;
(d) instigate a green management plan; this should not be too prescriptive, and should set targets rather than set out specific obligations;
(e) ensure that all plant and equipment, particularly air-conditioning systems, operate to maximum efficiency; and
(f) obtain an annual independent audit of the building's performance level.

Similarly, the tenant will be required to:

(a) fit out or alter using recycled materials, or those that can be recycled (if practicable);
(b) make all alterations energy neutral, or provide energy savings;
(c) not partition in such a way as to make the air-conditioning system less efficient or that leads to a greater use of energy;
(d) observe and perform the landlord's green management plan; and
(e) yield up the premises with at least the same energy rating as applied at the beginning of the lease.

As with EPCs, it is still too early to determine the overall support for and impact of green leases.

7.8 Regulatory Enforcement and Sanctions Act 2008

From April 2010 the Environment Agency and Natural England were given powers to impose administrative civil sanctions under the Regulatory Enforcement and Sanctions Act 2008 (RESA 2008). It is hoped that these will be used in place of criminal sanctions in appropriate circumstances. For example:

(a) fixed or variable monetary penalties to address the financial benefits of non-compliance;

(b) voluntary enforcement undertakings to remediate any harm to the environment;

(c) compliance/restoration notices.

The aim is to prioritise compliance and the restoration of environmental harm, ahead of fines. This is a considerable new tool for environmental law regulators. Given their financial restrictions addressed elsewhere in this chapter, the sanctions could prove to be well adopted over the traditionally costly or disproportionate enforcement methods, particularly where an offender has an otherwise good record of attempted compliance.

Again, it is too early to assess the impact of the RESA 2008, but a client should be warned of the potential for the imposition of such sanctions (particularly monetary penalties) in addition to criminal liability.

7.9 Asbestos

7.9.1 Introduction

Asbestos remains the single greatest cause of work-related deaths in the UK. According to the Health and Safety Executive (HSE), at least 3,500 people in Great Britain die each year from asbestos-related cancer, as a result of past exposure.

Asbestos was used extensively as a building material in the UK from the 1950s through to the mid-1980s. It proved ideal for fireproofing and insulation, and so is likely to be found in roofing, floor tiles, around pipes (as insulation), and for wall and ceiling panels.

Although such use is now illegal, much asbestos remains in place. It is safe to assume that any building constructed before 2000 may contain asbestos. If it is in poor condition or damaged, asbestos fibres may become airborne, which is when they pose a significant risk.

7.9.2 Control of Asbestos Regulations 2006

The Control of Asbestos Regulations 2006 (SI 2006/2739) impose a duty to identify and manage asbestos in non-domestic buildings. The duty could fall on the employer, owner or occupier of premises to conduct an asbestos survey and implement an Asbestos Management Plan (AMP).

7.9.2.1 Duty to manage asbestos in non-domestic premises

Regulation 4 imposes an obligation on the 'dutyholder' in 'non-domestic premises' to:

(a) determine whether asbestos is present in a building, or is likely to be present (advice from the HSE is to assume that it is unless there is strong evidence to the contrary); and

(b) manage any asbestos that is or is likely to be present (this requires an AMP, and the lack of one is also an offence).

Managing asbestos could include proper containment or even removal of it, which entails even further duties.

7.9.2.2 Definition of 'dutyholder'

The 'dutyholder' is defined in reg 4(1) as:

(a) every person who has, by virtue of a contract or tenancy, an obligation of any extent in relation to the maintenance or repair of non-domestic premises or any means of access thereto or egress therefrom; or

(b) in relation to any part of non-domestic premises where there is no such contract or tenancy, every person who has, to any extent, control of that part of those non-domestic premises or any means of access thereto or egress therefrom.

This broad definition could encompass owners, landlords, tenants, licensees and potentially managing agents.

Where there is more than one dutyholder, the relative contributions to be made by each in complying with the reg 4 duties are determined by the 'nature and extent of the maintenance and repair obligations' owed by each dutyholder.

7.9.2.3 Enforcement

Section 33(1)(c) of the Health and Safety at Work Act, etc 1974 provides that it is an offence for a person to contravene any health and safety regulations. Similar to the EPA 1990, s 37 provides that where an offence is committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other similar officer, then that person (as well as the organisation) can be held criminally liable. If convicted on indictment in the Crown Court, the penalty for each offence is imprisonment for no more than two years and/or an unlimited fine.

The HSE enforces asbestos regulation rigorously. In transactional work, it is imperative that enquiries are made of assessments and current AMPs.

7.9.2.4 Landlord and tenant issues

In multi-let premises, the responsibility for maintenance of the common parts, services, external fabric and main structure of the building will generally lie with the landlord. The landlord will be a dutyholder, and will be required under reg 4 to arrange for asbestos surveys to be carried out and for copies of asbestos registers to be produced to each tenant.

Where a lease imposes repairing obligations on a tenant, the landlord should ensure that the tenant is aware of his obligations under reg 4 and be satisfied that the tenant has complied with those obligations.

7.10 Japanese knotweed

7.10.1 Introduction

According to the EA, Japanese knotweed is the most invasive species of plant in Britain. It spreads extremely quickly, can grow 10cm a day, exists in almost any habitat and destroys native vegetation. It is now found in almost every county in the UK, particularly along rivers and railways and on brownfield sites.

7.10.2 Practical impact

The plant is an increasing problem for many developers. Japanese knotweed shoots can push through tarmac and damage pavements and building foundations. The presence of the plant on a development site can lead to significant delays and huge costs. Effective control of the plant using herbicides takes at least three years. Excavation offers rapid removal, but the costs are substantial, and the disposal at a licensed landfill site of a stand of Japanese knotweed measuring $1m^2$ will cost in the region of £27,000. Recent reports have indicated that the cost of dealing with Japanese knotweed on the Olympic site in east London could be around £70 million (Local Government Executive).

7.10.3 Liability

A developer that has Japanese knotweed on its site also faces the risk of criminal and civil liability. Under the Wildlife and Countryside Act 1981, for example, it is an offence to plant or otherwise cause the species to grow in the wild. Japanese knotweed is also classed as controlled waste under the EPA 1990, and must therefore be disposed of safely at a licensed landfill site, according to the Environmental Protection (Duty of Care) Regulations 1991 (SI 1991/2839).

The *Knotweed Code of Practice: Managing Japanese Knotweed on Development Sites* was produced by the Environment Agency towards the end of 2006, and provides advice and guidance in dealing with knotweed.

Review activity

Below are three different scenarios, which cover many of the core environmental issues above, as well as some related areas which a property lawyer may need to address. The issues and liabilities increase with each scenario, such that those in the first scenario will undoubtedly be included in the third.

(1) Operation of a dry cleaners

A client wants quick legal advice on what environmental liabilities he may face for operating a typical dry-cleaning business.

(2) Mixed use inner-city redevelopment

A developer wishes to purchase and knock down a large inner-city building (built in the 1950s), and to build hundreds of new offices and residential units. During investigations it discovers that there is a lack of complete history on the site's use, but a small petrol station was in operation on part of the land until 10 years ago. During excavation the developer finds the remnants of an old Roman wall. What environmental issues are raised on these facts alone?

(3) Sale of an aluminium and steel foundry

A plc manufacturing giant wishes to purchase a large steel foundry, to add to its production capabilities. You know the site firsthand: it has been in use as a factory since the early 1900s and it is near a major river. What environmental issues would this raise, in addition to the typical activities and impact of a factory?

Chapter 8
Searches and Enquiries

8.1	Local search and enquiries	99
8.2	Planning matters	99
8.3	Drainage	100
8.4	Highways	100
8.5	Contaminated land	100
8.6	Enquiries of the seller	100
8.7	Survey and inspection	100
8.8	Special searches	101
8.9	Investigation of title	101
Review activity		101

A buyer of development land (or other commercial property) will make the same pre-contract searches and raise broadly similar pre-contract enquiries as a buyer of residential property. This part of the book does not intend to repeat sections of the Legal Practice Guide, ***Property Law and Practice***; rather it focuses upon the particular concerns of a buyer of a development site at the pre-contract stage.

8.1 Local search and enquiries

The usual form of application for a search and enquiries should be submitted to the local authority in duplicate together with the fee. A plan should be attached so that the local authority can identify the land concerned.

In commercial transactions, consideration ought to be given to the possibility of raising the optional enquiries which are set out in form CON29O, in addition to the usual CON29R enquiries. An additional fee is payable in respect of each optional enquiry. These enquiries are designed to cover matters which are relevant only in particular kinds of transactions.

By way of example, on the acquisition of a development site, the buyer's solicitor ought to consider raising the optional enquiry relating to the location of public footpaths or bridleways which may cross the development site (since consent of the local authority would be required in order to divert them), and the optional enquiry relating to the location of gas pipelines to see if any run under or near the property (since this may affect development of the land). Prudent purchasers will opt for safety by paying for replies to all of the optional enquiries.

In reviewing replies to CON29R enquiries, particular attention should be given to information relating to planning matters affecting the property and access to the site over adopted highways.

8.2 Planning matters

The developer will want to know whether planning permission currently exists in respect of all or part of the site, or whether there have been any past applications for permission which have been unsuccessful. (The fact that an application for development was recently refused will be an important consideration for a developer.) He will also need to know what type of land use is currently indicated by the local planning authority in the development plans for the area in which the site is situated. Any existing or proposed tree preservation orders must be clearly pointed out to the developer.

8.3 Drainage

It will be important for the developer to establish how foul and surface water currently drains away from the property to the public sewers (ie through main drains, private drains, or watercourses) so that he can estimate whether the current drainage system will be able to cope with foul and surface drainage from the developed site, or whether new drains will have to be constructed. If the site is vacant land, there are unlikely to be any drains serving it, and therefore he will need to know the location of the nearest public sewer where connection of newly-constructed drains may be made.

8.4 Highways

The developer will need to know that immediate access to the site can be obtained from a public highway, and that there are no new highways proposed in the vicinity of the site which would adversely affect his development.

Some of the information to be gleaned from the enquiries may simply confirm matters already known to the developer through site inspections and surveys, and through discussions between the developer and the local authority regarding the possibility of obtaining planning permission to develop the site.

8.5 Contaminated land

There is a danger that a buyer of land will become liable to pay excessive clean-up costs in relation to contaminated land. See **Chapter 7** regarding contaminated land and suggested ways of reducing the risk.

8.6 Enquiries of the seller

Pre-contract enquiries of the seller will be raised on one of the standard printed forms of enquiry, or on the buyer's solicitors' own word-processed form of enquiry. Additional enquiries may be raised as the buyer's solicitor considers appropriate. These may focus upon discovering further information about the planning status of the site, the location of public drains and highways, the suitability of the land for building purposes and possible past contamination of the land. Again, information regarding these matters is often discoverable from other sources, but that alone should not be a sufficient reason for the seller to refuse to provide answers.

8.7 Survey and inspection

Even though the land may be vacant, the developer-client should be advised to commission a survey of the land. Primarily, his surveyor will be checking on the suitability of the land for building purposes, in terms both of land stability and means of access and drainage. However, regard must also be had to the provisions of the Environment Act 1995 (EA 1995), and a thorough environmental survey of the land should be conducted to ensure that the developer does not acquire land which could have a potential clean-up liability under that Act.

For a number of reasons, an inspection of the property must always be conducted before exchange of contracts in order to:

(a) assist in establishing ownership of, or responsibility for boundary walls, hedges and fences;

(b) discover the existence of public or private rights of way which may be evidenced by worn footpaths, stiles, or breaks in the hedgerows;

(c) spot the presence of overhead electricity power lines which would prevent or impede development. If there are power lines, the land is likely to be subject to a written wayleave agreement between the landowner and the electricity company giving the

company the right to maintain its supply across the land. A copy of the agreement should be requested from the seller;

(d) discover the rights of persons in occupation of the land. Solicitors are accustomed to thinking only in terms of a contributing spouse as the type of person who has occupiers' rights. However, with a development site, it is not unknown for a solicitor to overlook the presence of several cows in the corner of a field, which is unremarkable if the seller is a farmer but could be serious if the cows are grazing by virtue of rights of common, or under an agricultural or farm business tenancy;

(e) ensure that adjoining landowners do not enjoy the benefit of easements of light or air which would impede the buyer's proposed development.

8.8 Special searches

The need to raise CON29O optional enquiry 22 relating to the registration of the property in the commons register maintained by the county council will depend upon the type and location of the land being acquired, but the case of *G & K Ladenbau (UK) Ltd v Crawley and de Reya* [1978] 1 All ER 682 serves as a warning to all solicitors of the dangers of overlooking the necessity for raising such an enquiry in appropriate cases. In that case, solicitors were held to be negligent for not having carried out a commons registration search in respect of a site being acquired for a new factory development. If a rural site is being acquired, enquiry 22 should always be made. If an inner-city industrial site is being acquired for redevelopment, this enquiry might be inappropriate. However, between these two extremes there will be other cases where the buyer's solicitor is unsure as to whether or not such an enquiry is necessary, and in those cases it would therefore be prudent to raise enquiry 22.

Other special searches may be appropriate, depending on the circumstances of the acquisition.

8.9 Investigation of title

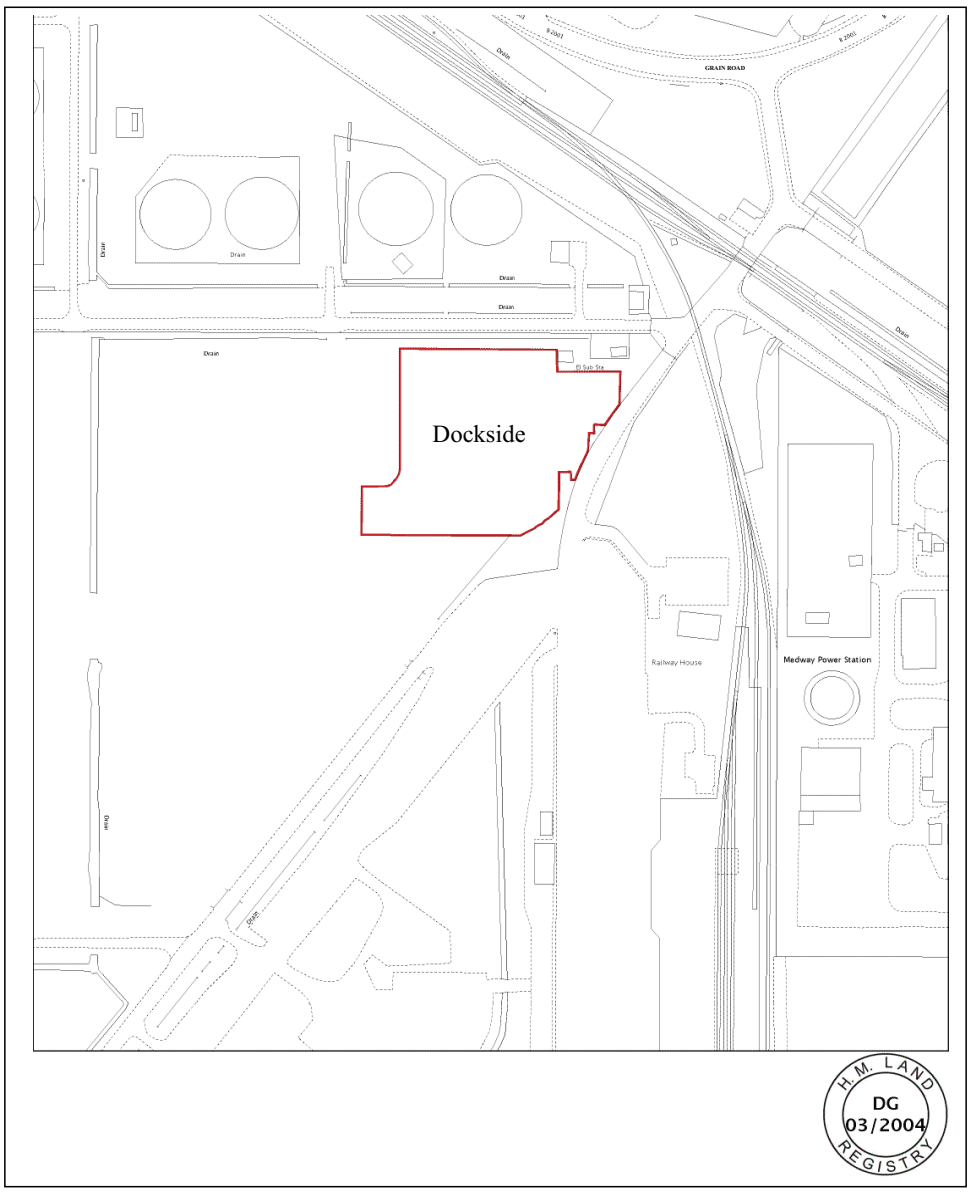
Title is almost invariably deduced and investigated at the pre-contract stage of the transaction.

A thorough investigation of title is required in the same way as in the case of residential property. The developer-client will be particularly concerned to ensure that the property enjoys the benefit of all necessary easements and rights of access (both for the purpose of developing and for future occupiers of the completed development) and drainage (for foul and surface water). He will also need to be satisfied that there are no covenants restricting the proposed development or use of the land; or if there are, that they will be released, removed or modified, or that appropriate insurance will be available, and that any easements which burden the property will not prevent or restrict the proposed development or use.

Review activity

Consider the development site in Canvey Island, Essex shown in the title plan overleaf. If you were acting for the prospective buyer of this site, what searches and enquiries would you raise?

LR	TITLE NUMBER **K866133**	N
	ESSEX:THURROCK	
ORDNANCE SURVEY MAP REFERENCE: TQ8674NE	Scale 1:1250	



Chapter 9
Construction Projects

9.1	Introduction	103
9.2	Who will be involved? The design and construction team	103
9.3	Different forms of procurement	106
9.4	Duties owed to third parties	112
9.5	Protecting third parties	115
9.6	Dispute resolution	119
Review activity		120

9.1 Introduction

Having completed the acquisition of a site which is physically capable of being developed, and which is not encumbered in a way which would impede development, and having obtained satisfactory planning permission and sufficient funds, the client will now want to obtain a building which will be completed within a satisfactory timescale, within budget and in accordance with his specified requirements.

9.2 Who will be involved? The design and construction team

9.2.1 The employer

The employer is the owner of the site who will employ various professionals to design and construct a building upon his land. For the purposes of this book, the employer is a client who has acquired a site with the aim of developing it, and who will grant leases of the completed development. This part of the book assumes that the client, whilst involved in commercial property, is not a member of the construction industry and will, therefore, need to employ other persons in connection with design and construction.

9.2.2 The building contractor

In a traditional building contract (see **9.3.2**), the building contractor is engaged by the employer to construct a building in accordance with plans and specifications prepared by the employer's architect (see **9.2.3**). The contractor (sometimes called the 'main contractor' or 'principal contractor') will enter into a building contract with the employer, although he may not necessarily carry out all, or indeed any, of the building works. Instead, the contractor may enter into sub-contracts with other builders or trade contractors who will carry out the work. These sub-contractors are likely to be specialists in particular areas of the construction industry, such as lift sub-contractors, cladding sub-contractors or mechanical and electrical sub-contractors, so that, in a large project, there may be several different sub-contractors who execute works on different parts of the development. Most traditional forms of building contract permit sub-contracting only with the prior written consent of the employer (to be given through the agency of his architect), and some building contracts require the sub-contractors to be engaged on specific terms and conditions acceptable to the employer, which may include the obligation on the sub-contractors to grant collateral warranties (see **9.5.1**) to the employer/lenders in relation to the works carried out under their sub-contracts.

There are many different standard forms of building contract used in the construction industry, and this chapter does not intend to provide a detailed analysis of the obligations of the employer and the main contractor. The basic obligations of the employer under most traditional forms of contract are to give up possession of the site to the contractor (to enable

uninterrupted building works to commence), not to interfere with the execution of building works (as the contractor has an implied right to complete the works, as well as a duty to do so), to appoint an architect for the purposes of the contract (ie to supervise the execution of the works, in his role as designer of the works, and to certify when the building has been satisfactorily completed and therefore adjudged to have reached the stage of 'practical completion'), to nominate sub-contractors to carry out the works (unless the contractor is to select his own), and to pay the price payable to the contractor as and when the contract requires.

In return, the contractor agrees to complete the work set out in the contract in the form of the architect's plans and specifications. When the architect has issued a certificate of practical completion, the contractor becomes entitled to receive full payment of the contract price less an amount known as 'retention' monies, and the employer is able to resume possession of the site for the purpose of granting leases to his tenants. The retention monies are held until such time as any minor works still to be completed at practical completion, known as snagging items of work, are completed, whereupon the retention monies are released to the contractor and a 'final certificate' is issued. If the contractor does not complete the works on time, the employer will usually be able to levy liquidated damages for delay, the amounts of which the parties will have agreed at the outset of the project. Such damages must represent a 'genuine pre-estimate' of the losses likely to be incurred by the employer, otherwise there is a danger that they will be classified as penalties which are unenforceable under English law.

Obligations as to quality and fitness of the building materials are implied under s 4 of the Supply of Goods and Services Act 1982, and s 13 of that Act implies a term that the contractor will exercise reasonable care and skill to see that the works will be of satisfactory quality and reasonably fit for their intended purpose. However, notwithstanding his implied obligations, the building contract is likely to contain an express obligation to execute the works in accordance with a standard prescribed by the contract and in accordance with the employer's requirements and performance specifications. The 'fitness for purpose' implied term referred to above is often included as an express term of the contract and is heavily negotiated between the parties. Employers sometimes seek an obligation that the contractor will carry out the works so that completed project as a whole (rather than simply the works) is fit for purpose. Conversely, contractors often seek to exclude fitness for purpose obligations altogether, spurred on by their professional indemnity insurers, by stating that such risks are uninsurable. A compromise is commonly achieved by linking the obligation of the contractor back to the wording of the Act, with a clause in the contract being inserted stating that the liability of the contractor shall be to carry out the works (rather than the completed project as a whole) so that such works are reasonably fit for their intended purpose.

It should be noted that with all forms of procurement, save for construction management (see **9.3.4.2**), there is no privity of contract between the employer and the sub-contractors since it is the main contractor who engages their services. However, the main contractor should be made liable under the terms of the main contract in respect of the acts or omissions of the sub-contractors. As noted above, in major projects, collateral warranties (see **9.5.1**) are often sought by clients from a list of principal sub-contractors, ie those whose packages of work are particularly important by size, value or the nature of their particular expertise. A client may regard any sub-contractors' warranties beyond such principal sub-contractors as an added benefit, but will likely be relying on the strength of the main contractor's covenant in the event that a defect arises in the completed works.

9.2.3 The architect

In a traditional form of contract the architect is engaged by the employer to carry out various tasks in relation to the design of the building. Broadly speaking, the architect prepares plans and specifications of the works required by the employer from which the builders will take

their instructions, and he will supervise the execution of those works by the building contractor (or sub-contractors) in accordance with the plans and specifications. When the architect is satisfied that the works required by the building contract have been completed, he will issue a certificate of practical completion. As noted at **9.2.2**, this triggers the release of payments to the contractor save for retention monies, which are released only when snagging has been completed. In some instances, where, for example, there are several sections of the works comprising a building contract, the architect may issue sectional completion certificates to reflect the completion of different phases of the project.

9.2.4 The quantity surveyor/cost consultant

The quantity surveyor or cost consultant is engaged by the employer (or by the architect on behalf of the employer) to estimate the quantities of the materials to be used and to set them into bills of quantities. What the quantity surveyor or cost consultant does is to measure the amount of work and materials which will be necessary to complete construction in accordance with the architect's plans and specifications. On the basis of his bills of quantities, building contractors will be able to work out the amount of their estimated cost of construction.

9.2.5 The engineers

In large construction projects, there may be a team of consulting engineers, including a structural engineer, engaged by the employer to give advice on structural design, and mechanical, electrical, heating and ventilating engineers, who give advice to the employer on matters within their areas of competence.

The architect, quantity surveyor and team of consulting engineers, as professional people, owe the employer a duty by contract to carry out the work required of them with reasonable skill, care and diligence. The standard of care expected is the standard of the ordinary skilled man exercising and professing to have that special skill. If any one of them falls below that standard, or below any higher standard of care set by the professional appointment under which he is engaged, he will be liable in damages for breach of contract.

9.2.6 The project manager

In addition to the consultants referred to above, clients will often engage a project manager on major projects to assist with managing the contractor and professional team to achieve a successful completion of the project. The role of the project manager will be to coordinate the other team members, ensure deadlines are met and oversee the project as a whole.

9.2.7 The construction, design and management coordinator

There is also an obligation on clients involved in major construction projects in the UK to engage a construction, design and management coordinator (a 'CDM co-ordinator'). The updated Construction (Design and Management) Regulations 2007 (SI 2007/320) (the CDM Regulations), which came into force on 6 April 2007 and which replaced the Construction (Design and Management) Regulations 1994 (SI 1994/3140), govern the relevant obligations of the client and team members. The CDM coordinator's function is to ensure that the project is carried out in accordance with applicable health and safety regulations. For example, the CDM co-ordinator will ensure that the contractor provides adequate welfare facilities for its workers on site and that the site is adequately protected with hoarding. There are also general duties on all team members to communicate, coordinate and cooperate effectively with one another. Breach of the CDM Regulations can lead to criminal as well as civil liability.

9.3 Different forms of procurement

9.3.1 Introduction

The way in which risks and responsibilities are allocated between the parties on a construction project is determined by the procurement process and form of construction contract used. There are various industry bodies, one of which is the Joint Contracts Tribunal (JCT), which over the years have developed their own standard-form construction documents. These contain different terms and conditions depending upon what risks the employer or the contractor will be taking in relation to the project. As these industry bodies usually represent building contractors (rather than employers), it is usually necessary for lawyers acting for the employer to amend the standard terms and conditions to redress the balance of risk in favour of the employer.

The key elements of any building contract usually centre around time (ie when does the project need to be delivered), price (ie how much is the project going to cost) and quality (ie what standard of skill and care will be required, and is that appropriate for the intended use of the finished project, eg a high-tech city office or tower as opposed to a low-grade warehousing facility).

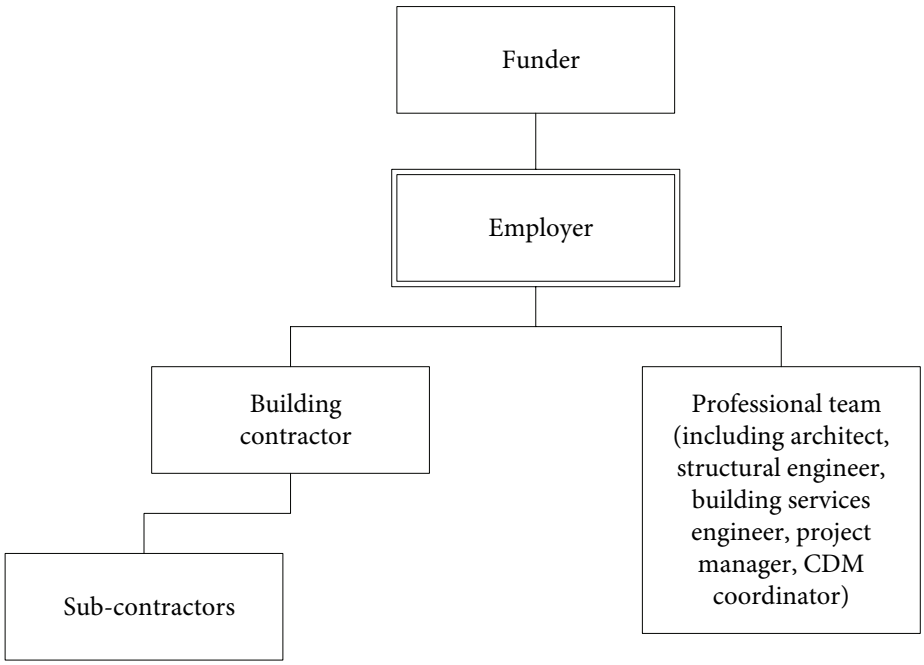
The relative importance attached to each of these critical factors will often determine the procurement process adopted and the form of building contract used. Many building projects require external funders in the form of commercial lenders to finance the construction of the project. The different forms of procurement are outlined below.

9.3.2 Traditional contract

A key feature of traditional procurement is that the design element and the construction of a project are separate. As noted at **9.2**, the building contractor is engaged to construct the project pursuant to the building contract, and the professional consultants are engaged to design the project under the terms of their professional appointments.

The typical structure of traditional procurement is set out in **Figure 9.1** below.

Figure 9.1 Structure of traditional procurement



Some advantages and disadvantages of a traditional contract are listed in **Table 9.1** below.

Table 9.1 Advantages and disadvantages of a traditional contract

	Time	Money	Quality
Advantages	More certainty in the construction period, as the design is completed and the contractor therefore has to build according to the detailed plans.	Greater certainty in the fixed lump-sum contract price as the design is fully developed prior to construction.	The detailed contract documents can specify the employer's exact requirements so should lead to better quality, with the construction phase starting only after the detailed design has been completed.
Disadvantages	Longer overall, because the employer needs to complete the design before the construction phase commences. Employer-driven changes to the project during construction phase may delay the project.	Additional design fees are paid to professional consultants. Employer-driven changes to the project during construction may increase costs.	The building contractor may not be solely responsible for the works as in the case of a design and build contract. The technical documents, forming part of the building contract, need to set out precisely the requirements of the employer. This places an additional burden on the employer.

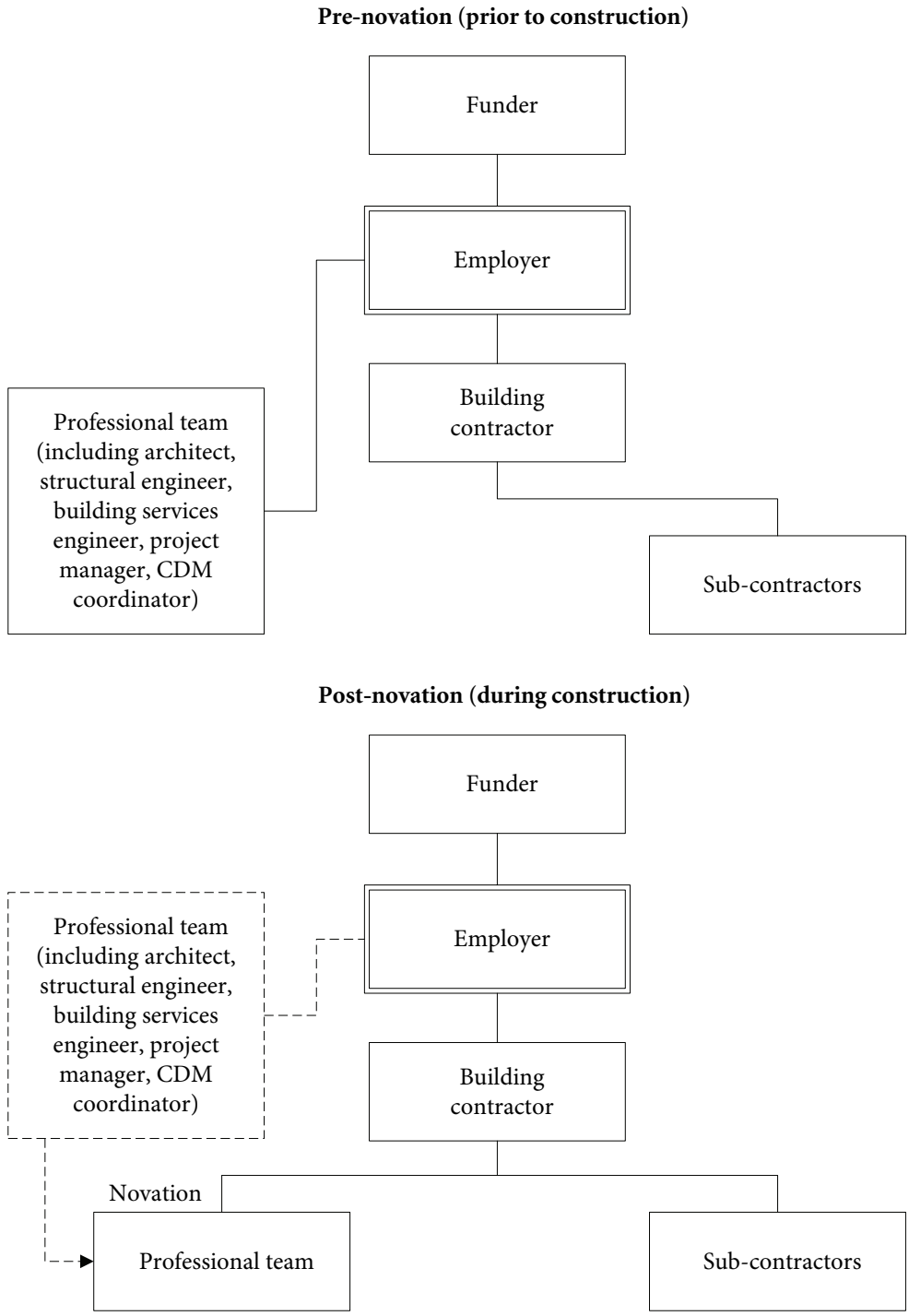
9.3.3 Design and build contract

Under a design and build building contract, the building contractor is responsible for both the design and the construction of a project. The building contractor may appoint its own design team or sub-contractors to carry out design, but the building contractor is liable to the employer for the design (as well as construction) of the project.

In major construction projects where employers often seek an effective and complete risk transfer, the employer ordinarily appoints its own professional consultants to develop initial designs. After such designs have been developed, the employer, principal members of the design team (ie the architect and engineers) and the building contractor will enter into a 'novation' agreement. This tripartite agreement transfers both rights and responsibilities from the employer to the building contractor. The building contractor is then able to instruct the consultant previously engaged by the employer to complete the detailed design for the project, and also has direct rights against the consultant in the event that such designs developed under the appointment are deficient.

The typical structure of design and build procurement is set out in **Figure 9.2** below.

Figure 9.2 Structure of design and build procurement



Some advantages and disadvantages of a design and build contract are listed in **Table 9.2** below.

Table 9.2 Advantages and disadvantages of a design and build contract

	Time	Money	Quality
Advantages	May be quicker than a 'traditional' contract because the employer needs to develop only outline designs.	Offers certainty by having a fixed lump-sum contract price.	The 'single point of responsibility' can help manage the employer's requirements as the employer can instruct one party to undertake its requirements.
Disadvantages	An employer who appoints and novates a team of professional consultants may take a similar total time to a traditional contract. Employer-driven changes to the project during construction phase may delay the project.	Employer-driven changes to the project may significantly affect the final price paid.	Where the building contractor has single point responsibility for design and construction, there may be a temptation to drive down quality to save costs, as the building contractor's profit depends on meeting the building contract requirements at the lowest cost.

Design and build contracts are currently the most popular form of building contract, and are widely used on both simple structures and major projects.

9.3.4 Management contracting and construction management

The two forms of procurement referred to above are the most commonly used forms of procurement for building projects in the UK. However, other forms of procurement are available, one of which is called management contracting and the other of which is called construction management. These are usually adopted only by sophisticated developers on high-value projects, who are familiar with the procurement processes involved.

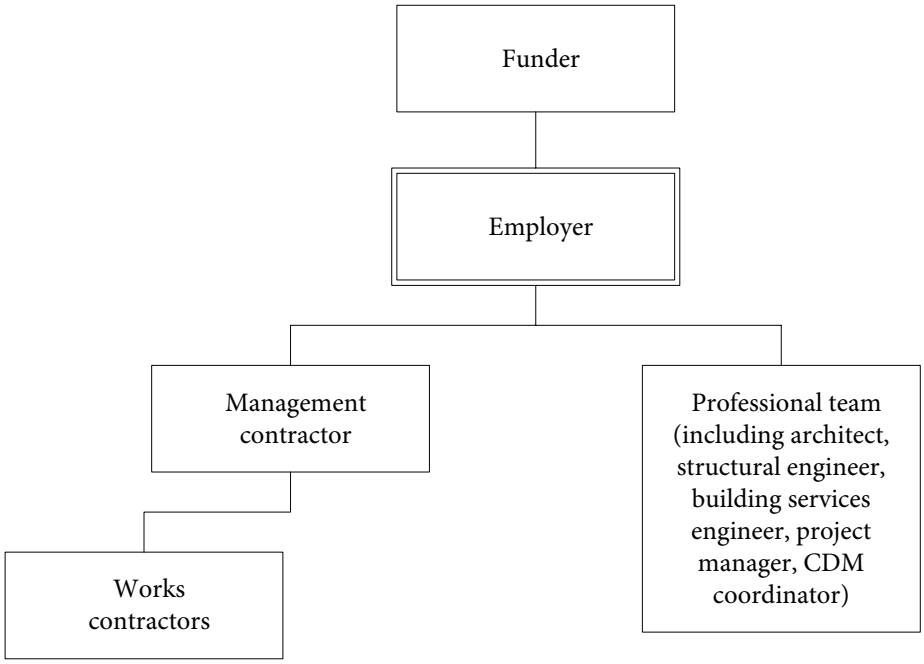
9.3.4.1 Management contracting

A management contractor is appointed by the employer and is similar to a professional consultant rather than a building contractor. The management contractor is responsible for managing the construction of the project.

The management contractor does not carry out the work itself, but instead appoints works contractors to carry out the work and any specialist design. The management contractor administers the works contracts. The employer looks to the management contractor to see that the work is carried out properly, but the management contractor has very limited liability to the employer for failure by the works contractors to carry out their works.

The typical structure of management contracting procurement is set out in **Figure 9.3** below.

Figure 9.3 Structure of management contracting procurement



Some advantages and disadvantages of management contracting are listed in **Table 9.3** below.

Table 9.3 Advantages and disadvantages of management contracting

	Time	**Money**	**Quality**
Advantages	May be quick: design and construction may progress in parallel as works contractors instructed on an ad hoc basis.	Shorter construction period and more flexible arrangements may allow the project to adapt to meet employer's needs.	Management contractor and design team can work together flexibly to meet employer's requirements.
Disadvantages	No certain construction period, and could be haphazard if works contractors not managed properly. The employer may have to claim delay damages from the management contractor and many works contractors if the requirements of the works contracts and management contract are not met.	No certain construction price. Number of different works contractors involved.	Overall responsibility for quality may be diluted between the professional consultants, the management contractor and the works contractors. No single point of responsibility for design and construction.

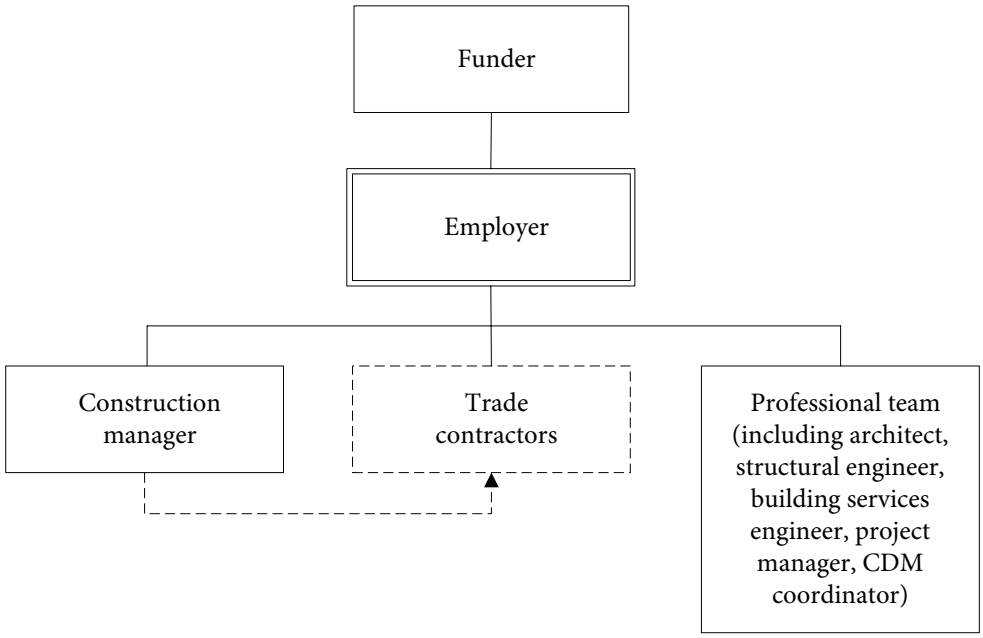
9.3.4.2 Construction management

The employer appoints a construction manager and the professional consultants. The construction manager is responsible for managing the construction of the project. The remaining professional consultants carry out the remaining design.

Where this form of procurement differs from management contracting (see **9.3.4.1**) is that whilst the construction manager arranges for the employer to appoint specialist trade contractors and administers the trade contracts, it is the employer that actually enters into the trade contracts themselves. The trade contractors carry out construction and any specialist design directly for the employer.

The typical structure of construction management procurement is set out in **Figure 9.4** below.

Figure 9.4 Structure of construction management procurement



Some advantages and disadvantages of construction management are listed in **Table 9.4** below.

Table 9.4 Advantages and disadvantages of construction management

	Time	**Money**	**Quality**
Advantages	May be quick: design and construction may progress in parallel as works contractors instructed on an ad hoc basis.	Compared with management contracting, the construction manager may charge a fixed fee, rather than a percentage on the whole construction price.	Construction manager and design team can work together to meet employer's requirements. Flexible process can help meet employer's requirements.

	Time	Money	Quality
Disadvantages	No certain construction period and could be haphazard if works contractors not managed properly. The employer may have to claim delay damages from the many trade contractors if the requirements of the trade contracts and management contract are not met.	No certain construction price. Even with a construction manager, the client needs to be hands-on with the trade contractors, and this requires time, experience and resources.	Overall responsibility for quality may be diluted between professional consultants, the construction manager and the trade contractors. No single point of responsibility for design and construction.

9.3.5 Pricing mechanisms

Within the different forms of building contract, there is often flexibility as to how the price paid by the employer to the building contractor will be calculated. A 'fixed price lump-sum' contract gives the employer certainty as to what he will pay to the building contractor for the works described in the building contract, provided that the employer does not change his description of the works required to be carried out, or there are no grounds available to the building contractor to claim additional monies under the building contract.

Alternatively, certain building contracts have a guaranteed maximum price (GMP) mechanism in them for determining the price to be paid to the building contractor. This allows the employer to set a maximum price payable to the building contractor; it often includes financial incentives for the building contractor to achieve cost savings in relation to the works so that they cost less than the GMP and allow the contractor to benefit from any such cost savings.

Another way of calculating the price to be paid is found in a 'measurement' contract. Under a measurement contract, the employer pays the building contractor for expected levels of work carried out. Then, at given stages of the project or when the project is complete, the employer's professional consultants review the amount of work the building contractor has actually carried out. The building contractor or the employer makes any necessary balancing payment, if the building contractor has carried out more or less work than the parties originally expected.

There are also bespoke forms of building contract to cater for different types of contract. Major engineering contracts use their own bespoke forms of contract. Project finance transactions also have specific forms of contracts, as do projects carried out overseas, government projects and partnering or joint venture contracts. The key point to note here is that all projects place different values on the three critical objectives of time, cost and quality, and the relative importance attached to each of these factors will often determine the preferred method of procurement and the choice of contract.

9.4 Duties owed to third parties

9.4.1 Introduction

If the project results in the employer obtaining a completed building which turns out to be defective by reason of its design or the materials used, or by reason of the manner in which it

was constructed, the employer is likely to have a claim for breach of contract against those members of the design and construction team who caused the defect. Contractual damages are assessed under the rule in *Hadley v Baxendale* (1854) 9 Exch 341, under which the claimant will be able to recover:

(a) losses arising naturally, according to the normal course of things, from the breach of contract; or

(b) such losses as may be reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as a probable result of the breach. This is likely to enable the employer to recover any costs incurred in carrying out remedial repairs, subject to the normal limitation rules under the Limitation Act 1980.

However, consider the position of a buyer from the employer who discovers a defect after completion of his purchase of the freehold; or that of a mortgagee of the freehold who discovers that the value of his security is seriously impaired because of a hidden design or construction defect; or that of a tenant of the building who enters into a lease on the basis of a full repairing covenant, which may oblige him to repair damage caused by such inherent defects. Traditionally, such third parties were unable to bring a claim for breach of contract as they did not have a contractual relationship with the employer's development team. Because of the rules of privity of contract, the practice arose of members of the development team giving a collateral warranty with such parties in order to enable them to bring a claim; as to collateral warranties, see **9.5.1**. In the absence of such a collateral warranty, the only other potential remedy for a third party lies in tort. There are, however, problems in bringing such a claim, as to which see **9.4.3**.

9.4.2 Contracts (Rights of Third Parties) Act 1999

The Contracts (Rights of Third Parties) Act 1999 came into force on 11 May 2000 and applies to contracts entered into on or after that date. It allows the parties to a contract to confer rights on third parties. A third party, such as a future tenant or mortgage lender, may enforce the contract as if he were a party to it, provided that the contract expressly provides that he may, or that it purports to confer a benefit on him. The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description, but need not be in existence when the contract is entered into.

In theory, therefore, this Act provides a mechanism whereby third parties would be able to enforce the contractual obligations of the employer's development team if, for example, the contract was stated to be for the benefit of 'all future tenants' of the building. Whilst the use of the Act has been promoted widely amongst City firms of solicitors, there has been a general reluctance on the part of beneficiaries, in particulars funders, to accept it, many of whom seem to prefer the paper security of holding a document, ie in the form of a collateral warranty, rather than relying on the operation of the Act.

It seems likely, therefore, that, for the time being at least, traditional forms of protection (eg tort or collateral warranties) will still need to be relied upon. However, the Act has great potential benefits, particularly for major projects, given the sheer number of interested third parties requiring rights. The use of the Act to grant third parties rights ought therefore to be promoted further as a way of minimising the paper trail that otherwise results in large-scale projects.

9.4.3 Liability in tort

In seeking to bring a claim in tort, the problem that the buyer, lender or tenant will encounter is that any loss they sustain as a result of faulty design, materials or workmanship is likely to be classified as pure economic loss and therefore generally irrecoverable in tort. For example, in the case of the freehold buyer, if he discovers after completion of his purchase that the foundations of the building have been laid in a negligent fashion, so that the building cannot

be used without remedial works first being carried out, he can either execute the repairs himself (thereby incurring repair costs), or dispose of the defective building to someone else (probably at less than the purchase price) or simply abandon the property (thereby wasting the money paid for the building in the first place); but whichever course of action the buyer takes, the loss he incurs is purely economic, and only in limited circumstances will the courts allow the claimant to recover such loss in tort.

To establish a claim in negligence, the claimant will have to show that the defendant owed him a duty of care, that the defendant breached that duty and that the claimant suffered an actionable form of damage as a result. Following a series of House of Lords decisions in the late 1980s and early 1990s, it is safe to say that liability in the tort of negligence will arise only if there is a breach of one of two categories of duty. The first duty is based upon the decision in *Donoghue v Stevenson* [1932] AC 562, where liability will arise out of a lack of care which results in reasonably foreseeable damage to persons or to property (other than to the property which causes the damage). The second duty is founded upon the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and is concerned with a lack of care which causes non-physical economic loss.

9.4.3.1 Liability for physical damage

The duty of care under *Donoghue v Stevenson* [1932] AC 562 is a duty to avoid physical injury to person or property. It imposes a duty upon the manufacturer of a product (eg a builder constructing a building) to take reasonable care to avoid damage to person or property through defects in the product. However, it does not impose a duty upon the manufacturer to ensure that the product itself is free from defects. Simply because the design or construction of the building is defective does not necessarily render the person who was responsible for the defect liable in damages, even if a duty was owed and the damage was foreseeable. The case would turn upon whether the claimant suffered a type of loss recognised by the courts as legally recoverable. Pure economic loss (eg the cost of repairing the defect, and the loss of profits while repairs are carried out) is not recoverable under *Donoghue v Stevenson* principles.

In *D&F Estates Ltd v Church Commissioners for England* [1989] AC 177, the House of Lords held that liability in tort arises only where there is some physical damage to the person or to some other property, and that damage to the building itself which merely reduces its value is pure economic loss and thus irrecoverable in tort (except under *Hedley Byrne v Heller* principles – see **9.4.3.2**). In *Murphy v Brentwood District Council* [1990] 2 All ER 908, the House of Lords reaffirmed its earlier decision and stated that the idea that component parts of the same building could amount to separate species of property (the 'complex structure' theory) – so that, for example, negligently laid foundations could be said to have damaged 'other' property when they led to cracks appearing in the walls – was not correct.

To give an example of what may be recoverable, consider the position where, after completion of his purchase of the freehold, a defectively-constructed roof collapses and causes personal injury to a buyer. The buyer may be able to recover damages in respect of his personal injuries and any economic loss arising out of those injuries (eg loss of earnings), but he will not be able to recover the cost of repairing the roof itself since that loss is pure economic loss.

9.4.3.2 Liability for economic loss

Economic loss is a term which can be used to describe any monetary loss. Pure economic loss is monetary loss which is not connected to physical injury to person or property. With one or two isolated and doubtful exceptions (see, eg, *Junior Books v Veitchi* [1983] 1 AC 520), pure economic loss is recoverable in tort only where, in a special relationship of close proximity, a duty of care is owed to avoid loss arising from a negligent misstatement. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, the House of Lords decided that, in a relationship of close proximity, where a person was seeking information from one who was possessed of

certain skills, a duty was owed by the latter to exercise reasonable care if he knew, or ought to have known, that reliance was being placed upon his skill and judgement. Put simply, the duty amounts to a duty to prevent pure economic loss arising from the making of a statement or the giving of advice. In the context of a building project, many statements are made and much advice is given, but proximity of the parties and reliance are the fundamental factors.

The extent of this duty was restated and redefined by the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605. It is now the case that, in order for there to be the requisite degree of proximity between the parties for the duty to arise, the defendant (ie the person who made the statement or gave the advice) must have known (both in the preparation of what was said and in the delivery) that the statement would be communicated to an identified person or group of persons in connection with a transaction of a particular type, and that the recipient would be very likely to rely upon it.

While the employer, by reason of his contractual relationship with his professional advisers (eg the architect or structural engineer), might easily establish the requisite degree of proximity and show reliance upon the advice given, his tenant, buyer or the buyer's lender is unlikely to be able to show the requisite proximity. In other words, the pure economic loss that a third party suffers remains irrecoverable.

As a result of this inability to recover the cost of repairing damage to the building outside a contractual relationship, various devices have been utilised by buyers, their lenders, tenants and the employer's own financiers. These are examined further at **9.5**.

9.5 Protecting third parties

9.5.1 Collateral warranties

A collateral warranty is an agreement (under hand or by deed) entered into by someone engaged in the construction or design of a building, by virtue of which that person assumes a contractual duty of care for the benefit of someone who has an interest in seeing that the building is free from defects, but who does not otherwise have a contractual relationship with the warrantor. Collateral warranties are commonly required to be given by the consultants, the main contractor and the sub-contractors to the freehold buyer of the development, his lender, the employer's financiers and possibly (if negotiated) the tenant. The employer does not need warranties from either the building contractor or the design team as he is in direct contract with such parties under the building contract and professional appointments. However, he may require warranties from the sub-contractors with whom he has no direct contractual relationship as additional protection behind the main contractor's warranty, or may require warranties after the consultants have been novated to the contractor.

The key advantage of having collateral warranties is that they create the certainty of a contractual relationship, as opposed to the uncertainty that exists in tort. All the claimant would need to show in order to establish a claim is that the contractual duty contained in the warranty had been breached and that damage had ensued. Losses which can be described as purely economic will also be recoverable under contractual principals where the loss suffered as a result of the breach of warranty could reasonably be said to have been in the contemplation of the parties at the time the warranty was entered into.

Many of the standard building contracts and forms of consultancy appointment also contain suggested forms of collateral warranty. However, as with the terms of such contracts themselves, it is unlikely that well-advised employer/developer clients would accept these forms of collateral warranty as they often contain unacceptable limits of liability, once again driven by the requirements of the warrantor's professional indemnity insurers. For instance, standard forms of collateral warranty have been published by the British Property Federation, the Construction Industry Council and the Joint Contracts Tribunal, and have been approved

by the relevant professional bodies. Such forms of warranty will not be sufficient if acting for employer/developer clients, who will require bespoke forms of collateral warranty without extensive limitation of liability provisions. This is an area where solicitors are involved extensively in the negotiation of acceptable forms, and where the market at the time the negotiation takes place can play a large part in resolving such negotiations.

A collateral warranty will normally contain the following provisions:

(a) Confirmation that the warrantor (ie building contractor, sub-contractor or consultant) owes to the third party benefiting from the warranty a duty of care similar to that owed to the person employing him. The warrantor will already owe a duty of care to the person employing him, normally the developer, by virtue of being appointed under a contract by his employer to carry out the design or construction work. It will oblige the warrantor to use reasonable skill and care in the performance of his duties under the contract, and he will be negligent if he fails to do so.

(b) Confirmation that deleterious materials will not be used in the development. A warranty given by the architect will confirm that such materials will not be specified for use in the development, and a warranty given by the building contractor will confirm that such materials will not be used in the development. The materials that are not to be used may be listed in the warranty, cross-referenced to the list appearing in the appointment, or the warranty may exclude the use of materials that do not comply with British Standards or are known to be deleterious. Listing deleterious materials in the warranty itself has been largely replaced by a general warranty not to use deleterious materials. This is because certain materials which appeared on the lists included in warranties were found not to be deleterious, and producers of such materials were able successfully to challenge the presence of such materials on the lists and bring claims for misrepresentation. A general warranty not to use deleterious materials is therefore thought to be a safer approach to avoid claims of this nature.

(c) Confirmation that professional indemnity insurance cover will be maintained by the warrantor up to a specified amount for a specified period. The period will normally be either six years (if the warranty has been signed under hand) or 12 years (if the warranty has been entered into as a deed) from the date of issue of the certificate of practical completion in relation to the development. The beneficiary is usually entitled to request evidence that the relevant amount of professional insurance set out under the building contract/appointment is being maintained, and this can be provided in the form of a broker's certificate.

(d) Confirmation that, on giving appropriate notification to the warrantor, the person to whom the warranty is given may 'step into the shoes' of the developer and, upon paying to the warrantor any outstanding fees or sums due, may instruct the warrantor under the terms of the contract as though the person to whom the warranty is given had in fact been the warrantor's employer. This step-in right is essential for any contracting purchaser of the completed development or any funder. If the employer becomes insolvent during the development process, it will be crucial for the contracting purchaser or funder to ensure that the development is completed properly, and the best way of achieving this is to instruct the team originally appointed to carry out the development. The right of step-in is not required or appropriate for a tenant, who will enter into a lease only when the building has been completed and the risk of insolvency of the employer has passed.

(e) In the case of an architect or other person providing design material, an irrevocable, royalty-free licence to use that material in connection with the completion and subsequent maintenance of the development, with additional rights for the beneficiary to sub-licence if required. The copyright in the design material will normally remain with the designer but the person benefiting from the warranty will be able to use the material, though only to the extent that this is needed in connection with the

development. This is critical, as the design material is likely to include details of how the major pieces of equipment or plant in the building operate.

(f) Limitations on the number of parties that can benefit from the warranty. The warrantor, and his professional indemnity insurer, will wish to limit the number of parties to whom a warranty must be given. Although the giving of a warranty to a future purchaser (or two) or a lender will not normally cause any difficulty, providing a warranty to a future tenant other than a tenant who is critical to the success of the completed development may not always be accepted by the warrantor or his insurer.

(g) Similarly, there will be limitations/prohibitions on the assignment of the benefit of the warranty and often commercial caps on liability requested by the warrantor, who may also wish to state specifically that it shall be entitled to rely on any rights it has under the underlying consultancy appointment in defence of any claim made by the beneficiary of the warranty. This makes it vital for solicitors acting for the beneficiary of the warranty to undertake a specific review of the underlying building contract/professional appointment at this point, to ascertain whether or not there are similar caps on liability on which the warrantor will be able to seek to rely.

It is extremely unlikely that warranties will be given after the building contractor or professional team has been engaged, even if an additional fee for such warranties is provided to the building contractor or professional team. It is therefore essential that the professional/building contractor is contractually committed to give warranties pursuant to the building contract or professional appointment.

9.5.2 Other methods

9.5.2.1 Assignment of rights

The employer may consider attempting to satisfy the demands of his financier, buyer or tenant for protection against latent defects by assigning whatever rights the employer may have (primarily under contract law) against the contractor and the consultants. An assignment is probably appropriate only if made in favour of a financier, a buyer or a tenant of the whole of the development site. However, even where a tenant takes a lease of the whole of a development site, a landlord will be reluctant to part with his contractual rights in case the tenant's lease is forfeited or disclaimed. If collateral warranties can be provided to the interested third party instead, the landlord will be able to retain its rights against the contractor and design team.

Building contracts and contracts for the engagement of consultants may contain prohibitions on the assignment of the benefit of the contract without consent; and it seems that, following the House of Lords decision in *Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1993] 3 WLR 408, most prohibitions will be effective, although each clause will have to be interpreted to discover its exact meaning.

9.5.2.2 Declaring a trust of rights

Declaring a trust of rights may be considered as an alternative to an outright assignment where the employer is retaining an interest in the property and therefore does not wish to part with valuable contractual rights. In this way the employer can retain the benefit of the rights he has against the contractor and consultants, but declares that he holds them upon trust for the benefit of himself and his tenants. Again, the effectiveness of a trust has not been tested in the courts and may fall foul of the rule that the party claiming damages must have suffered a loss: in a trust arrangement the party claiming damages may have suffered no loss, for example if the employer has sold the building to a purchaser for full value (see **9.5.2.6**), and therefore damages would be irrecoverable.

9.5.2.3 Latent defects insurance

With residential properties, buyers are anxious to ensure that a newly-constructed property is covered by the National House Building Council (NHBC) Buildmark scheme, or other equivalent insurance. In the commercial field, there are no such standard schemes. However, following the Building Users Insurance against Latent Defects Report (BUILD Report), published in 1988 by the National Economic Development Office, several of the leading insurance companies in the UK have introduced latent defects insurance in respect of commercial properties. This is a concept which is very familiar on the Continent, where latent defects insurance has been used for some time. There it is known as 'decennial liability' insurance, reflecting the period of 10 years during which such an insurance policy is usually valid.

Policies will vary from company to company (and, indeed, from development to development), but the essential elements are likely to be similar across the board. Latent defects insurance commonly provides cover against damage caused by defective design or construction works for a period of 10 years after practical completion of the development (or such longer period as may be agreed with the insurer). The beneficiary of the policy is covered against the cost of making good most (but not necessarily all) damage caused by a design or construction defect (although not other risks), and the policy may cover other items of economic loss such as loss of rent, or loss of use of the building while repairs are being carried out. The policy can be taken out to cover the employer (as initial owner of the building) and his financiers. Most policies will also automatically insure subsequent owners and occupiers, which will obviously be the desired aim from the employer's point of view. The premium is likely to be substantial (perhaps 1.5% of development costs) and often prohibitive.

The advantages of such a policy are that there is no need for the claimant under the policy to establish legal liability for the damage incurred, and there ought to be easy access to funds to finance repairing costs and, possibly, to cover other economic loss. The disadvantages are that, as with other policies, the insurance may be subject to excesses (meaning that the claimant might have to fund, say, the first £50,000 of a claim), there are often significant exceptions (eg structural elements may be carved out of the policy) and that the insurer will invariably require some element of supervision over the execution of the works from commencement, since the risk he is taking on will be considerable. Such insurance is not something which can be obtained after the construction process is complete, and in any event, at that stage of the project risks are generally known.

9.5.2.4 Limiting repair covenants

In a landlord and tenant relationship, the tenant should consider limiting the scope of his repairing covenant. The main problem for a tenant is that the landlord is likely to insist upon the tenant entering into a lease which contains a covenant by the tenant to repair the demised premises. Provided the damage amounts to disrepair, the usual repair covenant imposed by the landlord may oblige the tenant to repair damage which is caused by a defect in the design or construction of the building. While the tenant can commission a full structural survey of the premises prior to the grant of the lease in an effort to discover defects, the very nature of a design or construction defect makes it unlikely that it will manifest itself until some time after the building has been completed and the lease granted.

It is therefore suggested that, on the grant of a lease of a relatively new building, the tenant should attempt to limit the scope of his repairing covenant by excluding (either totally, or for a limited period of, say, three or six years after the grant of the lease) liability to repair damage caused by latent defects. Not only should the tenant seek to exclude such liability from his own covenant, but he also should make sure that no vacuum is left in the repairing obligations under the lease by insisting that the landlord assumes this liability. If this is not done, there is a risk that the property may remain in disrepair. The landlord will be anxious to avoid having to

bear any repair costs in respect of the building, and so the limitation of the tenant's repairing obligations is a matter to be negotiated and will depend upon the relative bargaining strengths of the parties. It is most unlikely that the tenant would succeed in his negotiations if, in the agreement for lease, the tenant had insisted upon a degree of control and supervision over the execution of the landlord's works. The landlord would probably argue that the tenant had been given every opportunity before the lease was granted to discover defects and that he should, therefore, consider taking action against his professional advisers.

On the grant of a lease of part of a building, where the tenant would not ordinarily undertake repairing responsibilities in respect of the structure and external parts but would instead be expected to contribute via the service charge to the landlord's costs incurred in maintaining those parts, the tenant would seek to ensure that he was not obliged to contribute via the service charge to the landlord's costs of repairing damage caused by design or construction defects (either throughout the term, or for a limited period). Again, while the tenant could commission a full structural survey, design defects may not be apparent at the time of the survey, or may be hidden in some other part of the building to which the surveyor was unable to gain access.

9.5.2.5 Defect liability periods

In a landlord and tenant relationship, the tenant may seek the benefit of a defect liability period. If the landlord will not agree to exclude the tenant's liability for inherent defects in the lease, the tenant ought to press for the inclusion of a clause in the agreement for lease obliging the landlord to remedy any defects which appear within a short period of time following practical completion of the building. If the landlord agrees to the inclusion of a defects liability period, it is likely to mirror a similar clause in the building contract entered into with the contractor. Quite often, building contracts provide for the contractor to remedy any defects which manifest themselves within, say, the first six or 12 months after practical completion. By including a similar clause in the agreement for lease, the landlord is indirectly passing on the benefit of the clause to the tenant, but this should not be seen as an alternative to a limiting repair covenant.

9.5.2.6 Forced enforcement of remedies

A buyer, financier or tenant may seek the inclusion of a provision whereby the employer agrees to enforce his rights as original contracting party against the contractor or the consultants in respect of defects where loss or liability to repair would otherwise fall upon the former. Difficulties have arisen in this area, in that if the employer has received full market value on a sale of the property to a buyer, or has secured the inclusion of a full repairing covenant on the grant of a lease of the property to a tenant, he cannot be said to have suffered any loss upon which a claim could be maintained.

However, the House of Lords decision in the *Linden Garden* case (see **9.5.2.1**) has shown that in a commercial contract, where it was in the contemplation of the contracting parties that legal title to the property which formed the subject matter of the contract might be transferred to a third party before a breach had occurred, the original contracting party is taken to have entered into the contract for the benefit of himself and all persons who might acquire an interest in the property before the breach occurs. What this means is that, in certain circumstances, the employer may be able to recover damages for breach of contract in respect of loss incurred by his buyer, financier or tenant. This area is not without its complications, and the full ramifications of recent developments in this area have yet to be tested in full.

9.6 Dispute resolution

Disputes often arise in the construction context in relation to claims by the employer or end user that the works, materials or workmanship carried out by the contractor are defective, or

the contractor may bring a claim for additional time to complete the works or additional monies for doing so.

Before briefly considering the different types of dispute resolution relevant to construction contracts, whatever the contract says, in the event of a dispute, the parties are not compelled to resort to the courts for the settling of their differences. They can choose instead to attempt to settle their differences amicably. The parties are likely to consider factors including the cost and expense of bringing a claim and the uncertain and time-consuming nature of dispute resolution in determining whether to settle disputes through the courts rather than attempting to resolve disputes in a non-adversarial manner such as through conciliation, mediation or independent private enquiry.

The main adversarial methods of dispute resolution include adjudication, arbitration and litigation, and these are examined briefly below.

9.6.1 Adjudication

There is now a statutory right to adjudication which is designed to produce a decision that is at least temporarily binding on the parties. The right to adjudication is included within the Housing Grants, Construction and Regeneration Act 1996, which provides that any party to a construction contract has the right to refer any dispute arising under the contract for adjudication under a procedure complying with the Act. In order to satisfy the Act, the contract must include certain specific provisions, an important one of which requires the adjudicator to reach a decision within 28 days, or such longer period as both parties agree. If the parties do not explicitly lay down certain minimum provisions about the right to adjudication and the process thereof, an appropriate set of rules will be implied, known as the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649), which was issued by the Government as a statutory instrument made under the 1996 Act.

9.6.2 Arbitration

The parties may also agree that any disputes arising in relation to the contract will be resolved by arbitration. The Arbitration Act 1996 sets out the procedural and evidential matters to be adopted in relation to the settling of disputes by arbitration. In addition, there are standard arbitration rules, including the Construction Industry Model Arbitration Rules 1998 (CIMAR) and the Institution of Civil Engineers (ICE) Arbitration Procedure 1997. International arbitration is commonly used as a choice of dispute resolution in relation to international contracts.

9.6.3 Litigation

In practice, many disputes of a construction nature are resolved finally by litigation, with construction and engineering cases of any appreciable size ordinarily tried in the Technology and Construction Court, which is a specialist subdivision of the Queen's Bench Division of the High Court. The advantages of litigation include the ability to join third parties in the proceedings and the ability to deal with legal complexities. These may be outweighed by the advantages of alternative forms of dispute resolution such as arbitration or adjudication, which are often preferred as cheaper, quicker and more commercially expedient ways of resolving disputes.

Review activity

Scenario

Your client, Land UK plc (LUK), a large property developer based in the UK, intends to build a new office tower in the City of London. LUK is taking out a bank loan to fund the

development from the Royal Bank of England plc (R). The new tower is set to be a landmark, iconic building in the heart of the City, and LUK would like to engage an international architect to undertake the design of the tower. There will also be a number of other consultants, including structural and building services engineers, and the client will need to comply with UK health and safety legislation. In addition, the building will contain a large auditorium for board meetings, with a specialist acoustic engineering sub-contractor appointed to undertake its design and construction. The client has entered into a pre-let agreement with a major law firm, GoodLaw and Partners (G), who will be taking space on several floors of the building, one of which it intends to sub-let to an accountancy firm, HardSums and Partners (H).

Question

Consider what form of procurement your client might use to construct the tower, including the advantages and any disadvantages of such form of procurement, together with any rights each party involved in the transaction might require in the event that a defect arises in the building after its construction.

Chapter 10
An Outline of Taxation of Commercial Properties

10.1	Value added tax	123
10.2	Stamp duty land tax on leases	128
Review activity		129

10.1 Value added tax

At the outset of any property transaction, it is essential to consider the impact of VAT legislation and to advise the client accordingly. The reader will already be aware of the basic principles of VAT, which dictate that VAT may be payable in respect of a supply of goods or services made in the course of a business. Whether VAT is payable depends upon a number of things, including whether the supplies in question are exempt, zero-rated or standard-rated. The reader will also be aware of the effects of such supplies, the payment and receipt of input and output tax, and the recovery of VAT incurred.

Supplies of goods and services made in relation to a property transaction may be grouped as follows:

(a) *Residential properties*
   (i) sale of a green field site – exempt (but subject to the option to tax);
   (ii) construction services – zero-rated;
   (iii) civil engineering works – zero-rated;
   (iv) professional services (eg legal and other professional fees) – standard-rated;
   (v) sale of a new house – zero-rated;
   (vi) grant of a lease of a new house (for a term exceeding 21 years) – zero-rated.

(b) *Commercial properties*
   (i) sale of a green field site – exempt (but subject to the option to tax);
   (ii) construction services – standard-rated;
   (iii) civil engineering works – standard-rated;
   (iv) professional services – standard-rated;
   (v) sale of a new freehold building or the grant of an option to purchase such a building – standard-rated;
   (vi) sale of an old freehold building – exempt (but subject to the option to tax);
   (vii) the grant of a lease (for any length of term) – exempt (but subject to the option to tax);
   (viii) the assignment of a lease – exempt (but subject to the option to tax);
   (ix) the surrender of a lease – exempt (but subject to the option to tax by the person who receives the consideration);
   (x) repair, alteration and demolition works – standard-rated.

Rules relating to work carried out on listed buildings are not considered in this book, and the particular problems associated with premises of mixed use are also outside the scope of this work.

Some of the supplies listed above are exempt supplies but are subject to what is called the 'option to tax' (also known as the 'option to waive exemption'). This is dealt with more

comprehensively at **10.1.3**. What the option means is that the person who makes the supply can voluntarily convert the supply from one which is exempt, and therefore gives rise to no VAT liability, into a standard-rated supply.

The VAT consequences arising in residential and commercial developments are now considered.

10.1.1 Residential developments

In a typical new residential development, the VAT consequences will not be too complicated. If, for example, a property company, ABC Ltd, buys a green field site, the seller is making an exempt supply to ABC Ltd which will not be subject to VAT unless the seller, being a taxable person, has elected to waive the exemption. In any event, if, as is often the case, the seller is a private individual, he is not likely to be selling the land in the course of a business, and the supply will therefore be outside the scope of VAT. Any construction services (such as work provided by builders and the provision of materials) and civil engineering works (such as the construction of the roads and sewers serving the development) supplied to ABC Ltd will be supplied at a zero-rate of VAT. It is therefore probable that the only significant VAT incurred by the property company in constructing the residential development will be in respect of professional fees paid to surveyors, solicitors, architects and selling agents for services supplied.

On completion of construction, ABC Ltd will dispose of the houses. The purchase price payable on the freehold sale of a newly-built house, or the premium (or rent) payable in respect of a lease of the house granted for a term exceeding 21 years, does not attract VAT because these supplies are zero-rated. However, when zero-rated supplies are made, while no VAT is paid for the supply, tax is deemed to be charged at a nil rate on the output (so that they are still technically regarded as taxable supplies) and therefore related input tax incurred can be recovered. What this means is that ABC Ltd will account to HM Revenue & Customs (HMRC) for output tax on supplies made (which will be nil), less input tax on related supplies received (ie the VAT paid on professional fees). This clearly leads to a deficit, which means that a refund of VAT will be due from HMRC. This process is sometimes known as 'recovering the VAT'.

A subsequent sale of a house (either freehold or leasehold) will be made by a private individual and will not, therefore, be made in the course of a business. In the event that the sale is made in the course of a business (eg by a relocation company), the supply would be exempt.

10.1.2 Commercial developments

In a typical new commercial development, the same process can be followed, with different VAT consequences. The sale of a green field site to a developer is again an exempt supply, subject to the option to tax. However, the provision of construction services and civil engineering works to a commercial developer is a standard-rated supply, which means that considerable VAT will be incurred in addition to VAT on the standard-rated supply of professional services.

Once the building has been completed, the developer may either sell the freehold, or grant a lease of it to a tenant. The sale of a 'new' or partially-completed building is a standard-rated supply. Value added tax must be charged in respect of the purchase price. In this context, a 'new' building is one which was completed within the three years preceding the sale, and 'completion' of a building takes place on the earlier of either the day upon which the certificate of practical completion was issued by the architect or the day upon which the building was completely occupied. The grant of a lease of all or part of commercial premises (whether new or old) is an exempt supply, subject to the right of the landlord to opt to tax the rents, premium and other sums payable under the lease. In both cases, whether the freehold sale or the grant of a commercial lease, the developer is able to charge VAT either because it is a standard-rated

supply, or because the exemption has been waived. This means that output tax will be received to facilitate recovery of related input tax incurred.

Take, by way of example, a commercial development where the construction costs paid by the developer amount to £2 million (with VAT on a standard-rated supply of £400,000), the cost of roads and sewers amounts to £500,000 (with £100,000 VAT) and professional fees total £100,000 (with £20,000 VAT). The total input tax paid by the developer adds up to £520,000. If the developer, being a taxable person, is able to sell the 'new' freehold building for £4 million, he will have to charge VAT amounting to £800,000. This output tax can be set against related input tax incurred, resulting in only the difference (£280,000) having to be accounted for to HMRC. The developer suffers from cash-flow difficulties in that he is likely to incur the input tax some time in advance of receiving the output tax, but he is not left out-of-pocket. The same result will be achieved if, instead of selling the freehold, the developer chooses to grant a lease of the building and elects to charge VAT on the sums payable under the lease. The making of the election facilitates immediate recovery of related input tax.

10.1.3 The option to charge VAT

The election to waive exemption or, as it is more commonly called, the option to tax was introduced on 1 August 1989 in order to lessen the impact of the VAT charges on commercial developers. The purpose of the option to tax is to enable the commercial owner to convert what would otherwise be exempt supplies in respect of a particular property into supplies chargeable to VAT at the standard rate, so that the developer will be able to recover the input tax which he incurred when acquiring or developing the property.

The consequence of opting to tax is that all future grants in the property by the person who opts will be subject to VAT at the standard rate.

10.1.3.1 How is the election made?

As a preliminary to opting to tax, the owner must check that he is registered for VAT or the option will be meaningless. There is no prescribed form or procedure for opting to tax, neither is there any requirement to consult with or notify anyone who might be affected by the option. However, from a practical point of view, it is advisable that a landlord notifies his tenants, since it is the tenants who will bear the VAT. The one procedural requirement that must be followed when opting to tax is that written notice of the option must be given to HMRC within 30 days.

If an exempt supply (eg the grant of a lease) has been made by the person wanting to opt to tax in respect of the relevant property in the 10 years prior to the date on which the option is to take effect, consent of HMRC will be required before the option can be made, and consent will be granted only if HMRC is satisfied that the input tax which the person will be able to recover as a consequence of his opting to tax is fair and reasonable. It is therefore advisable for a landlord intending to opt to tax to do so before he grants a lease of his property. In all other cases, consent of HMRC is not required.

10.1.3.2 Who or what is affected?

The option to tax is personal, done on a property-by-property basis and, once made, it may be revoked only within six months of the option, where there has been a lapse of six years since any relevant interest in the property has been held, or after 20 years from the date of the option. The fact that the option is personal means that while a landlord who opts to tax would have to charge VAT on the rents payable by its tenants, its tenants would not, unless they too opted to tax, have to charge VAT to their sub-tenants, and the same applies to a buyer of the landlord's interest. As an exception to the general rule, an option to tax made by a company in respect of a property will bind other companies (in respect of that property) if they are in the same VAT group of companies at the time of the option, or joined the group later when the property affected was still owned by a group company.

The fact that the option to tax is made on a property-by-property basis means that a commercial owner can pick and choose which of its properties should be voluntarily standard-rated. Once made, the option to tax affects the whole of the property, or if that person owns an interest in only part of the property, it will affect the entirety of that part. Hence, a person cannot choose to opt to tax in respect of the ground floor and not the upper two floors if he owns the entire building. What may appear to be separate buildings, but which are linked together internally or by covered walkways, are to be treated as one building. Therefore, if a shopping precinct is owned by one landlord (as is usually the case), an option to tax by that landlord will affect all of the shops in the precinct.

10.1.3.3 Should the option to tax be made?

The reason for opting to tax is to facilitate the recovery of related input tax incurred on the acquisition or development of the property. If no related input tax has been or is likely to be incurred, there is no reason why the option to tax should be made. If considerable input tax has been or will be incurred, consideration must be given to whether or not the option to tax should be made, but the person must have regard to the effect that the option will have on the persons to whom supplies are being made.

If a developer-landlord, having incurred VAT on acquisition or development costs, wants to opt to tax and charge VAT on the rents it will receive from its tenants, and those tenants make mainly standard-rated or zero-rated supplies in the course of their businesses (eg tenants of retail food stores, solicitors or surveyors offices), the tenants would not be adversely affected by a charge to VAT on rent, since there will be output tax (actual or deemed) to offset against the input tax. The tenants will be able to recover any VAT paid and will not end up out-of-pocket.

Tenants who make only exempt supplies in the course of their businesses (eg banks, building societies, insurance companies) will be hard hit by the option to tax. The VAT that these tenants have to pay on the rent will be irrecoverable, and will have to be borne as an overhead of the business. This could have the effect of frightening off a class of tenants whom the developer might have been hoping to attract to the development, or lead to their reducing the amount of rent that they would be prepared to pay.

10.1.3.4 Drafting points

Is the option to tax on its own sufficient to render VAT payable by the person who receives the supply? It is necessary to look at two principal relationships: seller and buyer; and landlord and tenant.

Seller and buyer

If a seller sells a 'new' commercial building (whether it is the first sale, or a subsequent sale of the still 'new' building) the seller is making a standard-rated supply, and so there will be mandatory VAT on the purchase price. The basic rule is that, unless the contrary appears, the purchase price stated in the contract is deemed to include VAT. It is therefore important that the seller includes a clause in the contract obliging the buyer to pay VAT in addition to the purchase price. Failure to do so will result in the seller having to account to HMRC for the VAT out of the purchase price received, which will mean that the seller will be left with considerably less than he anticipated, and his solicitor would no doubt be liable in negligence.

If the seller sells an old commercial building (ie one that is now more than three years old) then the supply which is being made is an exempt supply and the position is different. If the seller opts to tax *before* exchange of contracts then he converts the supply into a standard-rated supply and the above paragraph would then be applicable. The seller would have to make an express provision in the contract obliging the buyer to pay VAT in addition to the purchase price. If the option to tax is made *after* exchanging contracts then, under s 89 of the Value

Added Tax Act 1994 (VATA 1994), the option to tax would operate as a change in the rate of tax from 0% to 20% (ie from an exempt to a standard-rated supply), and accordingly the seller could add VAT to the purchase price without the need for an express clause in the contract enabling him to do so. In this case, it is important that the buyer's solicitor ensures that the contract makes it clear that the purchase price is inclusive of VAT so that no hardship is felt by the buyer if the seller chooses to opt to tax after exchange. Only if the contract expressly excludes s 89, or the purchase price is expressly stated to be payable inclusive of VAT, will the seller be unable to add VAT to the purchase price.

Landlord and tenant

The grant of a commercial lease (of either an old or new building) is an exempt supply, unless the landlord has opted to tax. In respect of existing leases, s 89 of the VATA 1994 again operates, so that an option to tax by the landlord after the grant of the lease effects a change in the rate of VAT from 0% to 20%. The landlord does not need the benefit of an express clause in the lease, and can simply add VAT to the rent (and other sums payable under the lease) unless there is a clause in the lease (which would not usually be the case) expressly exonerating the tenant from liability to VAT on such payments, or excluding s 89.

If the option to tax is made before the grant of the lease, so that the supply is converted to a standard-rated supply from the outset, s 89 will not operate and the rent will be deemed to be payable inclusive of VAT. It is therefore essential that the landlord's solicitor ensures that the lease contains a covenant by the tenant to pay VAT on the rent (and the other sums payable under the lease). Whenever a lease is drafted, irrespective of whether advantage can be taken of s 89, there ought to be a covenant by the tenant to pay VAT in addition to the sums payable under the lease. This avoids problems for the landlord.

10.1.4 Other areas of concern

Value added tax is a far-reaching tax in the property world which can impact on other aspects of property transactions.

10.1.4.1 Reverse premiums and rent-free periods

A reverse premium is a payment made by the landlord to a prospective tenant as an inducement to him to enter the lease. Money is passing from landlord to tenant, and is the consideration for a supply being made by the tenant. This payment will be subject to VAT and the tenant should ensure that the terms of the contract allow this to be added to the payment. The landlord will not, however, be able to recover this VAT as input tax if, when granting the lease, he is making an exempt supply. So the cost to the landlord will be increased by 20%. The landlord could recover this VAT if he opted to tax in respect of the property, but this would also mean that he would have to charge VAT on the rent. This would then be a particular problem for exempt tenants, such as banks or insurance companies, as the VAT on the rent will not be recoverable, and they may wish to try to negotiate a lower rent to compensate for this.

Rent-free periods give rise to difficult VAT problems. It appears that if the rent-free period is being given because the tenant is carrying out work to the premises which will benefit the landlord, or simply because the landlord is trying to induce the tenant to enter into the lease (as an alternative to a reverse premium), then VAT at the standard rate will be payable on the amount of rent forgone. The tenant is making a supply to the landlord (ie is positively doing something) in consideration of a rent-free period. However, if the rent-free period is given simply because the state of the market means that it is part of the bargain negotiated between landlord and tenant (eg where it is given to allow the tenant some time in which to fit out the premises for his own benefit, or arrange sub-lettings), there will be no VAT on the rent-free period, since nothing is being done in return for it.

10.1.4.2 Surrenders

When a tenant surrenders his lease to the landlord, consideration may move in either direction, either because the tenant is desperate to rid himself of the liability to pay rent and perform the covenants, or because the landlord is anxious to obtain vacant possession. By virtue of the Value Added Tax (Land) Order 1995 (SI 1995/282), the supply made in either case is an exempt supply, subject to the option to tax by the person who receives the consideration.

Where a surrender is effected by operation of law, it is unclear whether any VAT can be claimed by HMRC. Indeed, it may be difficult to establish the value of the supply being made. If such a surrender is to arise, it may be advisable to ensure that liability for VAT is clearly documented by the parties before surrender occurs.

10.1.4.3 Transfers of going concerns

There are complicated rules regarding the transfer of a going concern, which can include the sale of a tenanted building. However, these rules are outside the scope of this book.

10.1.4.4 VAT on costs

Sometimes, a lease will oblige the tenant to pay the landlord's legal costs incurred on the grant of the lease. Often, a lease will oblige the tenant to pay the landlord's legal costs on an application for licence to assign, or alter or change use. The position as regards VAT on those costs is complicated by the approach of HMRC, which treats the payment of the landlord's legal costs, in either case, as part of the overall consideration for the grant of the lease. Hence, the VAT position depends upon whether the landlord has opted to tax.

If the landlord's solicitor charges his client £1,000 plus VAT for legal services provided on the grant of the lease, he will issue his client with a VAT invoice requiring payment of £1,000 plus VAT of £200. The landlord, having opted to tax in respect of this property, and making use of his VAT invoice, will be able to recover the input tax (£200) from the output tax which he will receive on the rents. If the lease contains a clause obliging the tenant to pay those legal costs, the landlord will look to the tenant for a reimbursement of the outstanding £1,000. However, since HMRC treats such a payment as part of the consideration for the grant of the lease, and since the landlord has opted to tax, the tenant must pay £1,000 plus VAT, the landlord must issue the tenant with a VAT invoice, and the landlord must account to HMRC for the VAT element received. The tenant may be able to recover the VAT which he has paid, depending on the nature of his business.

If the landlord has not opted to tax, the position is different. First, he will not be able to recover the VAT charged by his solicitor, since that VAT was incurred in relation to an exempt supply. Secondly, therefore, he will require the tenant to reimburse the full amount of costs and VAT (ie, £1,200), but because this reimbursement is treated as part of the consideration for the grant of the lease, and because the supply made by the landlord is an exempt supply, no VAT invoice can be issued to the tenant (as, in fact, there is no charge to VAT being made to the tenant), and the tenant will be unable to recover any part of the reimbursement.

The same principles are adopted where, during the term, the tenant exercises a right given to him under the lease and pays the landlord's legal costs (eg on an application for licence to assign pursuant to a qualified covenant (see **20.2.2**)).

10.2 Stamp duty land tax on leases

Stamp duty land tax (SDLT) will be assessed on any premium paid and also on the rent. It must be paid within 30 days of completion of the lease.

The amount of SDLT payable on the premium is assessed in the same way as on purchases of land. The normal reduced rates of duty are available.

In relation to the rental element of leases, SDLT is payable at a flat rate of 1% on the 'net present value' (NPV) of the total rent payable over the term of the lease. The NPV is calculated by discounting rent payable in future years by 3.5% per annum. Where the NPV of the total rent does not exceed £150,000, no duty will be payable. Stamp duty land tax will not be chargeable on the VAT element of consideration, provided the landlord has not opted to tax by the time the lease is granted.

Stamp duty land tax has now become an important factor in commercial leases as the amount of duty is directly related to the length of the term, ie the longer the lease, the more duty is potentially payable. Further, if the tenant remains in possession ('holds over') after the end of a fixed term under the provisions of Pt II of the Landlord and Tenant Act 1954 (see **Chapter 31**), a further charge to duty may arise. This will be payable by the current tenant.

Review activity

1. Which one of the following statements is correct?

   VAT is a tax levied on:

   (a) Land transactions.

   (b) The gain resulting from a disposal in an interest in land.

   (c) The supply of goods or services made in the course of a business.

   (d) Fixed plant and machinery within a commercial property.

2. Which of the following statements is correct?

   Provided the supplier is registered for VAT, input tax will be paid by a business where the supply made to it is:

   (a) Standard-rated.

   (b) Zero-rated.

   (c) Exempt.

   (d) Exempt but where the supplier has exercised the option to tax.

3. Which of the following statements is correct?

   Input tax may be recovered from HMRC provided that it was incurred by a business in making supplies that are:

   (a) Standard-rated.

   (b) Zero-rated.

   (c) Exempt.

   (d) Exempt but where the supplier has exercised the option to tax.

4. Set out below are the stages in a typical commercial property *development* transaction. For each stage, state whether the supply is standard-rated, zero-rated, exempt or exempt subject to the option to tax.

   (a) Sale to the developer of a green field site for development as a retail superstore.

   (b) Payment to the building contractor for constructing the superstore.

   (c) Grant of a lease of the superstore to a retail tenant.

   (d) Sale of the freehold interest in the superstore one year after construction, subject to the lease.

5. In the circumstances set out in question 4, the developer of the retail superstore can recover the input tax paid on the construction costs.

   True or false?

6. Set out below are the stages in a typical commercial property *leasing* transaction. For each stage, state whether the supply is standard-rated, zero-rated, exempt or exempt subject to the option to tax.
   (a) Grant of a lease to an insurance company.
   (b) Payment of legal fees to the solicitors for negotiating the terms of the lease.
   (c) Payment to the building contractor for fitting out the property for the tenant's business.
   (d) Assignment of the lease to another tenant.
7. In the circumstances set out in question 6, the insurance company tenant will be able to recover the input tax on the legal fees, fitting-out costs and (if the landlord opts to tax) the rents payable under the lease.

   True or false?

Part II
COMMERCIAL LEASES

Chapter 11
Landlord and Tenant Law

11.1	Introduction	133
11.2	Liability of the parties on the covenants in the lease	133
11.3	Security of tenure	134
11.4	Lease/licence distinction	134

11.1 Introduction

A thorough knowledge and understanding of landlord and tenant law is essential for all commercial property lawyers; without such an understanding it would be impossible to properly advise clients on their rights and liabilities under the lease. Consequently, this part of the book starts with a consideration of the more important principles governing the relationship between landlords and tenants of commercial premises.

11.2 Liability of the parties on the covenants in the lease

The detailed rules relating to the enforceability of covenants are considered in **Chapter 14**. The following is intended only as an outline of the main issues involved.

11.2.1 Leases granted before 1 January 1996

11.2.1.1 Position of the original parties

Unless the lease provides to the contrary, the original parties will remain liable on their express covenants in the lease by privity of contract throughout the whole term, despite any disposition of their interests. Thus, the original tenant must appreciate that he will be liable not just for breaches committed while he is the tenant but also for any breach of covenant committed by his successors. This continuing liability may have serious consequences for the original tenant and means, for example, that he will be liable for any arrears of rent occurring throughout the whole term.

In the same way, through privity of contract, the original landlord will remain liable on his covenants to the original tenant for the whole term, despite any assignment by him of the reversion, ie, he will be liable to the original tenant if a buyer of the reversion breaks a covenant.

11.2.1.2 Position of landlord and tenant for the time being

The relationship between an assignee of the lease and the landlord for the time being and between a buyer of the reversion and the tenant for the time being rests on the doctrine of privity of estate. Liability under this doctrine extends only to those covenants which touch and concern the land.

Further, a party is only liable for breaches committed during his period of ownership of the lease or reversion, as the case may be. Thus, for example, an assignee of the lease, for the period while he has the lease, has the benefit of the landlord's covenants and is liable on the tenant's covenants provided, in both cases, the covenants touch and concern the land.

11.2.2 Leases granted on or after 1 January 1996

The Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995) abolished the concept of privity of contract for leases entered into on or after 1 January 1996. Thus once the original

tenant has assigned the lease he is not liable for any future breaches (although he may be required to guarantee his immediate assignee: see **20.2.4.3**). On a sale of the reversion, the landlord may apply to the tenant for release from the landlord's covenants in the lease (see **14.2.2**).

11.3 Security of tenure

The majority of business tenants will enjoy security of tenure under Pt II of the Landlord and Tenant Act 1954 (LTA 1954) and the importance of this Act in its effect on termination of the lease cannot be overstated. The protection given to tenants covered by the Act is twofold. First, a business tenancy will not come to an end at the expiration of a fixed term, nor can a periodic tenancy be terminated by the landlord serving an ordinary notice to quit. Instead, notwithstanding the ending of the contractual term, the tenancy will be automatically continued under s 24 until such time as it is terminated in one of the ways specified in the Act. Secondly, upon the expiration of a business tenancy in accordance with the Act, business tenants normally have a statutory right to apply to court for a new tenancy and the landlord may only oppose that application on certain statutory grounds (some of which involve the payment of compensation by the landlord if the tenant has to leave). Any new tenancy granted will also enjoy the protection of the Act.

It is possible, in certain circumstances, for the landlord and tenant to contract out of the Act, but certain formalities must be observed.

Further consideration of this Act is dealt with in **Chapter 31**.

11.4 Lease/licence distinction

The security of tenure provisions in the LTA 1954 and other statutory provisions dealt with elsewhere in the book do not apply to licences. It therefore becomes necessary to examine the distinction between a lease and a licence. A lease is an interest in land. A licence, on the other hand, confers no interest in land; it merely authorises that which would otherwise be a trespass. One of the leading cases in this area is *Street v Mountford* [1985] 2 All ER 289. While this case concerned a residential tenancy, similar principles have subsequently been applied to business tenancies. Subject to certain exceptions, for example, lack of intention to create legal relations or occupation pending the grant of a lease, the House of Lords held that as a general rule:

(a) the grant of exclusive possession,
(b) for a term,
(c) at a rent,

will create a tenancy rather than a licence; and the court will ignore any shams or pretences aimed at misleading the court.

In the context of business premises, some arrangements will clearly not confer exclusive possession and will thus remain licences, for example, the 'shop within a shop' sometimes found in department stores, or the kiosks often found in theatres or hotel foyers. Moreover, there seems to be a greater readiness by the courts to find that exclusive possession was not granted than is the case with residential premises (see, eg, *Esso Petroleum Co Ltd v Fumegrange Ltd* [1994] 46 EG 199 and *National Car Parks Ltd v Trinity Development Co (Banbury) Ltd* [2001] EWCA Civ 1686, [2001] 28 EG 144).

To avoid the risk of inadvertently creating a lease, the use of licences needs very careful consideration. As an alternative, the parties should consider the 'contracting out' provisions in the LTA 1954.

Chapter 12
Agreements for Lease

12.1	Introduction	135
12.2	When are they used?	135
12.3	A typical agreement	136

12.1 Introduction

The agreement for lease, if used, will be drafted by the landlord's solicitor in duplicate, and submitted to the tenant's solicitor for approval together with the draft lease in duplicate (attached to each part of the draft agreement). If the landlord requires the tenant to pay the landlord's costs of drafting, negotiating and executing the lease, he is also likely to require the tenant to pay his costs in connection with the agreement for lease. In recessionary times, the tenant is likely to resist such requirements.

The agreement for lease is an estate contract and can be protected by way of a C(iv) land charge against the landlord's name, or by notice against the landlord's registered title. The circumstances in which an agreement may be used will necessarily involve a delay between exchange and completion, in which case it might be considered advisable to protect the agreement against the possibility of the landlord selling the reversion and defeating the tenant's interest.

12.2 When are they used?

In most commercial letting transactions, the parties proceed straight to the completion of the lease without concerning themselves with the formality of entering into an agreement for lease. The reason for this is that the agreement would simply exist as a contractual commitment between the parties to enter into a lease, the form and content of which had already been agreed by negotiation. With the terms of the lease already agreed, why bother to embody them in an agreement for lease, when the parties could proceed immediately to the execution and exchange of the lease and counterpart? There is little risk in either party backing out of the arrangement in the time between the conclusion of negotiations and completion of the lease, especially since both parties will have invested considerable time and resources in the negotiation process.

The circumstances when an agreement for lease is used are usually limited to occasions where one (or both) of the parties is required to do something to the premises prior to the grant of the lease.

Typically, an agreement for lease is used where the landlord has commenced, or is about to commence constructing the premises. The landlord's aim is to secure an agreed letting of the premises to a prospective tenant as soon as possible so that, when construction has been completed, the tenant will be bound to complete the lease, and rent will become payable to the landlord to provide income to offset his building costs. On other occasions, an agreement may be used where the landlord, at the request of the tenant, is carrying out substantial works of repair or refurbishment to the premises prior to the grant of the lease. In this kind of situation the landlord would not want to go to the expense of executing works without a commitment from the tenant to enter into a lease once the works have been carried out. An agreement may also be used where it is proposed that the tenant carries out major works to the premises prior

to the grant of the lease, in which case both parties would ideally like the security of a binding commitment to enter into a lease upon completion of the works.

The main aim of the agreement, apart from recording the agreed terms of the lease to be entered into, is to stipulate the nature of the works to be carried out to the premises, the time in which they are to be carried out, and the manner in which they will be executed. There is little point in the landlord agreeing to grant a lease of premises to the tenant upon the completion of the construction of a building if the agreement does not state, amongst other things, who will construct the building, and by when, and to what specifications.

12.3 A typical agreement

In order to consider the type of clauses commonly found in an agreement for lease where works are required to be carried out, this chapter concentrates on an agreement in which the landlord will be obliged to construct a building prior to the grant of the lease. Many of the points raised will be equally applicable, or can be adapted to a situation where it will be the tenant who is carrying out works to the premises before completion.

The basic thrust of the agreement will be that the landlord, as the owner of the site, will construct (or, by engaging building contractors, cause to be constructed) premises for occupation by the tenant. Once the premises reach a stage of 'practical completion' (see **12.3.5**) the tenant will be obliged to enter into the form of lease attached to the agreement. Rent will then become payable under the terms of the lease, giving the developer/landlord a return on his investment. Naturally, the terms of the agreement are open for negotiation. In particular, negotiations will revolve around the extent of control, input or supervision the tenant will be allowed to have in respect of the execution of the works, and how much protection he will have if, after completion of the lease, the works turn out to be defective.

The following is a list of some of the problems to be addressed in the drafting and negotiation of the agreement.

12.3.1 What works will be carried out by the landlord?

In the type of agreement under consideration, the works will involve the construction of the entire building which will house the premises to be demised by the lease. The extent of works proposed by the landlord must be clearly indicated in the agreement.

It will, therefore, be necessary for detailed plans and specifications, recording exactly what is to be constructed, to be attached to the agreement for lease, and for the agreement to stipulate that the landlord is to develop in accordance with them.

12.3.2 Will the landlord be able to depart from the agreed plans and specifications?

The tenant will not want the agreement to permit the landlord's development to vary from the plans and specifications, since this might result in the tenant being obliged to take a lease of premises differing radically from those originally planned. On the other hand, the landlord would like to build into the agreement a degree of design and construction flexibility, so that if, as the development proceeds, it becomes apparent to the architect that a variation in design or construction is necessary or desirable (either on economic, architectural, or purely aesthetic grounds), the agreement will permit a variation to be made. This is a matter for negotiation between the parties. A possible compromise might be reached if the agreement allows certain 'permitted variations', which could be defined to mean those required by the local planning authority under the terms of any planning permission for the development of the site, or those which are insubstantial and are reasonably required by the landlord.

It should be noted that if a contract is varied in a material manner, outside the scope of existing contractual provisions, a new contract will come into being which will have to satisfy

the requirements of s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989) (see *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995).

12.3.3 What standard of works is required?

It is usual to include an obligation in the agreement on the landlord's part to ensure that the works described in the agreement are carried out with reasonable skill and care, and in accordance with all relevant statutory approvals (eg, planning permission, Building Regulations).

12.3.4 Is there to be any degree of supervision?

The landlord will want complete freedom to enable his builders to progress the development of the site without any interference from the tenant, and may be able to insist upon this in his negotiations. However, the tenant may have sufficient bargaining strength to demand a degree of control and supervision over the execution of the landlord's works. He may require the agreement to make provision allowing a surveyor, appointed by the tenant, to inspect the works as they are being carried out, in order to make comments and representations to the landlord (or his architect), and to point out errors in the works, and variations not permitted by the agreement. The issue of whether the tenant is to have any involvement in the development and, if so, the degree of control to be allowed, is a matter which will depend heavily upon the relative bargaining strengths of the parties.

12.3.5 Who decides when the building is ready for occupation?

The determination of the date upon which the building is completed is important since it will trigger the commencement of the lease (and therefore liability for rent).

A landlord is interested in achieving completion as soon as possible in order to obtain rent, whereas the tenant may have an interest in delaying completion (unless he is especially keen to gain possession). The tenant will not want the agreement to force him to complete the lease until the premises have been fully completed to his satisfaction, and are ready for immediate occupation and use. However, the landlord will not want to give the tenant any scope for delaying the transaction beyond a date when the premises are sufficiently ready. The landlord will want to be able to force the tenant to complete the lease notwithstanding one or two imperfections. It is, therefore, a representative of the party who is carrying out the works who usually certifies that the building has reached the stage of 'practical completion' for the purposes of the agreement.

Practical completion occurs when the building works have been sufficiently completed to permit use and occupation for the intended purpose, even though there may be some minor matters outstanding.

The certificate of practical completion, in the type of agreement under consideration, will be given by the landlord's architect (as defined by the agreement). Issues which will concern the tenant are whether the tenant should have any control over who should act as the architect, whether the architect is to be independent (ie, whether he may be someone who is in the employ of the landlord), and whether, at the final inspection of the works, the tenant can insist upon the attendance of his own representative to make representations to the landlord's architect, or to carry out a joint inspection for the purpose of issuing the certificate. The tenant's main aim in this regard is to be able to object to and delay the issue of the certificate of practical completion (which triggers completion) if in his opinion the works have not yet been satisfactorily completed. As ever, this is a matter upon which negotiations are required.

12.3.6 Will the agreement specify a completion date?

If the building is being built between exchange and completion, there will not be a fixed date for completion. The agreement will provide for the lease to be completed within a specified

number of days after the issue of the certificate of practical completion. The landlord would seek to resist being obliged to complete his building works within a fixed time-scale, since there are any number of reasons why the execution of the works might be delayed. However, on the other hand, the tenant would like the agreement to impose some time restraints upon the landlord, as he will not want to be kept waiting indefinitely for the building to be completed. Presumably the tenant would be anxious to obtain possession of a completed building as soon as possible in order to satisfy his business needs. The tenant may press for the inclusion of a clause which requires the landlord to use his best (or reasonable) endeavours to ensure that the building is completed by a certain date. The landlord may be prepared to accept such a clause provided he is not liable for delays caused by matters outside his control.

12.3.7 Is the person carrying out the works to be liable for any delay?

It is usual for the agreement to include what is called a '*force majeure*' clause to ensure that the person executing the works will not be in breach of the requirement to complete the works by a certain date if the delay is caused by matters which are outside his control. A *force majeure* clause covers delaying factors such as adverse weather conditions, strikes, lock-outs, or other industrial action, civil commotion, shortages of labour or materials and others.

12.3.8 Will there be any penalties for delay?

Usually, the tenant can only delay the transaction by failing to complete the lease within the stipulated number of days after the issue of the certificate of practical completion. To discourage the tenant from delaying completion, and to compensate the landlord, the agreement should stipulate a 'rent commencement date' from which rent will become payable under the lease, regardless of whether the tenant has completed the lease. If the tenant delays completion beyond the rent commencement date, he will still be bound to pay rent to the landlord on completion of the lease calculated from the earlier rent commencement date. In this way the tenant is penalised for his delay by having to pay rent in respect of a period when he was not in occupation of the premises, and the landlord is thus not left without income. The rent commencement date is usually stated to be the day upon which the lease is due to be completed (ie, a certain number of days after the issue of the certificate of practical completion) or, if a rent-free period is being given to the tenant, a certain number of months after the day upon which completion is due.

If the landlord fails to complete the building by any long-stop date inserted in the agreement, and is unable to avail himself of the *force majeure* clause, the tenant could just sit tight and await completion, in the knowledge that rent will not become payable until then. However, most tenants will not want to be kept waiting indefinitely, since premises are usually required for immediate business needs. Therefore, as an incentive to the landlord to build within the timescale specified by the agreement, the tenant should insist upon a clause providing for liquidated damages to be payable by the landlord if he delays beyond the long-stop date. The agreement ought to state a daily rate of damages payable to the tenant in the event of a delay. The landlord should ensure that the building contract entered into with his building contractors runs 'back-to-back' with the agreement for lease so that he may claim liquidated damages from his contractors in the event of a delay. The tenant may want a further provision enabling him to terminate the agreement in the event of a protracted delay.

12.3.9 What if there are any defects in the works or materials?

If, after completion, the tenant discovers that there are defects in the design or construction of the premises, or in the materials used, then in so far as the defects amount to disrepair (see **19.4.1.3**) the tenant will be bound to remedy them under the repairing covenant in the lease. A well-advised tenant will have instructed a surveyor to look for defects in the works prior to the grant of the lease. However, the nature of a design or construction defect is such that it rarely manifests itself until some time after the lease has been completed. The tenant should,

therefore, ask for some protection in the agreement (or in the lease itself) against the prospect of such 'latent' or 'inherent' defects arising. There are several ways in which this can be done (see **9.5**).

12.3.10 Who is to be responsible if the premises are damaged after practical completion, but before completion of the lease?

If the premises are damaged before practical completion, then the certificate will not be issued, for the obvious reason that the premises will not have reached the stage of practical completion. The landlord will have to put right the damage before the certificate can be issued. If the premises are damaged after practical completion, but before actual completion, the agreement ought to stipulate that the premises remain at the landlord's risk since the tenant is not yet entitled to possession. The landlord ought to maintain insurance cover until the premises are handed over, and the agreement may make this a requirement.

12.3.11 What form will the lease take?

Before the agreement is entered into, the final form of the lease which the tenant will be required to enter into must have been agreed between landlord and tenant. Full negotiations must have taken place regarding the terms of the lease. The agreed form of draft should be appended to the agreement, with an obligation in the agreement upon the tenant to take a lease in that form on the date of actual completion. It is unwise to attach the original draft lease which, after amendments and counter-amendments, may now be untidy and difficult to interpret. A fair copy of the agreed draft should be prepared and attached to the agreement. There seems little point in the parties entering into an agreement for lease unless all negotiations regarding the lease terms have been concluded.

12.3.12 To which premises will the agreement relate?

The agreement will normally describe the premises by reference to the parcels clause in the draft lease, which in turn will refer to plans attached to the agreement showing the exact extent of the premises. Plans will be essential where a lease of part is intended.

12.3.13 Should any conditions of sale be incorporated?

The terms of the agreement for lease ought to set out extensively the rights and obligations of the landlord and tenant, in which case there may be no need to incorporate a set of conditions of sale. However, safety ought to dictate that they be incorporated in any case, with a provision that they apply except in so far as they are inconsistent with any other terms of the agreement.

12.3.14 Will the agreement require the landlord to deduce title, and will he disclose incumbrances in the agreement?

If title is deduced to the tenant, the agreement will usually prohibit requisitions after exchange.

12.3.15 Will the agreement merge with the lease?

The usual conveyancing doctrine of merger applies to an agreement to grant a lease, but it is common practice to include a clause excluding the doctrine since many of the contractual obligations are intended to continue in operation post-completion.

In so far as they do continue in operation, they may be construed as landlord or tenant covenants of the tenancy, and therefore binding upon successors in title (see the definition of 'covenant' and 'collateral agreement' in s 28(1) of the LT(C)A 1995).

Chapter 13
Lease Drafting

13.1	Principles of drafting	141
13.2	Rules of construction	141
13.3	Prescribed clauses leases	142
13.4	The structure of the lease	143
13.5	The 2007 Code for Leasing Business Premises in England and Wales	148

13.1 Principles of drafting

A commercial property lawyer will encounter many different types of commercial lease, since every firm of solicitors engaged in property matters is likely to have its own commercial lease precedent which it will adapt for use in each commercial letting in respect of which the firm is instructed. Most firms restrict their office precedent to a document of manageable length. However, it is not uncommon when acting for a tenant to receive a draft lease which runs to 60 or more pages of relatively small print, all of which has to be carefully examined by the tenant's solicitor. Brevity and concise language must always be encouraged in the drafting (and the amending) of a lease. If the draft lease is kept short, less time will be taken in the subsequent negotiation of the terms and, therefore, in the transaction generally. It will also be easier to read for both clients and solicitors, and will result in legal fees being kept to a minimum. However, the draftsman cannot always restrict the length of the document where complex and extensive legal obligations are being entered into. Clauses cannot be left out of the lease simply to reduce its length, and even though the possibility of a clause being relied upon during the term might appear slight, if a reason exists for the inclusion of the clause, it should be retained. There are many matters to be contemplated in a landlord and tenant relationship, all of which require regulation in the lease.

If, following the grant of the lease, the reversion is to be sold to an investment fund (which is the case with many commercial developments, both new and old), the draftsman should always have regard to the requirements of institutional investors who will require the form of lease to be as close to their standard 'institutional' form as possible. If an institutionally preferred form of lease has not been granted, the landlord will have greater difficulty in disposing of the freehold. All leading commercial practices ensure that their office precedent is in an institutional form. An 'institutional' lease is one which places all the costs of repairing and insuring upon the tenant, thereby ensuring that the income derived by the landlord from the rent is subject to as little fluctuation (in terms of outgoings) as possible. It is often granted for a term of at least 10 years with a five-yearly rent review pattern although in recessionary times, shorter leases are common.

The techniques to be adopted in the drafting of the lease are outlined in the drafting section of the Legal Practice Guide, ***Skills for Lawyers*** and are not repeated here.

13.2 Rules of construction

The purpose of interpreting any legal contract is to discover the real intention of the parties, but that intention can only be ascertained from the wording of the contract itself, and not from extrinsic evidence.

In construing a lease, the court is always reluctant to hold a clause void for uncertainty and thus, if the court can find a way to interpret the clause, some sense will be given to it. Equally, however, the court is generally unwilling to imply terms into a document which has been

entered into after extensive negotiations between legally represented parties (although see the approach of the Court of Appeal in *Royal Bank of Scotland plc v Jennings and Others* [1997] 19 EG 152). Faced with an ambiguity, the court will usually adopt the literal approach to interpretation, unless this would lead to a result so absurd that, in the commercial reality of the situation the parties find themselves in, they could not reasonably have intended it (see *Broadgate Square plc v Lehman Brothers Ltd* [1995] 01 EG 111). The court will not examine the offending clause in isolation, but will construe the lease as a whole, to see if some assistance can be gained from other parts of the deed, where similar words and phrases may have been used in other contexts. Ordinary and technical words of the English language will be given the meanings usually attributed to them by the lay person unless the lease clearly directs some other meaning (eg, by use of a definitions or interpretation clause).

If, owing to a common mistake between the parties, the lease, as executed, does not embody the common intentions of the parties, the remedy of rectification may be available. This is, however, an equitable and discretionary remedy, and there is a heavy burden upon the claimant in a claim for rectification to show the existence of a common mistake. Rectification will not be awarded so as to prejudice a bona fide purchaser of the interest of either landlord or tenant who did not have notice of the right to rectify.

If there is a discrepancy between the executed original lease and counterpart, the former prevails over the latter, unless the original is clearly ambiguous.

13.3 Prescribed clauses leases

The LRA 2002 empowered Land Registry to prescribe a form of lease which would have to be used in all cases where the lease was registrable. This would be necessary to facilitate the registration of the lease and also because of the proposed introduction of electronic conveyancing. After consultation, Land Registry has now decided against a prescribed form of lease as such. However, the Land Registration (Amendment) (No 2) Rules 2005 provide that certain leases must contain prescribed clauses.

Use of the prescribed clauses is compulsory for leases that are dated on or after 19 June 2006, which are granted out of registered land, and are compulsorily registrable. These leases are known as 'prescribed clauses leases'.

A lease will not, however, be a prescribed clauses lease if it arises out of a variation of a lease which is a deemed surrender and re-grant, or if it is granted in a form expressly required by any of the following:

(a) an agreement entered into before 19 June 2006;
(b) a court order;
(c) an enactment;
(d) a necessary consent or licence for the grant of the lease given before 19 June 2006.

If an applicant claims that a lease is not a prescribed clauses lease due to one of these exceptions, a conveyancer's certificate or other evidence must be supplied with the application for registration.

13.3.1 Required wording

The wording required in a prescribed clauses lease must appear at the beginning of the lease or immediately after any front cover sheet and/or front contents page. A new Sch 1A is inserted into the Land Registration Rules 2005 which sets out the required wording and gives instructions as to how to the prescribed clauses must be completed. An example can be found in the lease in **Appendix 4**.

Land Registry Practice Guide 64 gives detailed guidance on use of the clauses.

13.4 The structure of the lease

13.4.1 Commencement, date and parties

It is customary to start the drafting of a document by describing the document according to the nature of the transaction to be effected; for example, a lease will commence with the words 'This Lease'. The date of the lease will be left blank until it is manually filled on completion with the date of actual completion. The draft lease should then set out the names and addresses of each party to the lease (eg, landlord, tenant and any guarantors).

13.4.2 Definitions

Every well-drafted document should contain a definitions section. If a word is to bear a specific meaning in a document, that meaning ought to be clearly defined at the start of the document. If certain phrases or words are likely to recur in the document, those phrases or words ought to be given a defined meaning at the start of the document. The use of a definitions clause in a legal document avoids needless repetition of recurring words and phrases, and permits a more concise style of drafting. If a word or phrase is to be defined in the definitions clause, the first letter of the defined term should be given a capital letter, and every use of that word or phrase thereafter should appear in the same form.

The following words and phrases are commonly used as defined terms in commercial leases. Further examples can be found in the lease in **Appendix 4**.

'Development'

The lease is likely to regulate the carrying on of building, mining, engineering or other operations at the premises, and the making of a material change in the use of the premises. Rather than having to repeat the statutory definition of development at each reference, it is simpler just to refer to 'Development', which can be defined in the definitions clause as having the meaning given to it by s 55 of the TCPA 1990.

'Insured Risks'

There are many risks against which the lease will require the premises to be insured, and there will be several references to those risks in the insurance and repairing provisions of the lease. A full list of risks can be set out in the definitions clause, and then referred to elsewhere as the 'Insured Risks'.

'Interest'

If the tenant delays paying rent or any other sums due to the landlord under the lease, the landlord will want to charge the tenant interest on the unpaid sums. The rate of interest can be set out in the definitions clause. It is usually agreed to be a rate which is between 3 and 5% above the base lending rate of a nominated bank. The landlord usually stipulates that if the base rate of that bank should cease to exist, the interest rate under the lease will be a reasonably equivalent rate of interest.

'Pipes' or 'Conduits'

The tenant may be granted rights to use pipes in other parts of the landlord's building in order to run services to and from the premises. The landlord may reserve the right to use pipes passing through the tenant's premises. The lease should make it clear that 'Pipes' includes all pipes, sewers, drains, watercourses, wires, cables and other conducting media. In this sense the defined term is not so much a definition, as an expansion of the meaning of the word.

'Planning Acts'

The lease will contain several references to the TCPA 1990, the EA 1995, the PCA 1991, and other statutes relating to planning and environmental law, and the tenant will have obligations to comply with them. Those statutes can be grouped together and called 'the Planning Acts'.

'Premises'

There will be many references in the lease to the premises demised to the tenant. The draftsman will not want to repeat anything other than 'the Premises' at each reference. Hence, the definitions clause should define the premises demised by the lease, and a full verbal and legal description should be set out either here, or in the parcels clause (see **13.4.4**), or in one of the schedules to the lease.

'Term'

The term of the lease is one of the phrases most commonly referred to in the lease. Thought should be given to whether the definition should relate just to the contractual term, or whether it should include any extension, holding over or continuation of the term.

'VAT'

In defining value added tax, it should be made clear that 'VAT' also includes any tax replacing VAT, or becoming payable in addition to it, in case the fundamental principles of the tax are changed.

'Rent'

Rent will also be a commonly recurring word. Careful thought should be given as to what 'Rent' is to mean, and in the light of its definition, whether it is appropriate to use the term at every reference to rent in the lease. If the landlord wants to reserve service charge payments, insurance premiums and VAT as rent, so that he enjoys the same remedies for recovery of those sums as he enjoys in respect of rent (eg, distress and forfeiture without the need to serve an LPA 1925, s 146 notice), 'Rent' should be defined to include those items. It should also be made clear that 'Rent' means not only the original contractual rent, but also any revised rent which becomes payable by virtue of the rent review clause, and any interim rent which becomes payable under s 24A of the LTA 1954 during a statutory continuation tenancy. In this manner, it is made clear that, in a case where a tenant's liability continues after assignment, the liability relates to the payment of a rent which may be increased after the date the landlord assigns his interest in the premises. The term 'Rent' is not an appropriate term in every case under the lease. For instance, in the rent review clause, it is the annual rent which is to be reviewed from time to time during the term, not necessarily the 'Rent' as defined. Also, the landlord might be prepared to allow payment of the annual rent to be suspended for a period of time if there is damage to the premises by an insured risk, but he may not wish to have suspended the payment of other sums (eg, service charge) which have been reserved as 'Rent'. This was the point in issue in the case of *P&O Property Holdings Ltd v International Computers Ltd* [2000] 2 All ER 1015, ChD.

'Building'

If the lease is of part only of the landlord's building, the building itself should be identified, as the landlord will probably be entering into covenants in the lease to repair the structure and exterior of the building. There may be other references to the 'Building' with regard to the provision of services and the grant and reservation of easements.

'Common Parts'

Where a lease of part of a building is intended, the tenant will be granted rights to use the 'Common Parts' of the 'Building'. The extent of the 'Common Parts' should be clearly expressed.

13.4.3 The interpretation clause

Certain words or phrases do not require a fixed definition for the purposes of the lease, rather their meaning needs to be expanded or clarified to assist the reader in his interpretation and construction of the lease. Common examples of matters of interpretation are the following:

Joint and several liability

The lease should make it clear that, if the landlord or tenant is more than one person, the obligations placed upon those persons by the lease will be enforceable against either or both of them.

One gender to mean all genders

Section 61 of the LPA 1925 applies in respect of all deeds executed after LPA 1925 came into force so that any reference in a deed to the masculine will include the feminine, and vice versa. However, s 61 does not deal with the neuter (ie, 'it'), and it is therefore common to state, for the avoidance of doubt, that a reference to one gender includes all others.

References to statutes

Leases usually provide that, unless a particular clause expressly provides to the contrary, a reference in the lease to a statute or to a statutory instrument is to be taken as a reference to the Act or instrument as amended, re-enacted or modified from time to time, and not restricted to the legislation as it was in force at the date of the lease.

Expanding the meaning of words or phrases

If one of the tenant's covenants states that the tenant is prohibited from doing a certain act, the tenant will not be in breach of covenant if the act is done by a third party. It is, therefore, usual to state that if the tenant is required by the lease not to do a certain act, neither may he permit nor suffer the act to be done by someone else. If one of the tenant's covenants prohibits the carrying out of a certain act without the landlord's prior consent, and it is stipulated that the landlord's consent cannot be unreasonably withheld, it is usual to stipulate that his consent may not also be unreasonably delayed. Rather than dealing with these matters of drafting as and when the need arises in the lease, both of these points can be concisely dealt with by using an appropriate form of wording in the interpretation clause at the beginning of the lease.

13.4.4 The letting

The letting is the operative part of the lease which will create the tenant's interest, define the size of that interest, reserve rent, impose covenants, and deal with the grant and reservation of rights and easements. The clauses will be set out in the following logical sequence:

The operative words

Sufficient words of grant should be used to show the intention of the landlord to grant an interest in favour of the tenant. The landlord usually either 'demises' or 'lets' the premises to the tenant.

The parcels clause

A full description of the premises, including the rights to be granted to the tenant should be contained in the parcels clause. Often, the description is removed to one of the schedules (see below) so that the parcels clause simply refers to 'the Premises' (which will be a defined term).

Exceptions and reservations

Usually, the rights to be reserved for the benefit of the landlord are only briefly referred to in this part of the lease, and are set out extensively in one of the schedules.

The habendum

The habendum deals with the length of term to be vested in the tenant, and its commencement date.

The reddendum

The reddendum deals with the reservation of rent (which may be varied from time to time by a rent review clause), the dates for payment, and the manner of payment (ie, whether in advance or in arrear).

The covenants

Although the covenants on the part of landlord, tenant and surety are often set out in separate schedules, the parties expressly enter into them in the operative part of the lease.

13.4.5 The provisos

Grouped together under the heading of provisos is a wide variety of clauses which cannot easily be dealt with elsewhere in the lease, being clauses which are neither in the nature of covenants nor easements, and do not impose obligations upon one or other of the parties to the lease. They are clauses which have no common thread except that most of them are inserted into the lease for the landlord's benefit alone.

The provisos usually include the following clauses:

(a) The proviso for re-entry, (ie, the forfeiture clause). This is dealt with in greater detail in **Chapter 25**.

(b) An option to determine the lease where the premises are damaged by an insured risk so that they are no longer fit for use or occupation, and the landlord either cannot or, after a period of time, has not reinstated the premises (see **24.7**).

(c) A rent abatement clause, which provides that the rent (and, possibly, other sums payable by the tenant under the lease) should cease to be payable if the premises are rendered unusable by damage caused by an insured risk (see **24.6**).

(d) A provision which states that the landlord does not, by reason of anything contained in the lease, imply or represent that the tenant's proposed use of the premises is a permitted use under planning legislation. In *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810 (a case at first instance), the landlord had let premises to the tenant as 'offices'. After completion of the lease, the tenant discovered that only part of the premises enjoyed the benefit of planning permission for office use, and that the local planning authority was only prepared to grant planning permission in respect of all of the premises on a temporary basis. The court held that the tenant was entitled to rescind on account of the landlord's misrepresentation, since it was implicit in what was said in the lease that the premises could lawfully be used by the tenant for the intended purpose throughout the term. The landlord should therefore make it clear in the lease that, simply because the lease (or any licence granted subsequently) permits a certain type of business activity at the premises, the landlord does not warrant that permission is available for that use.

(e) A provision whereby the tenant acknowledges that he has not entered into the lease in reliance upon any statement made by or on behalf of the landlord. This provision seeks to prevent the tenant from pursuing a remedy against the landlord in respect of a misrepresentation, but it will be subject to s 3 of the Misrepresentation Act 1967 (as amended by s 8 of the Unfair Contract Terms Act 1977) and will have to satisfy the test of reasonableness set out in the 1977 Act.

(f) A provision regulating the method of service of notices under the lease. On occasions during the lease, one party will want or need to serve a notice on the other under one of the provisions in the lease (eg, to implement a rent review clause, or to give notice of an assignment of the lease, or as a preliminary step to the exercise of a right of re-entry). Whether or not a notice has been validly served will be an important issue and should, therefore, be a matter which is capable of conclusive determination. Accordingly, the lease should specify the method of service of notices, either by incorporating the provisions of s 196 of the LPA 1925 (as amended by the Recorded Delivery Service Act 1962) into the lease, or by expressly setting out the methods of service to be permitted by the lease. Section 196(3) provides that service can be effected by leaving the document at the premises or at the person's last-known abode or place of business. Section 196(4) deems service to have been effected if the notice is sent by recorded delivery post, provided that it is not returned through the Post Office as undelivered. The importance of tenants having proper systems in place to deal with notices was emphasised in *Warborough Investments Ltd v Central Midlands Estates Ltd* [2006] PLSCS 139. In this case, a 'trigger' notice initiating a rent review (see **18.7.1**) was held validly served when left at the customer service desk of a supermarket.

(g) Excluding compensation under the LTA 1954. If the parties agree that the tenant should not be entitled to compensation under s 37 of the LTA 1954 at the end of his lease (see **31.6.4**), this part of the lease should include a clause whereby the tenant's right to compensation is excluded.

(h) Excluding the tenant's security of tenure. Occasionally, the parties agree that the security of tenure provisions contained in the LTA 1954, Pt II should not apply to the lease (see **31.1.6**). If this is to be the case, the contracting-out provision should appear in this part of the lease. Consent of the court would be required in respect of such an agreement.

(i) Options to break. If either party is to enjoy the right to terminate the lease early by the exercise of an option to break (see **16.2**), the option is usually contained in this part of the lease.

13.4.6 Schedules

Most of the detail of the lease can be omitted from the main body of the document and placed in separate schedules. This will make the lease easier to read, and from the client's point of view, it makes it easier for him to refer to the various provisions of the lease.

Most leases contain schedules dealing with the following matters:

The premises

The first schedule to the lease often contains a description of the premises, which should be complete and accurate and, where appropriate, refer to plans to be incorporated in the lease.

Rights

If rights are to be granted to the tenant (eg, on a lease of part), they are usually referred to briefly in the body of the lease and set out in detail in a schedule.

Exceptions

Where the landlord is reserving rights (which will usually be the case) those matters will briefly be referred to in the body of the lease, and set out in detail in a schedule.

Rent review

Provisions relating to revisions of the annual rent during the term will either be contained in a separate clause in the body of the lease, or included in a schedule.

Covenants

There will be separate schedules detailing the tenant's covenants, the landlord's covenants and the covenants to be entered into by the tenant's guarantor on the grant of the lease, the assignee's guarantor on the assignment of the lease, and an outgoing tenant as an authorised guarantor (as to which, see **20.2.4.3**).

Service charge provisions

If there is to be a service charge, it is usual to group all the service charge provisions in one schedule to the lease.

13.4.7 Execution

The lease and its counterpart are deeds and, therefore, the usual rules relating to the execution of deeds are applicable. A testimonium clause is not an essential part of a lease but, if one is included, it ought to appear immediately before the first schedule. Attestation clauses will, of course, be essential.

13.5 The 2007 Code for Leasing Business Premises in England and Wales

The origins of the 2007 Code can be traced back to the *Code of Practice for Commercial Leases in England and Wales*, which was published in April 2002 following government pressure on the property industry. The 2002 Code was drafted by a working party comprising representatives from property and industry and professional advisers. The Government felt that landlords were generally not offering tenants sufficiently flexible lease terms to match their business requirements. The Government was especially concerned that upward-only rent reviews remained prevalent in longer leases and was considering outlawing them.

At the launch of the Code in 2002, Sally Keeble, the then Regeneration Minister, stated that the Code recommended that commercial property owners should, wherever possible, provide a choice of leasing terms to prospective tenants, where this was practicable.

The Government also commissioned a two-year study of the impact of the Code. This was undertaken by the University of Reading and its report, *Monitoring the 2002 Code of Practice for Commercial Leases*, was released in early 2005. The Code was found to be having little direct effect upon lease negotiations. Restrictions on assignment and sub-letting had not been relaxed and were still the subject of complaint by many tenants. The provisions of the Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995) had, indeed, encouraged landlords to impose detailed restrictions on assignment and to require authorised guarantee agreements (AGAs) from assigning tenants (see **20.2.4.3**). The property industry thus appeared to be ignoring the thrust of the recommendations in the Code that restrictions, beyond the standard 'consent not to be unreasonably withheld', should be imposed on tenants only if that is necessary to protect the landlord's interests and, in particular, that AGAs should be required only where the assignee is of lower financial standing than the present tenant.

In March 2005, Housing and Planning Minister Yvette Cooper stated that the Government was still concerned about inflexibility in the commercial property market. The major problems were assignment and sub-letting provisions, which made it difficult for tenants to

dispose of properties that were surplus to requirements. She announced a review of the law of assignment and sub-letting, with the aim of easing the position for tenants while not jeopardising property investment; this included looking at legislative options. There was also continued concern about the prevalence of upward-only rent review clauses in longer leases and further progress in this area was necessary to improve the flexibility of the market. The Government would continue to monitor the situation and retain the option to legislate in future if necessary.

The Government clearly believed that the property industry was providing inadequate flexibility for tenants and that it was time to reconsider the rights given to landlords by the LT(C)A 1995 with regard to assignment and AGAs. Although legislation amending the LT(C)A 1995 or banning upward-only rent reviews has not been ruled out, the Government signalled its desire for change to be achieved voluntarily and for the 2002 Code to be updated. The joint working group that produces the Code was reconvened and a new version of the Code was published in March 2007 (the Code for Leasing Business Premises). The 2007 Code provides a step-by-step occupiers' guide to contract negotiations, intended to help tenants avoid the pitfalls of bad contracts and to ensure that landlords operate to industry-agreed standards. It also encourages parties to move away from upward-only rent review clauses, which have enabled landlords to increase rents unchecked.

A number of radical overhauls of leasing practices were recommended, including the following:

(a) Landlords should price alternative rent review terms on a risk-adjusted basis.

(b) Preconditions on break clauses should be restricted.

(c) If sub-letting is allowed, it should be at the market rent.

(d) At the time of lease negotiations, landlords should disclose known irregular events that would have a significant effect upon the amount of future service charges.

(e) Unless expressly stated in the heads of terms, tenants will be obliged only to give the premises back at the end of their lease in the same condition as they were in when the lease was granted.

The 2007 Code offers three documents to improve leasing practice:

(a) a two-page 'Landlords Code', which clarifies what is expected from landlords;

(b) a step-by-step 'Occupier Guide' for tenants that will take them through the leasing process; and

(c) a checklist showing tenants at a glance what they are signing up to, which can also be used by all parties, their agents and solicitors during lease negotiations.

Housing and Planning Minister, Yvette Cooper, said: 'The new code will mean all businesses get a better deal on commercial property leases. This is an important step forward by the industry since it sets out clearly and simply best practice and advice for lease negotiations. My challenge to the industry is to make sure that it is used in all lease negotiations. We shall be keeping a close watch on the market to see that it makes a real difference.'

She also said: 'We believe the new code should have a chance to work, but . . . we have legal options if it does not succeed. Industry needs to take the lead here. We will keep an eye on the effect of the code and watch with interest to ensure that there is proper, accountable self-regulation so that legislation is not necessary.'

In July 2009, the Department of Communities and Local Government published a report on the use of the Code conducted by the University of Reading. This shows a disappointing lack of awareness and use of the Code. The Parliamentary Under Secretary of State for Communities and Local Government, Ian Austin, commented on this in a written statement to the House of Commons on 3 July 2009 (*Hansard* col 30WS).

He stated that the Government had 'held back' on legislating to 'give the 2007 Code a chance to work'. He made it clear that if the forthcoming impact assessment on the Code 'shows that the market has not responded, legislation is bound to come back on the agenda'. He firmly placed the onus on the property industry to ensure the Code's success. He stated (*Hansard* col 31WS):

> I call on the property industry, while there is still time, to redouble efforts to disseminate and use the code – every tenant negotiating a lease should have a copy and be encouraged to use it. In particular, the professions – surveyors and solicitors – have a special responsibility for making it available. A professional, modern industry will surely have an interest in ensuring that its customers are fully and properly informed about the leasing choices they are making. The UK commercial property industry should be a world leader, not just in its level of sophistication, but also in the fairness with which it operates.

The 2007 Code is set out in full in **Appendix 3**. A lease prepared by the Practical Law Company (^{PLC}Property) to promote discussion of the 2007 Code is set out in **Appendix 4**. It is intended to be compliant with the Code and also the RICS Code of Practice for Service Charges.

Chapter 14
The Parties to the Lease

14.1	Introduction	151
14.2	The landlord	151
14.3	The tenant	153
14.4	The guarantor	156
14.5	Rent deposits	160

14.1 Introduction

Following the date and commencement, the lease will set out details of the parties to the lease, namely the landlord, the tenant and any guarantor (who is also often referred to as a surety).

In respect of a corporate party, the lease should give the company's full name and either its registered office or its main administrative office, and the company's registration number. In respect of an individual party, the full name and postal address of the individual will suffice.

The purpose of this chapter is to examine the extent and duration of liability of the parties to a lease, the Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995) (which came into force on 1 January 1996) brought about considerable changes in this area. In particular, it abolished the concept of privity of contract in relation to leases which are defined as new leases for the purposes of the Act (see **14.2.2**). Accordingly, this chapter examines the law and practice both in relation to leases already in existence at the date when the Act came into force (the old regime), and those which are new leases (the new regime).

14.2 The landlord

The landlord's primary purpose as a party to the lease is to grant to the tenant the leasehold interest that both parties intend, upon the terms agreed between them. These terms may require the landlord to enter into covenants with the tenant in order to ensure that the tenant peaceably enjoys occupation of the premises, and a certain quality of accommodation (see, more specifically, **Chapter 23**).

14.2.1 The old regime

14.2.1.1 The original landlord

By virtue of the principle of privity of contract, the original landlord, as an original contracting party, remains liable in respect of any covenants entered into in the lease, even after he has sold the reversion. The landlord protects himself against the possibility of being sued for a breach of covenant committed by his successor by obtaining from him an express indemnity covenant in the transfer of the reversion. Such a covenant is not implied at law.

If the landlord has granted a lease of an entire building, it is unlikely that he entered into many covenants with the tenant. If the landlord has granted a lease of part of a building, or of premises forming part of a larger commercial site, the landlord may have entered into covenants to provide services to the tenants. If this is the case, the landlord may have limited expressly the duration of his liability under the covenants to the time the reversion is vested in him, rather than relied upon obtaining an indemnity covenant.

14.2.1.2 A successor to the reversion

The landlord's successor in title is bound during his period of ownership by all covenants imposed upon the landlord which have reference to the subject matter of the lease (see s 142(1) of the LPA 1925). At the same time, he takes the benefit of the tenant's covenants which have reference to the subject matter of the lease under s 141(1) of the LPA 1925. There was some doubt as to whether the benefit of surety covenants contained in the lease would pass to a buyer of the reversion without an express assignment, but it now appears in the light of *P&A Swift Investments v Combined English Stores Group plc* [1988] 3 WLR 313 that it will, provided the lease made it clear that a reference in the lease to the landlord includes his successors in title.

14.2.2 The new regime

14.2.2.1 The original landlord

Under a lease affected by the LT(C)A 1995 (as a general rule, those granted on or after 1 January 1996), on an assignment of the reversion by the original landlord, while there is no automatic release from his obligations under the lease, ss 6 and 8 of the Act provide a procedure whereby the assigning landlord can apply to the tenant to be released from his obligations under the lease. The outgoing landlord may serve a notice (in a prescribed form) on the tenant (either before or within four weeks after the assignment) requesting his release. If, within four weeks of service, the tenant objects by serving a written notice on the landlord, the landlord may apply to the county court for a declaration that it is reasonable for the covenant to be released. If the tenant does not object within that time limit, the release becomes automatic. Any release from a covenant under these provisions is regarded as occurring at the time when the assignment in question takes place. However, in the case of *BHP Great Britain Petroleum Ltd v Chesterfield Properties Ltd* [2001] EWCA Civ 1797, [2002] 2 WLR 672, the Court of Appeal held that the statutory release mechanism did not operate to release the landlord from those covenants which were expressed to be personal. In respect of such covenants, the original landlord would continue to be liable even after the assignment of the reversion had taken place. This decision may have significant implications for landlords.

Once a landlord is released under these provisions, he ceases to be entitled to the benefit of the tenant covenants in the lease as from the date of the assignment of the reversion.

However, the House of Lords decision in *Avonridge Property Co Ltd v Mashru* [2005] UKHL 70 offers a further opportunity for landlords to ensure that they are released from liability on an assignment of the reversion. In that case, it was held that a provision that expressly limited the landlord's liability under the covenants to the time that the reversion was vested in him was not rendered void by the provisions of the LT(C)A 1995. This seems likely to be an attractive provision for landlords to insert in leases, avoiding as it does the reliance on the 'reasonableness' provisions of the LT(C)A 1995. As the facts of that case show, however, tenants should be very cautious in agreeing to it when the landlord's covenants are of substantial value, eg to perform the covenants in the head lease. A transfer of the reversion to an impecunious person could result in the tenant having no effective remedy if the landlord's covenants were not performed.

14.2.2.2 A successor to the reversion

The landlord's successor becomes bound, as from the date of the assignment, by all of the landlord covenants in the lease, except to the extent that immediately before the assignment they did not bind the assignor (eg, covenants expressed to be personal). Similarly, the new landlord becomes entitled to the benefit of the tenant covenants in the lease. Sections 141 and 142 of the LPA 1925 do not apply in relation to new leases, so there is no need to enquire whether the relevant covenant is one which 'has reference to the subject matter of the lease'. The benefit of surety covenants (not being tenant covenants for the purposes of the Act) will

pass to an assignee of the reversion in accordance with *P&A Swift Investments* on the basis that the assignee has acquired the legal estate, and the surety covenants touch and concern that estate. In the same manner, the benefit of a former tenant's authorised guarantee agreement (see **20.2.4.3**) will pass to the assignee.

A successor can apply to be released from his obligations under the lease when, at some future time, he assigns the reversion. If at that time a former landlord is still liable on the lease covenants (because he did not obtain a release from the tenant when he assigned the reversion), he can make another application to the tenant to be released.

14.3 The tenant

The person to whom the lease is granted is known as the original tenant. The person to whom the tenant later assigns his lease is known as the assignee. The original tenant will be required to enter into many covenants in the lease regulating what can be done in, on or at the premises.

14.3.1 The old regime

14.3.1.1 The original tenant – privity of contract

Prior to the LT(C)A 1995, basic principles of privity of contract dictated that the original tenant, as an original contracting party, remained liable in respect of all of the covenants in the lease for the entire duration of the term, even after he assigned the lease. The original tenant under the existing regime is in the undesirable position of being liable for a breach of covenant committed after he has parted with his interest in the premises. If, for example, the tenant was granted a 25-year term which he assigned at the end of the fifth year to an assignee who then failed to pay rent and allowed the premises to fall into disrepair, the landlord could choose to sue, not the assignee, but the original tenant for non-payment of rent and breach of the repairing covenant. It does not matter that since the assignment the rent has been increased under the rent review clause (unless the increase is referrable to a variation of the lease terms agreed between the landlord and assignee – see s 18 of the LT(C)A 1995 and the case of *Friends' Provident Life Office v British Railways Board* [1995] 1 All ER 336).

The effect of privity of contract becomes increasingly significant in recessionary times. If the reason why the assignee has defaulted in his obligations under the lease is that the assignee has become insolvent, instead of pursuing a worthless claim against the assignee, the landlord would look to the original tenant for payment of rent.

14.3.1.2 For how long is the original tenant liable?

The original tenant's liability lasts for the entire duration of the contractual term. Once he has assigned his interest in the lease, his liability will not extend into any continuation of that term that may arise under s 24 of the LTA 1954, unless there is an express provision in the lease to the contrary. As will be seen later (at **31.1.7**), a tenancy which is protected by Pt II of that Act will not come to an end on the expiration of the contractual term. Instead, s 24 continues the tenancy on exactly the same terms, and at the same rent, until the tenancy is terminated in one of the methods prescribed by the Act. Hence, the contractual rent remains payable beyond the expiry date of the lease, but the effect of the House of Lords' decision in *City of London Corporation v Fell* [1993] 49 EG 113 is that, where the original tenant has already assigned his lease before the contractual expiry date of the lease, his liability will cease at that date, and will not be continued.

However, even before *City of London Corporation v Fell,* landlords were drafting leases to include a provision to ensure that the original tenant (and any assignees who entered into a direct covenant with the landlord) would remain liable to perform the covenants during a statutory continuation. This would be done by defining 'the Term' in the lease to include 'the period of any holding over or any extension or continuance whether by agreement or

operation of law'. The tenant is then required to pay the rent and perform his covenants during 'the Term'. The one consolation for a tenant who has assigned the lease but remains liable because of the definition of 'the Term' is provided by *Herbert Duncan Ltd v Cluttons* [1992] 1 EGLR 101, which held that the continuing liability to pay rent relates only to the contractual rent under the lease, and not to any interim rent fixed by the court under s 24A of the LTA 1954 unless the lease states otherwise.

14.3.1.3 The need for an indemnity

As a result of the continuing nature of the original tenant's liability under the old regime, it is essential that, on an assignment, the original tenant obtains an indemnity from the assignee against all future breaches of covenant (whether committed by the assignee or a successor in title). An express indemnity may be taken, but this is not strictly necessary since s 77 of the LPA 1925 automatically implies into every assignment for value a covenant to indemnify the assignor against all future breaches of covenant. If the lease is registered at Land Registry, Sch 12 to the Land Registration Act 2002 (LRA 2002) implies a similar covenant for indemnity into a transfer of the lease, whether or not value is given.

From a practical point of view, it should be noted that an indemnity from an assignee (whether express or implied) is worthless if the assignee is insolvent, and this may be the very reason why the landlord is pursuing the original tenant in the first place.

Where there has been a succession of assignments, and the original tenant finds that he is unable to obtain a full indemnity against his immediate assignee, the assignee in possession may be liable at common law to indemnify the original tenant who has been sued for breach of covenant (see *Moule v Garrett and Others* (1872) LR 7 Exch 101), but again the indemnity may be worthless owing to the insolvency of the defaulting assignee.

14.3.1.4 The assignee – privity of estate

By virtue of the doctrine of privity of estate, an assignee under the old regime is liable in respect of all of the covenants in the lease which 'touch and concern' the demised premises, for as long as the lease remains vested in him.

An assignee cannot be sued for a breach of covenant committed prior to the lease being vested in him, save to the extent that the breach in question is a continuing breach (eg, breach of a covenant to repair) which effectively becomes the assignee's breach from the date of the assignment. If, at the time of the assignment there are arrears of rent, the landlord's claim to recover the arrears would be against the assignor, not the assignee. However, from a practical point of view, the landlord is unlikely to give his consent to an assignment (assuming the lease requires his consent) unless the arrears are cleared. Further, the assignee is unlikely to take the assignment while rent is in arrear because of the risk of forfeiture of the lease on account of the outstanding breach.

An assignee is not liable for breaches of covenant committed after he has parted with his interest in the premises, (although he may still be sued in respect of breaches committed while he was the tenant) and he is not liable in respect of covenants which do not touch and concern the premises (but see **14.3.1.5**).

14.3.1.5 Covenants which touch and concern

Under the old regime, an assignee is liable only in respect of those covenants which touch and concern the demised premises. These are covenants which are not in the nature of personal covenants, but have direct reference to the premises in question by laying down something which is to be done or not to be done at the premises, and which affect the landlord in his normal capacity as landlord, or the tenant in his normal capacity as tenant. If the purpose of the covenant is to achieve something which is collateral to the relationship of landlord and tenant, then the covenant does not touch and concern.

Nearly all of the covenants in a typical commercial lease touch and concern the demised premises. For example, the covenants:

(a) to pay rent,
(b) to repair,
(c) to use the premises for a particular purpose,
(d) not to make alterations without consent,
(e) not to assign or sublet without consent,

are all covenants which relate to the premises and have reference to the landlord and tenant relationship in respect of those premises.

By contrast, the following covenants do not touch and concern:

(a) to pay a periodic sum to a third party;
(b) to build premises for the landlord upon some other land; or
(c) to repair or renew chattels (as distinct from fixtures, which would form part of the premises).

These covenants do not have any reference to the relationship of landlord and tenant in respect of the land in question and, therefore, would not bind an assignee.

14.3.1.6 Direct covenants

Landlords have never liked the limited duration of an assignee's liability under the doctrine of privity of estate. In practice, therefore, it is common for the landlord to try to extend the liability of an assignee under the old regime by requiring him, as a condition of the landlord's licence to assign, to enter into a direct covenant to observe the covenants in the lease for the entire duration of the term, thereby creating privity of contract between landlord and assignee. This covenant is usually contained in the formal licence to assign (see **27.2**). The landlord will always then have a choice between original tenant and present assignee as to whom to sue for a breach of covenant committed by the latter. Where intermediate assignees have entered into direct covenants in this manner, the landlord's options are increased.

If an assignee has given a direct covenant to the landlord, the extent of his continuing liability is governed by the *City of London v Fell* case, and the definition of 'the Term' in the lease in the same way as applies to the original tenant.

14.3.1.7 The need for an indemnity

The assignee from the original tenant will have covenanted, either expressly or impliedly, with the original tenant to indemnify him against liability for loss arising out of any future breach of covenant (whether committed by the assignee or a successor in title). Irrespective of whether the assignee is affected by privity of estate or contract, because he gave an indemnity covenant to his assignor, he needs to obtain one from his assignee. An express indemnity may be taken, but s 77 of the LPA 1925 and Sch 12 to the LRA 2002 will operate in the same way as before.

14.3.2 The new regime

As stated above, the main purpose of the LT(C)A 1995 was to abolish privity of contract in leases, and it is therefore in the area of tenant liability that the Act has the most significant impact.

14.3.2.1 The original tenant – privity of contract release

The basic rule is that a tenant under a lease which is a new lease for the purposes of the LT(C)A 1995 is only liable for breaches of covenant committed while the lease is vested in him. Thus, on assignment of the lease, the assignor is automatically released from all the tenant covenants of the tenancy (and he ceases to be entitled to the benefit of the landlord covenants).

This means that while the outgoing tenant can be sued for breaches of covenant committed at a time when the lease was vested in him, he cannot be sued for any subsequent breaches.

14.3.2.2 The assignee – liability on covenants

The basic rule applies equally to assignees. As from the date of assignment, an assignee becomes bound by the tenant covenants in the lease except to the extent that immediately before the assignment they did not bind the assignor (eg, they were expressed to be personal to the original tenant), but when he assigns the lease, he is automatically released from all of the tenant covenants. One slight change for leases under the new regime is that an assignee will be liable on all the tenant covenants in the lease whether or not they 'touch and concern' the land. The combination of this slight change, and the statutorily imposed limitation on the duration of an assignee's liability, makes the practice under the old regime of obtaining direct covenants from assignees inapplicable to leases granted under the new regime.

In the same way that the assignee becomes bound by the tenant covenants, so too does the assignee become entitled, as from the date of the assignment, to the benefit of the landlord covenants in the lease.

14.3.2.3 Excluded assignments

Assignments in breach of covenant (eg, where the tenant has not complied with a requirement in the lease to obtain his landlord's consent before assigning) or by operation of law (eg, on the death or bankruptcy of a tenant) are excluded assignments for the purposes of the LT(C)A 1995. On an excluded assignment, the assignor will not be released from the tenant covenants of the lease, and will remain liable to the landlord, jointly and severally with the assignee, until the next assignment, which is not an excluded assignment, takes place.

14.3.2.4 Authorised guarantee agreements

To counterbalance the loss to the landlord of the benefits of the old privity regime, the LT(C)A 1995 allows the landlord to require an outgoing tenant, who will be released from liability under the Act, to enter into a form of guarantee whereby the outgoing tenant guarantees the performance of the tenant covenants by the incoming tenant (see **20.2.4.3**).

14.3.2.5 Indemnity covenants?

As an assigning tenant is not liable for the breaches of covenant committed by his successor, the LT(C)A 1995 has repealed s 77 of the LPA 1925 and Sch 12 to the LRA 2002 in relation to leases granted under the new regime. However, it should be noted that an outgoing tenant may remain liable to the landlord for an assignee's breaches of covenant under the terms of an authorised guarantee agreement and, in such circumstances, an express indemnity from the assignee should be obtained.

14.4 The guarantor

Much attention in practice is given to the financial status of the proposed tenant, and a consideration of what is called 'the strength of the tenant's covenant'. A tenant is said to give 'a good covenant' if it can be expected that the tenant will pay the rent on time throughout the term, and diligently perform his other obligations under the lease. An established, high performing and renowned public limited company (such as one of the large retail food companies) will be regarded as a good covenant in the commercial letting market, whereas newly formed public limited companies and many private companies, whose reputation, reliability and financial standing are unknown in the property market, will not be perceived as giving a good covenant. If the covenant is so bad that the landlord has reservations about the proposed tenant's ability to maintain rental payments throughout the term without financial difficulties, the landlord will consider not granting a lease to that tenant in the first place.

However, in situations which fall between these two extremes, the landlord often requires a third party, known as a guarantor, to join in the lease to guarantee the tenant's obligations.

14.4.1 Practical points

The landlord's aim is to ensure that he receives the rent due under the lease on time throughout the term, either from the tenant, or if the tenant defaults, from the guarantor. Therefore, just as the landlord ought to investigate the financial status of his proposed tenant, so too should he investigate the status of the guarantor nominated by the tenant.

With private limited companies or newly formed public limited companies (who, even with plc status, may be just as likely to be in breach as any other tenant) many landlords will ask for one or more of the company's directors to guarantee the tenant's performance of its obligations. However, the landlord should not necessarily be so blinkered in his approach, since other options may prove to be more fruitful.

Does a subsidiary company have a parent or sister company which can stand as guarantor? If the directors are not of sufficient financial standing, are the shareholders of the company in any better position to give the landlord the element of reliability he requires? Will the tenant's bank guarantee the obligation of its client?

The guarantor should be advised to seek independent advice, since there is a clear conflict of interests between tenant and guarantor. The conflict arises in that, on the one hand, the advice to be given to the tenant is that, without a guarantor, the tenant will not get a lease, while, on the other hand, the advice to give to the guarantor would be to avoid giving the guarantee. Further, in seeking to make amendments to the surety covenants in the lease on behalf of the guarantor, the solicitor may be prejudicing the negotiation of the lease terms between the landlord and his tenant–client, causing delay or disruption.

14.4.2 The extent of the guarantee

14.4.2.1 The old regime

The purpose of the guarantee is to ensure that the guarantor will pay the rent if the tenant does not, and will remedy or indemnify the landlord against any breaches of covenant committed by the tenant. Two points should be noted. First, it is usual for the landlord in drafting the lease to define 'the Tenant' to include the tenant's successors in title. This means that in guaranteeing the obligations of 'the Tenant', the guarantor has guaranteed the performance of future (and as yet unknown) assignees of the lease. His liability would, therefore, extend throughout the duration of the lease (even after the original tenant had assigned the lease). Secondly, even if the guarantee was limited to a guarantee of the original tenant's obligations, an original tenant remains liable by virtue of privity of contract under the existing regime to perform the covenants in the lease for its entire duration. Should, therefore, the landlord choose to sue, not the assignee in possession, but the original tenant, the guarantee would remain active.

Ideally, the guarantor should seek to limit the extent of his liability so that the guarantee applies only for so long as the lease remains vested in the tenant in respect of whom the guarantee was originally sought. This is a matter for negotiation with the landlord.

14.4.2.2 The new regime

Abolition of the concept of privity of contract in leases applies equally to guarantors. Section 24(2) of the LT(C)A 1995 provides that where a tenant is released under the LT(C)A 1995 from the tenant covenants of the lease, any person (ie, the guarantor) who was bound, before the release, by a covenant imposing liability upon that person in the event of default by the tenant, is released to the same extent as the tenant. Any attempt to extend the liability of a guarantor beyond the duration of the liability of the tenant whose performance was

guaranteed is likely to fall foul of the anti-avoidance provisions of s 25 of the LT(C)A 1995. However, it is arguable that a guarantor can be required to undertake a separate obligation to guarantee the tenant's performance under any authorised guarantee agreement he may enter into.

There is some comfort for the guarantor in either regime in that, unless there is an express provision in the lease to the contrary, the liability of the guarantor will cease upon the contractual term date and will not continue during a statutory continuation tenancy under s 24 of the LTA 1954 (see *Junction Estates Ltd v Cope* (1974) 27 P & CR 482). However, it is common practice to define the lease term to include 'the period of any holding over or any extension or continuance whether by agreement or operation of law', and to prolong the guarantor's liability by requiring him to covenant with the landlord throughout 'the term' as so defined.

14.4.3 Discharge or release

The guarantor cannot unilaterally revoke his guarantee, but in certain cases, usually where the landlord acts to the prejudice of the guarantor, the conduct of the landlord might operate as a release.

14.4.3.1 Variations

If the landlord, without obtaining the consent of the guarantor, agrees with the tenant to vary the terms of the lease (eg, by substituting more onerous repairing obligations), the variation of the lease will operate to discharge the guarantor. A guarantor cannot stand as surety and be made liable for the tenant's default in the performance of terms different to those guaranteed to be performed, unless the guarantor has agreed to the variation. However, an immaterial variation of the lease which would not prejudice the guarantor (eg, by substituting less onerous repairing obligations) is not likely to discharge the guarantor, although authority appears to suggest that it is for the guarantor to decide whether or not he would be prejudiced by the proposed variation. In *Holme v Brunskill* (1877) 3 QBD 495, a surrender of part of the premises comprised in the lease (which might not appear in any way to prejudice the guarantor, particularly if the rent is reduced as a result), which was agreed without the consent of the guarantor, operated to discharge the guarantee. However, a variation which does not affect the terms of the (tenant's) principal contract will not affect the guarantor's secondary contract (see *Metropolitan Properties Co (Regis) Ltd v Bartholomew* [1995] 14 EG 143).

A surrender of the whole of the premises comprised in the lease will operate to end the liability of the guarantor as from the date of surrender, but not in respect of any breaches of covenant outstanding at that time.

Increasing the rent by exercising a rent review clause does not amount to a variation and so will not release the guarantor. This means that a guarantor may be guaranteeing the payment in future of an unknown level of rent (although see the protection given to guarantors of former tenants by s 18 of the LT(C)A 1995 and in the case of *Friends' Provident Life Office v British Railways Board* [1995] 1 All ER 336).

14.4.3.2 'Giving time'

'Giving time' to the tenant may operate to discharge the guarantee. A landlord 'gives time' to a tenant if, in a binding way, he agrees to allow the tenant to pay rent late, or not at all. It does not seem that a mere omission to press for payment (eg, due to an oversight, or perhaps to avoid a waiver of the right to forfeit the lease) will amount to the giving of time.

14.4.3.3 Release of co-guarantor

According to general principles of suretyship, if there is more than one guarantor, the release by the landlord of one of them operates as a release of all of them.

14.4.3.4 Death

The death of the tenant is not likely to bring an end to the guarantee, since the lease will vest in the tenant's personal representatives who, as the tenant's successors in title, will become 'the Tenant' under the lease, whose obligations are guaranteed by the guarantor. Under the new regime, such a vesting would be an excluded assignment, and so the guarantor would not be released. Further, the death of the guarantor will not necessarily bring an end to the guarantee since the guarantor's own personal representatives will remain liable under the guarantee to the extent of the deceased's assets passing through their hands. However, it is more common for the landlord to make provision for the possible death of the guarantor by obtaining a covenant from the tenant obliging him to find a suitable replacement.

14.4.3.5 Bankruptcy or liquidation

The bankruptcy or liquidation of the tenant will not operate to release the guarantor. On the bankruptcy of an individual tenant, the lease will vest in the trustee-in-bankruptcy who will become 'the Tenant' for the purposes of the lease (and such a vesting is an excluded assignment under the new regime). On the liquidation of a corporate tenant, the lease will remain vested in the company (unless the liquidator obtains an order under s 145 of the Insolvency Act 1986 (IA 1986)).

Even if the trustee or liquidator chooses to disclaim the lease, the disclaimer will not operate to end the guarantor's liability (see **32.9**).

14.4.4 Drafting points for the landlord

The landlord should ensure that the guarantor joins in the lease to give the covenants the landlord requires. A guarantee will be unenforceable if it is not in writing (see *Actionstrength Ltd v International Glass Engineering* [2003] 2 AC 541).

The two basic obligations of a guarantor are to pay the rent (and any other sums payable by the tenant under the lease) if the tenant does not pay, and to remedy, or to indemnify the landlord against loss caused by, any breaches of covenant committed by the tenant. The landlord will ensure that the guarantor is liable for the period in respect of which the tenant is liable under the lease (and, possibly, under any authorised guarantee agreement that the tenant may enter into).

Several other provisions are usually required by the landlord:

(a) A covenant from the tenant to provide a replacement guarantor should one of several unfortunate or undesirable events happen. For instance, if the guarantor is an individual who dies, or becomes mentally incapable (ie, a receiver is appointed under s 99 of the Mental Health Act 1983) or has a petition in bankruptcy presented against him (or is affected by other proceedings under the IA 1986 which the landlord considers serious enough to warrant substitution) the landlord will require the tenant to find a replacement of equivalent financial standing. If the guarantor is a company and a winding-up commences (or, as above, it is affected by other adverse insolvency proceedings), again the tenant will be required to find a reasonably acceptable replacement.

(b) A provision protecting the landlord against the tenant's trustee-in-bankruptcy or liquidator disclaiming the lease to bring the tenant's liability to an end. The effect of a disclaimer is dealt with at **32.9.6**. For present purposes it can be said that, whilst disclaimer does not end the liability of a guarantor, most landlords will nevertheless want the ability to require the guarantor to take a lease from the landlord in the event of disclaimer, for the full unexpired residue of the term then remaining.

(c) A provision to deal with situations which might otherwise operate to release the guarantor. As part of the guarantor's covenants, the landlord will include a declaration

that a release will not be effected by the giving of time to the tenant, or by a variation in the terms of the lease (although as a concession, the landlord might accept that a variation prejudicial to the guarantor will still operate as a release unless the guarantor has consented to it). The effect of stating in the lease that the guarantor will not be released 'by any other event which, but for this provision, would operate to release the surety' is doubtful.

14.4.5 Drafting points for the guarantor

If the guarantor has accepted the principle of giving a guarantee, he should make all efforts to minimise his liability. There are several provisions a guarantor can seek to negotiate:

(a) A limit on the length of his liability; while the LT(C)A 1995 releases a guarantor to the same extent as it releases the tenant, the guarantor should try to ensure that he is not contractually bound to guarantee the tenant under any authorised guarantee agreement (as to which, see **20.2.4.3**).

(b) An obligation on the landlord's part to notify the guarantor of any default by the tenant; one would expect the tenant to tell his guarantor if the tenant was experiencing difficulties in meeting his obligations under the lease. However, this might not always be the case, and in order to alert the guarantor to possible claims under the guarantee and, perhaps, to enable him to put pressure on the tenant, he could seek to include a covenant by the landlord to notify him in writing whenever the tenant falls into arrears with the rent, or otherwise breaches a covenant in the lease.

(c) Participation in rent reviews; as the guarantor guarantees payment of future unascertained rents he may try to persuade the landlord to allow him to play a part in the rent review process. This would necessitate amendments to the usual rent review clause, and would not be attractive to the landlord. Further, the tenant would not be keen either to hand over the review negotiations to the guarantor or to have him involved as a third party in the review process, and an assignee of the lease would certainly see it as an unattractive proposition.

(d) An ability to demand an assignment of the lease from the tenant where the tenant is in default under the lease. This would enable the guarantor to minimise his liability by being able to call for an assignment and then assign the lease to a more stable assignee.

14.4.6 An assignee's guarantor

The above paragraphs have concentrated on the guarantee to be provided by the original tenant on the grant of the lease. However, as a condition of granting licence to assign the lease, the landlord may require the assignee to provide a suitable guarantor in respect of his obligations. Under the old regime, it will be the landlord's intention to fix the new guarantor with liability for the duration of the contractual term and beyond, in the same way that he tries to fix the liability of the original tenant's guarantor. Under the new regime, liability should not exceed the liability of the assignee.

14.5 Rent deposits

As an alternative (or in addition) to a guarantee, the landlord may require the tenant to enter into a rent deposit deed whereby the tenant is required to deposit with the landlord, on the grant of the lease, a sum of money equivalent to, say, 12 months' rent, which the landlord is allowed to call upon in the event of tenant default. At the end of the lease (or, perhaps, on lawful assignment), the deposit should be returned to the tenant.

Careful thought must be given to the setting up of this arrangement and to the drafting of the rent deposit deed. The following factors should be kept in mind.

(a) The deed should specify what default by the tenant will trigger access to the deposit (eg, non-payment of rent, VAT or interest, or other breaches of covenant).

(b) If the deposited money is to be viewed as belonging to the landlord, it will be at risk if the landlord becomes insolvent. For instance, it would fall under the control of the landlord company's liquidator if the company went into liquidation. Equally, if the money is to be viewed as belonging to the tenant, it will be at risk at the precise moment when the tenant is likely to be in default in the performance of the lease terms (ie, the occasion of his insolvency). It is, therefore, usual to place the money in a separate deposit account (managed in such a way that only the landlord and his nominees may draw money out of the account) which is then charged to the landlord in order that the landlord has first call on the money in a liquidation or bankruptcy. If the tenant is a company, the charge it creates will have to be registered at Companies House pursuant to s 860 of the Companies Act 2006.

(c) Under the old regime, the obligations under the rent deposit deed are personal obligations between the original landlord and the original tenant, and the obligation to repay the deposit at the end of the term will not bind an assignee of the reversion: see *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] 1 AC 99. Further, the benefit of the obligation to repay does not pass to an assignee of the lease and thus, if the landlord inadvertently repaid the deposit to an assignee, the obligation to pay to the original tenant would still exist. The deed should deal with the personal nature of the obligations by providing that the landlord should not assign his interest in the reversion other than to a buyer who, by supplemental deed executed in favour of the tenant, expressly takes over the obligations of the landlord contained in the rent deposit deed. It should further provide that, on assignment of the lease, the deposit should be repaid to the tenant if the landlord has consented to the assignment in the usual manner under the alienation covenant. The assignee will be required to enter into a fresh rent deposit agreement.

    Under the new regime, unless expressed to be personal, the obligation to repay the deposit will pass to an assignee of the reversion as one of the landlord covenants of the tenancy. Similarly, the benefit of repayment will pass to an assignee of the lease. The original tenant should, therefore, ensure either that the benefit of repayment is expressed to be personal to him, or that the assignee pays to him a sum equivalent to the deposit at the time of the assignment. An assignee of the reversion should ensure that, as he will have the burden of the covenant to repay the deposit, he has control of the deposit itself. An original landlord may be reluctant to part with the deposit unless he is able to secure a release from the covenant to repay the deposit under the LT(C)A 1995. If he is unable to secure a release, he may prefer to retain the deposit (various schemes have been suggested which enable the landlord to keep the deposit under his control but, at the same time, allow the assignee access to it in the event of tenant default).

(d) The parties should consider to whom the interest earned on the money belongs (usually the tenant), whether the interest can be drawn out of the account, and at what stage the tenant will be required to make up any shortfall in the deposit (if, eg, the level of the account drops below an agreed figure due to the tenant's default). The deed will also have to make clear the situations in which the landlord will be entitled to draw upon the deposit.

One overriding factor that remains is that the tenant may not have sufficient money to put up a deposit in the first place.

Chapter 15
The Parcels Clause

15.1	Purpose	163
15.2	Airspace and underground	163
15.3	Fixtures	163
15.4	Rights to be granted and reserved	164

15.1 Purpose

The purpose of the parcels clause is to accurately and unambiguously describe the property being let to the tenant so that it is clear what is included and what is excluded. Where the whole of a building is being let, the parcels clause will contain the same sort of description as in the case of the sale of freehold land. Moreover, provided the boundaries are clearly identifiable it may be possible to adequately describe the premises in words alone. However, where a lease of part only of a building is intended, the parcels clause needs more care and attention and a plan will be essential (see **26.2**).

15.2 Airspace and underground

A lease of land includes the buildings on it and everything above and below the land. Thus, a lease of a building includes the airspace above it to such a height as is necessary for the ordinary use and enjoyment of the land and buildings. However, the parties may limit the extent of the parcels clause by excluding the airspace above the roof. If there is such a limitation, this will prevent the tenant from adding extra floors by extending upwards since to do so would be a trespass. The tenant should also appreciate that problems may be caused if he had to erect scaffolding above roof height to comply with his obligation to repair the roof; that would also amount to a trespass. The tenant should, therefore, ensure that he has any necessary right to enter the airspace above his building to the extent necessary to comply with his obligations under the lease. Without any limitation on the airspace the tenant will be free to extend upwards subject only to obtaining any necessary planning permission and consent under the alterations covenant.

15.3 Fixtures

The point about a fixture is that it is part of the demised premises and prima facie belongs to the landlord. If an article is not a fixture, it will be a chattel. Yet, despite the apparent simplicity of the matter, it is not always easy to distinguish between the two, and over the years the courts have developed a test based on the degree of annexation of the item to the land and the purpose of annexation (see, eg, *Holland and Another v Hodgson and Another* (1872) LR 7 CP 328). However, the application of this test to a given set of facts is notoriously difficult and the reader is referred to one of the standard works on land law for further consideration of this issue (and in particular the House of Lords' judgment in *Elitestone v Morris* [1997] 2 All ER 513).

For the avoidance of doubt, a prospective tenant should always compile a full inventory of the fixtures which are present at the commencement of the lease.

15.3.1 Repair of fixtures

If an article is a fixture, it is treated as part of the demised premises and the tenant will become responsible for its repair under his obligation to repair 'the demised premises'. This can have a

significant impact on the tenant bearing in mind that many business premises include expensive fixtures such as central heating and air conditioning plant. For this reason the tenant should always inspect the condition of the fixtures before completion of the lease and if any defects are discovered, the tenant must make sure that he does not become liable to remedy those defects under his repairing obligation. This can be achieved by getting the landlord to do any necessary repairs before the lease commences or by agreeing the state and condition with the landlord and ensuring that the covenant to repair does not require any higher standard than that existing at the date of commencement.

15.3.2 Removal of fixtures

The tenant may have the right to remove fixtures at the end of the lease depending upon whether they are 'landlord's fixtures', which cannot be removed, or 'tenant's fixtures', which the tenant is entitled to remove unless the lease provides to the contrary. Tenant's fixtures are those articles:

(a) affixed by the tenant;
(b) for the purpose of his trade; and
(c) which are capable of removal without substantially damaging the building and without destroying the usefulness of the article.

The terms of the lease may require the tenant to yield up the premises at the end of the term together with all fixtures. Whether this excludes the tenant's right to remove tenant's fixtures depends on the form of wording used; very clear words will be required before the right is excluded. However, it has been held that an obligation to yield up the premises 'with all and singular the fixtures and articles belonging thereto', is sufficient to exclude the right but the tenant should resist such a clause. Where the tenant is entitled to remove fixtures, he must make good any damage he causes by their removal and, as a general rule, the right only exists during the term.

15.4 Rights to be granted and reserved

The tenant may need to be granted rights to enable him to use the demised premises to their full extent. For example, he may need the right to enter upon the landlord's adjoining property to comply with his obligation to repair; this can be particularly important where the walls of the demised premises are flush against the boundary. The tenant may also need the right to connect into services on the landlord's adjoining property.

From the landlord's point of view, he may need to reserve rights such as a right to enter the demised premises to view the state and condition or to repair. The service pipes and cables for the landlord's adjoining property may pass under or through the demised premises and the landlord will thus need to reserve rights in respect of them.

Chapter 16
Term

16.1	Introduction	165
16.2	Break clauses	165
16.3	Options to renew	167
16.4	Impact of SDLT	167

16.1 Introduction

The duration of a lease for a term of years must be fixed and certain before the lease takes effect. Thus, for example, a tenancy 'until the landlord requires the land for road widening' is void for uncertainty (*Prudential Assurance Co Ltd v London Residuary Body* [1992] 3 All ER 504). This principle applies to all leases, including periodic tenancies. A provision that one party is unable to determine a periodic tenancy, or for it only to be determined in certain circumstances, is inconsistent with the concept of a periodic tenancy. If termination on the happening of an uncertain event is required by either party, this can be achieved by granting a long fixed term with a break clause exercisable only on the happening of the event in question (see **16.2**).

Most business tenancies will be for a fixed term in which case the lease must specify the date of commencement of the term and its duration (eg 'for a term of ten years from and including the 29 September 1994'). There is no need for the commencement of the term to be the same date as the date of completion of the lease. It may be more convenient for the landlord, particularly when he is granting several leases in the same block, to choose one specific date from which the term of each will run. If this is an earlier date than completion then, unless the lease provides to the contrary, the tenant's rights and obligations will only arise on completion, not the earlier date. However, for the avoidance of doubt, the lease should expressly state the precise date from which the rent is to be payable.

In specifying the date of commencement, it is important to avoid any ambiguity so that it is clear beyond doubt when the term expires (but note the effect of the lease being protected under Pt II of the LTA 1954). The presumption is that if the term is stated to run 'from' a particular date, the term begins on the next day. If, however, the term is expressed to begin 'on' a particular date, that day is the first day of the term. To avoid any possible argument, it is always best to use clear words such as 'beginning on', 'beginning with' or 'from and including' (see *Meadfield Properties Ltd v Secretary of State for the Environment* [1995] 03 EG 128).

In recent years, various external pressures have been placed on the term of commercial leases. The changes brought about by SDLT and Government pressure (see **13.5**) have resulted in shorter lease terms. For example, a 20-year lease at a rent of £250,000 per year will result in a payment of £50,000 in SDLT. Over the past few years, lease terms have fallen from the classic 25-year term of the past to 10 or 15 years or even less – and even then many tenants are insisting on break clauses (see **16.2**) being included in the lease. Short, flexible lease terms are often the order of the day.

16.2 Break clauses

16.2.1 Who may operate them and when?

Either or both parties may be given an option to determine the lease at specified times during the term, or on the happening of certain specified events. For example, the tenant may be

given the option to determine a 21-year lease at the end of the seventh and fourteenth years, or if he is prevented from trading due to the withdrawal of any necessary statutory licences. The landlord may be given an option to determine if he, at some future date, wishes to redevelop the premises or to occupy them for his own business purposes. The tenant should try to stipulate that the landlord cannot exercise the option until after a specified number of years as otherwise from the tenant's point of view the venture will be too uncertain in its duration.

Some options to break are expressed to be personal to the original tenant in order to prevent them being exercised by successors in title following an assignment. However, in *Brown & Root Technology v Sun Alliance* [1997] 18 EG 123, the court held that following the assignment of a registered lease to the tenant's parent company, the option was still exercisable by the original tenant until the assignment was completed by registration. It was only on registration of title that the legal estate vested in the assignee; until then the assignor remained the tenant and thus retained the ability to exercise the option. However, the position may be different for those leases granted on or after 1 January 1996, the date the Landlord and Tenant (Covenants) Act 1995 came into force. That Act defines 'assignment' to include an equitable assignment, and thus liability on the lease covenants is not dependent on registration of the title.

16.2.2 How are they exercised?

The break clause must be exercised in accordance with its terms. Thus, it must be exercised at the correct time and in the correct manner (see, eg, *Claire's Accessories UK Ltd v Kensington High Street Associates* [2001] PLSCS 112, as to the correct place of service). If there are any pre-conditions for the exercise of the option, they must be strictly complied with. Consequently, the tenant should be wary of any provision in the lease making compliance of tenant covenants a pre-condition for the exercise of the option. In such a case, even a trivial, immaterial breach of covenant on the part of the tenant may prevent him from validly exercising the option. The tenant should modify such a pre-condition so that it requires 'substantial' or 'material' compliance (see, eg, *Bairstow Eves (Securities) Ltd v Ripley* [1992] 2 EGLR 47 and *Fitzroy House Epworth Street (No 1) v The Financial Times Ltd* [2006] EWCA Civ 329). Similarly, any notice requirements for the exercise of the option must be strictly complied with because, unless the lease states to the contrary, time is of the essence of a break clause (*United Scientific Holdings v Burnley Borough Council* [1978] AC 904). If an incorrect date is specified in the break notice, the court may be prepared to correct it if the mistake would not have misled a reasonable recipient (*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749). Subsequent cases have shown that the courts will adopt a similar approach when dealing with other errors in break notices, but it must always be borne in mind that each case will turn on its own facts (see, eg, the contrasting cases of *Lemmerbell Ltd v Britannia LAS Direct Ltd* [1998] 3 EGLR 67 and *Havant International Holdings Ltd v Lionsgate (H) Investments Ltd* [1999] EGCS 144).

16.2.3 Effect of exercise on sub-tenants

The effect of the exercise of an option in a head-lease may be to terminate any sub-lease granted. This is dealt with further at **30.4**.

16.2.4 Relationship with the LTA 1954, Part II

The landlord must be aware of the interrelationship with Pt II of the LTA 1954 and may wish to give thought to drafting the circumstances giving rise to the exercise of the option in line with the requirements of s 30(1)(f) or (g) of that Act (see **31.5**). This is desirable because the exercise of the option may not necessarily entitle the landlord to recover possession as he must also, where necessary, comply with the provisions of the 1954 Act (see **31.2**). Further, where necessary, regard should be had to the relationship between the notice required under the break clause and the notice provisions of the 1954 Act.

16.3 Options to renew

Options to renew are not often found in business leases because most tenants are protected under Pt II of the LTA 1954 and will, therefore, have a statutory right to a new tenancy which the landlord may only oppose on certain grounds (see **Chapter 31**).

16.4 Impact of SDLT

Because the amount of SDLT payable will increase with the length of the lease (see **10.2**), a tenant will often find it preferable to take a short lease with an option to renew rather than a long lease with a break clause. So a five-year term with an option to renew will pay less SDLT on grant than a 10-year term with a right to break after five years. If the break clause is exercised, there will be no refund of SDLT paid in relation to the final five years of the term. Obviously, if a five-year lease is taken and this is renewed, extra SDLT will be then be payable – but it will only be payable if the lease is renewed.

Chapter 17
Rent

17.1	Introduction	169
17.2	Amount	169
17.3	Time for payment	170
17.4	Other payments reserved as rent	170
17.5	Suspension of rent	170
17.6	Interest	170
17.7	VAT	171

17.1 Introduction

One of the primary purposes in granting the lease is to enable the landlord to receive income in the form of rent. However, the payment of rent by the tenant is not essential to the landlord and tenant relationship and it is not uncommon, when property is difficult to let, for landlords to grant rent-free periods to tenants as an inducement for them to take the lease or to allow the tenant to fit out the premises.

The lease must contain a covenant by the tenant to pay the rent. In certain rare situations the tenant may have the right to deduct sums from the rent payable. For example, the tenant has the right to deduct those sums allowed by statute and, where the landlord is in breach of his repairing obligation, the tenant seemingly has an ancient right to undertake the repairs himself and deduct the expense from future payments of rent (see **29.2**). In addition, the tenant may be able to exercise a right of set-off and deduct an unliquidated sum for damages where the landlord is in breach of covenant and the tenant has thereby suffered a loss. Landlords often seek to counter the tenant's right to make deductions by stating in the covenant to pay rent that rent is to be paid 'without deduction'. However, this will not prevent a tenant from making a deduction authorised by statute, nor from exercising his right of set-off (see *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1993] 46 EG 184). To exclude the tenant's right of set-off, very clear words must be used.

The covenant to pay rent is usually followed by a covenant by the tenant to pay all taxes, rates, assessments and outgoings imposed on the demised premises; this will include rates and water rates. For the avoidance of doubt, the tenant should make it clear that this obligation does not extend to any taxes payable by the landlord arising out of the receipt of the rent or due to any dealing by the landlord with the reversion.

In the definitions clause of the lease the landlord should seek to define 'Rent' as also including any 'interim rent' which may become payable under s 24A of the LTA 1954 (see **31.4**). If this were not done and the original tenant's continuing liability was stated by the lease to extend into the statutory continuation (under s 24), he would remain liable only for the contractual rent during that period and not for any interim rent which an assignee may be ordered to pay as part of any future renewal proceedings under the 1954 Act (*Herbert Duncan Ltd v Cluttons* [1992] 1 EGLR 101).

17.2 Amount

The amount of rent must be certain. However, the actual amount need not be stated as long as some means are provided by which the exact amount can be ascertained. For example, the rent may be fixed at £25,000 per annum for the first five years of a 10-year lease and then at 'such revised rent as may be ascertained'. Provided the means of ascertaining the new rent are clearly

stated, this is a valid method of dealing with the rent. Such clauses are dealt with in **Chapter 18** where consideration is also given to the different methods of assessing the revised rent.

17.3 Time for payment

The lease should set out the following:

(a) The date from which the rent is payable and the date of the first payment. It is usual to state that the first payment, or an apportioned part of it, is payable on the date of the lease unless a rent-free period is to be given.

(b) The payment dates, otherwise, in the case of a tenancy for a fixed term of years, there is authority for the proposition that the rent will be payable yearly. It is common practice in business leases to make the rent payable on the usual quarter days, ie, 25 March, 24 June, 29 September and 25 December.

(c) Whether rent is to be payable in advance or arrear. Unless the lease provides to the contrary, which is usual, the general law provides that rent is payable in arrears.

In modern commercial leases, provision is often made for the payment of rent by way of direct debit or standing order to minimise the risk of delay.

17.4 Other payments reserved as rent

It is common for leases to provide for the tenant to make other payments to the landlord such as a service charge, or reimbursement of insurance premiums paid by the landlord. Landlords will often require the lease to state that such sums are payable as additional rent. The advantage to the landlord is that if the tenant defaults, the remedy of distress will be available; a remedy which can only be used for non-payment of rent and not for breaches of other covenants. Further, the landlord will be able to forfeit the lease for non-payment of sums defined as rent without the need to serve a notice under s 146 of the LPA 1925, see **30.5**.

It would also be possible for any VAT payable on the rent to be reserved as additional rent.

17.5 Suspension of rent

In the absence of any contrary provision in the lease, the rent will continue to be payable even if the premises are damaged or destroyed and so cannot be used by the tenant. The contractual doctrine of frustration will only apply to leases in exceptional circumstances (see *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675). From the tenant's point of view, therefore, he should insist on a proviso that the rent is suspended if the premises become unfit for use. If the lease contains a service charge, provision should also be made for this to be suspended as otherwise it too would continue to be payable. This issue is considered further at **22.7**.

17.6 Interest

Unless there is provision to the contrary, interest cannot be charged by the landlord on any late payment by the tenant of rent or other sums due under the lease (unless judgment is obtained against the tenant for such amounts). The Late Payment of Commercial Debts (Interest) Act 1998 does not apply to leases. It is, therefore, usual for a lease to provide that interest is payable by the tenant on any late payment of money due under the lease (from the due date to the date of actual payment). If, as usual, the rate of interest is geared to the base rate of a named bank (eg, 4% above), a problem may arise if that bank no longer fixes a base rate. It is, therefore, sensible to provide for an alternative rate should this situation arise. For the tenant's protection, this should be stated to be 'some other reasonable rate as the landlord may specify'. Without the addition of the word 'reasonable' the tenant would have no right to dispute any new rate he thought excessive.

From the landlord's point of view, it is preferable for the lease to state that the interest rate is to apply 'both before and after any judgment'.

17.7 VAT

The implications of VAT on business leases has been discussed in **Chapter 10**. The landlord should include an appropriate clause entitling him to add VAT to the rent and other payments due from the tenant by providing that the rent and other sums are payable exclusive of VAT.

Chapter 18
The Rent Review Clause

18.1	The need for review	173
18.2	Types of rent review clause	173
18.3	The dates for review	175
18.4	Working out the open market rent	176
18.5	The assumptions	176
18.6	The disregards	183
18.7	The mechanism for determining the rent	185
18.8	The late review	186
18.9	Recording the review	187

18.1 The need for review

Most commercial property leases exceeding five years in length will contain provisions requiring the parties to review the annual rent payable under the lease. With such leases it is difficult to set a rent at the outset of the term that both parties are satisfied will remain appropriate throughout the life of the lease. The effects of inflation, changes in the value of the rental property market or the tenant's circumstances can be reflected in the rent at review, depending on the type of rent review used.

18.2 Types of rent review clause

There are various ways in which rent may be varied during the term.

18.2.1 Fixed increases

This type of review provides for the rent to increase to a fixed amount at the review date. For example, in a lease for a 10-year term, the rent might be set at £10,000 for the first three years of the term, £15,000 for the next three years, and £20,000 for the remainder of the term. This sort of clause would be very rare since the parties to the lease would be placing their faith in the fixed increases proving to be realistic. If the parties have not been realistic then the tenant may pay more or the landlord receive less than on comparable properties.

18.2.2 Index-linked clauses

This type of review looks to increase or decrease the rent in line with an index reflecting changes in the value of money. In practice, the index favoured by practitioners is the Retail Prices Index (RPI). This is published by the Office of National Statistics and used as the domestic measure of inflation in the UK. Although changes in the RPI do not necessarily reflect changes in the property market, they do allow rents to change in line with inflation. Such clauses are usually relatively simple to operate. They generally involve multiplying the old rent by the relevant RPI increase since the date of last review. Due to their relative simplicity, they may be considered appropriate for lower-value property or in shorter leases where the parties would still like the rent to be reviewed. They may also be used where the property is very unusual and the comparable evidence used in assessing the open market rent (OMR) is not available (see **18.2.4**).

18.2.3 Turnover rents

A turnover rent is one which is geared to the turnover of the tenant's business, and can therefore be considered by the landlord only where turnover is generated at the premises. A

turnover rent would be impractical in the case of office or warehouse property, but would be appropriate for retail premises.

There are various methods of calculating a turnover rent. Probably the most common is where the tenant pays a 'base rent' plus a 'top up rent' based on the turnover of the business. The 'base rent' is usually a percentage of OMR (typically somewhere between 70% and 80%). The 'top up rent' is typically between 7% and 15% of the tenant's trading turnover.

The main advantage of a turnover rent is that both parties have an interest in ensuring the success of the business operated from the premises. For example, the landlord of a shopping centre will have an added incentive to ensure the shopping centre attracts as many customers as possible, as this will encourage visitors to the shops within it and, it is hoped, increase their turnover. This, in turn, will lead to increased rent for the landlord.

On the downside, if the business operated from the premises fails to thrive, the landlord will share in the pain! The landlord will also need to consider whether he is happy for the turnover provisions to continue on an assignment of the lease, since the identity of the tenant in a turnover rent lease is crucial. Underletting is usually prohibited in a turnover rent lease. Thought will also need to be given to what happens if the tenant ceases to trade from the premises, either temporarily or permanently.

18.2.4 Open market rent review

An OMR review clause requires the rent to be revised in accordance with changes in the property market.

The most common form of OMR review clause will provide that at every rent review date (eg every fifth anniversary of the term) the parties should seek to agree upon a figure that equates to what is then the current OMR for a letting of the tenant's premises. The aim of the exercise is to find out how much a tenant in the open market would be prepared to pay, in terms of rent per annum, if the tenant's premises were available to let in the open market on the relevant review date. This agreement is achieved either by some form of informal negotiated process between the landlord and the tenant, or (less commonly) by the service of notices and counter-notices which specify proposals and counter-proposals as to the revised rent. If agreement cannot be reached, the clause should provide for the appointment of an independent valuer who will determine the revised rent. The valuer will be directed by the review clause to take certain matters into account in conducting his valuation, and to disregard others, and he will call upon evidence of rental valuations of other comparable leasehold interests in the locality.

There are two forms of OMR review clause that practitioners are likely to come across:

(a) the upwards only rent review; and
(b) the upwards/downwards rent review.

18.2.4.1 The upwards only rent review

In an upwards only rent review, the rent on review will be the higher of the rent currently being paid and the open market valuation. In other words, the rental level will never go down. It can either go up, if the open market revaluation is higher than the rent currently being paid, or remain static. The benefits for the landlord are obvious. It is protected against the vagaries in the property market and will never receive less annual rent than the figure agreed at the outset. It can also benefit from any increase in rental levels identified in the open market revaluation. The tenant's position is less advantageous. It will never get the benefit of a fall in rental levels but is subject to any increases in rental levels that may occur. Clearly there is a risk to the tenant that in a falling market it may end up paying far more than competitors in similar premises are paying. Its premises are said to be over-rented. Despite these risks, upward rent reviews are still demanded by institutional landlords and often accepted by tenants. Threats by

the Government to legislate in this area have been met with attempts by the property industry to self-regulate. The 2007 Code for Leasing Business Premises provides as follows:

> **4 Rent Review**
>
> Rent reviews should be clear and headline rent review clauses should not be used. Landlords should on request offer alternatives to their proposed option for rent review priced on a risk-adjusted basis. For example, alternatives to upward only rent review might include up/down reviews to market rent with a minimum of the initial rent, or reference to another measure such as annual indexation.
>
> Where landlords are unable to offer alternatives, they should give reasons.
>
> Leases should allow both landlords and tenants to start the rent review process.

There is little evidence to suggest that landlords have taken much heed of the Code in this regard, and it seems upward only rent reviews will still be the most frequently encountered type of rent review in practice.

18.2.4.2 The upwards/downwards rent review

In an upward/downward rent review clause, the revised annual rent will be the OMR as determined in accordance with the lease. The annual rent will therefore reflect any increases or decreases in rental levels that have occurred since the start of the lease or the previous rent review. This is clearly an advantage to the tenant, but it means that the landlord cannot guarantee the amount of rent that will be generated by the lease. Sometimes, to protect itself against dramatic falls in rental levels, the landlord might provide in the lease that the rental level can never fall below a certain figure (often the initial annual rent figure).

18.3 The dates for review

18.3.1 How often should the rent be reviewed?

Most commercial property leases require the rent to be reviewed once every five years. Sometimes in a lease of less than 10 years the rent might be reviewed on a three-yearly basis.

18.3.2 The rent review dates

The tenant should ensure the dates for review are clearly set out in the lease. Usually the review dates are linked to the term commencement date (eg the fifth anniversary of the term commencement date). If this is the case, the tenant should ensure that the term commencement date does not start earlier than the date of the lease itself. Sometimes the term commencement date is backdated to enable the landlord to have all leases in a shopping centre or business park end on the same date (even though the leases have been completed on different dates). If the term commencement date has been backdated then the rent review date will be brought forward and the tenant will not enjoy the certainty of the initial rent figure for as long as it should.

Some leases specify actual dates for the rent review (eg 25 March 2020). This is probably best avoided, as it can give rise to valuation difficulties if on review the valuer is asked to value a hypothetical lease containing the same rent provisions as the actual lease (see **18.5.7**).

18.3.3 The penultimate day rent review

When specifying the rent review dates, the landlord may provide for the rent to be reviewed on the penultimate day of the term. Whilst it may seem strange to review the rent just before the lease is due to expire, there is of course the possibility of the lease continuing under the Landlord and Tenant Act 1954 (LTA 1954). By inserting a penultimate date review the landlord gives itself the possibility of obtaining an increased rent during the period of any holding over. Tenants' solicitors usually delete such penultimate day reviews, preferring instead for the parties to rely on the interim rent provisions in s 24A of the LTA 1954 (see

31.4). These provisions can result in a more favourable review for the tenant, not least because the rent can go down on an interim rent application. This might lead one to conclude that a landlord will fight quite hard to retain a penultimate day review. However, since 2004, tenants as well as landlords have had the ability to apply for an interim rent under the 1954 Act. This now means that even if the lease contains a penultimate day review, the rent determined under it can, after one day, be replaced by the rent determined under an interim rent application made by the tenant. So in reality, the penultimate day review will now be of use to the landlord only if the tenant fails to make an interim rent application.

18.4 Working out the open market rent

As already discussed in **18.2.4**, most modern rent review provisions require the parties to agree what the OMR of the premises would be if they were being let on the rent review date. This task requires the parties to think hypothetically, since in reality the premises are not available to let as they are occupied by the tenant. So the lease will usually direct the parties to assume that a hypothetical letting of the premises is taking place on the review date and that a hypothetical market exists in which such letting can take place.

18.4.1 Defining the OMR

Different phrases are used by different clauses to define the rent to be ascertained, although in broad terms it is the OMR of the premises at the rent review date. Both landlord and tenant are usually happy to define this as the rent at which the premises 'might reasonably be expected to be let in the open market' at the relevant review date. This wording follows that in s 34 of the LTA 1954, and is therefore considered by most practitioners to be unlikely to be subject to adverse interpretation. Most tenants would want to avoid the use of the expression 'the best rent at which the premises might be let' since this might allow the valuer to consider the possibility of what is known as a special purchaser's bid. If, by chance, the market for a hypothetical letting of the premises contains a potential bidder who would be prepared to bid in excess of what would ordinarily be considered to be the market rent, the 'best' rent would be the rent which the special bidder would be prepared to pay. For example, if the premises which are the subject matter of the hypothetical letting are situated next to premises occupied by a business which is desperate to expand, the 'best' rent might be the rent which that business would be willing to pay.

18.4.2 Comparables

The parties will look at what rents similar premises in similar areas are fetching at the review date. These 'comparables' give the parties an idea of the rent that might be achieved if the premises were available to let in the market at the review date.

18.4.3 Instructions to the valuer

The parties seeking to agree the OMR, or the valuer determining it in the event of dispute, will also need instructions about what matters should be assumed about this hypothetical lease and what issues should be disregarded. For example, what happens if the tenant has carried out substantial improvements to the premises? Should those be taken into account when fixing the revised rent, or should they be ignored? What are the terms of the hypothetical lease? Are they the same as the actual lease, or are there to be differences? The instructions on these issues normally take the form of a set of 'assumptions' and 'disregards' in the lease, which are discussed in further detail in **18.5** and **18.6** below respectively.

18.5 The assumptions

It is not possible to set out an exhaustive list of assumptions that can appear in a lease. It is important that the advice of a rent review surveyor is sought as to the impact on valuation of a particular set of assumptions and disregards before the lease is agreed. This is a much litigated

area where significant sums can turn on the interpretation of a particular clause. The following are, however, fairly typical of the type of assumptions that will be encountered in practice.

18.5.1 The parties are to assume that the premises are available to let 'in the open market by a willing lessor to a willing lessee'

The purpose of this assumption is to create a market in which the letting can be valued. It means that the valuer must assume there are at least two hypothetical people who are prepared to enter into the hypothetical lease. The valuer must assume they are 'willing', ie neither of them is being forced to enter the arrangement or is affected by difficulties which might affect their position in open market negotiations. This wording prevents a tenant arguing, for example, that the letting market is completely dead and therefore the open market value of the premises is zero.

18.5.2 The parties are to assume that the premises are available to let 'as a whole or in parts (whichever shall produce the higher rental)'

The valuer is directed by this assumption to calculate two different rental figures. The first is the rental value if the premises are let as a whole. The second directs the valuer to calculate the cumulative rental value if the premises were to be let off in parts. It may be, for example, that small areas of space are in greater demand than larger areas, thus making smaller units (on a square foot by square foot basis) more expensive. The cumulative rental figure could, therefore, result in a higher open market valuation. Is this fair on the tenant, even though clearly to the tenant's disadvantage? In a rent review negotiation a tenant will usually accept this assumption only if the alienation provisions allow the tenant to sub-let in parts. The tenant could then, in theory, achieve any higher rental figure itself by sub-letting different parts of its demise (for example, on a floor by floor basis).

18.5.3 The parties are to assume that the premises are available to let 'with vacant possession'

If this assumption were not included, the valuer might have to take into account the fact that the tenant is still occupying the premises at the review date. The tenant could then argue that the rent a hypothetical bidder would be prepared to pay would be very low. After all, the hypothetical tenant would not be able to occupy the premises itself if the actual tenant was still in occupation. To avoid this argument, most rent review clauses of this type include an assumption that vacant possession is available for the hypothetical letting, ie it assumes that the actual tenant has moved out.

There are two issues to be aware of with such an assumption:

(a) sub-tenancies; and
(b) rent-free periods for fitting out.

18.5.3.1 Sub-tenancies

The assumption of vacant possession requires the valuer to ignore the effect on rent of any sub-tenancies in existence at the rent review date. The effect on the OMR of this will depend upon whether those sub-tenancies are high or low yielding. Lucrative sub-tenancies would undoubtedly increase the OMR if the valuer were to take them into account. The converse would be true of low yielding sub-tenancies. If either party wished to ensure that the effect on rent of sub-tenancies would be taken into account, the assumption of vacant possession would need to be amended to refer to vacant possession of only those parts of the premises not sub-let at the date of review.

18.5.3.2 Rent-free periods for fitting out

The assumption of vacant possession means that the tenant is deemed to have moved out of the premises and, as all vacating tenants would do, to have removed and taken his fixtures with him. In respect of shop premises, this might mean that all of the shop fittings must be assumed to have been removed, leaving nothing but a shell behind. (Of course in reality the premises are still fully fitted out, but for hypothetical valuation purposes the tenant's fixtures are assumed to have gone.)

The tenant can argue that a hypothetical tenant bidding in the open market for these premises might demand a rent-free period in order to fit out the premises. The idea is that the rent-free period will compensate the hypothetical tenant for the cost of fitting out and the lost trade during the fit-out period. Such rent-free periods for fitting out often last between three and six months, depending on the extent of the fit-out needed.

If a rent-free period is granted at the start of the lease, it simply means the tenant will not start paying rent until the rent-free period has expired. When considering rent-free periods in the context of rent review, however, the situation is not as straightforward, as the valuer will be directed to determine an annual rental figure and will not be able to award a rent-free period.

If the valuer thinks a hypothetical tenant would have obtained a rent-free period in the market place, the valuer will need to 'spread' that rent-free period over the review period. This will reduce the amount of rent payable per annum. For example, imagine the valuer finds that the rent for the next five years should be £100,000 per annum, but that an incoming tenant would obtain a rent-free period of six months in order to fit out the premises. This is a saving to the tenant of £50,000, which the valuer will spread over the five-year review period. This would mean a £10,000 reduction per annum, ie an OMR of £90,000 rather than the £100,000 that would have been the OMR in the absence of the vacant possession assumption.

This result may not seem particularly fair on the landlord. After all, the premises will in reality be fitted out, and the actual tenant who will be paying this reviewed rent may well have had a rent-free period at the commencement of the term in order to carry out the fitting-out works. Why should the tenant in effect get another rent-free period at review (in the form of discounted rent) to compensate it for a notional fit out it does not actually need to do?

There are ways round this for the landlord when drafting the lease. It could include an assumption that the premises are fitted out (see **18.5.9**). Alternatively (or in addition), it could include an assumption that there is to be no discount or deduction made to the annual rent to represent a rent-free period for fit-out works that the hypothetical tenant would have been given (see **18.5.8**).

18.5.4 The parties are to assume that the premises are available to let 'without a fine or a premium'

This assumption is directing the valuer to assume that no capital sum is passing between the parties on the grant of the hypothetical lease. In reality, it is not uncommon for a capital sum to be given by one party to the other on the grant of the lease.

18.5.4.1 The reverse premium

A reverse premium is paid by the landlord to the tenant. The reasons for such a payment vary. It might be to induce a particularly attractive tenant to take the lease. However, it might also be that the rental level set by the landlord is higher than the market can actually support, and so to make the lease more appealing the landlord offers to pay the tenant a capital sum up front. Without such capital sum, the tenant may not be prepared to pay rent as high as the landlord wants. The landlord may prefer to keep the rent high (as it could be used as a comparable for similar units) and pay the inducement (or reverse premium).

18.5.4.2 Premiums

Sometimes, the tenant may pay a premium to the landlord for the lease in addition to an annual rent. This may be because the premises are particularly attractive to the tenant (for example, in a prime location). Or it may be because the landlord prefers to receive a capital sum up front, in return for which it will offer a lower annual rent.

18.5.4.3 The effect of premiums on rent

It can be seen from the illustrations above that the payment of a premium can distort the amount of annual rent that is paid by the tenant – increasing it where the tenant receives consideration and decreasing it where the landlord receives consideration.

To avoid such distortions on review, it is common for the rent review to assume that no 'fine or premium' (ie capital sum) is being paid for the hypothetical letting.

18.5.5 The parties are to assume that the premises are available to let 'for a term equal to the contractual term commencing on the relevant review date'

It is usual for the rent review clause to specify the length of the hypothetical lease. Often this will be the same as the original contractual term. So, in a 15-year lease with a five-year review pattern, the term of the hypothetical lease at the five-year review is 15 years, despite the fact that the actual lease has only 10 years left to run. On first glance this may appear to the disadvantage of the tenant, as it is tempting to assume that a longer hypothetical term will result in a higher OMR. This is not necessarily the case, however. In certain markets a tenant may prefer a shorter term, as it may not wish to commit itself to the premises for a long period of time. So sometimes a short-term lease can be worth more in rental terms than a longer-term lease.

Of course, at the time the lease is being negotiated it is very difficult to work out whether a shorter- or longer-term lease will command a higher rent. Whilst the advice of a rent review surveyor may be sought, this advice can only ever be speculative. For this reason the parties may agree the length of the hypothetical lease term should equal the unexpired residue of the actual lease at the date of the review. So, in our example, at the first review a 10-year term is assumed, and at the second review a 5-year term is assumed. This at least reflects reality.

18.5.6 The parties are to assume that the premises are available to let 'for any use falling within Class [A2 or B1] of the Town and Country Planning (Use Classes) Order 1987'

It is not uncommon to find that the valuer will be directed to assume a specified hypothetical use for the premises. This is often wider than the actual permitted use within the lease, meaning in effect the valuer is ignoring the restrictions on use within the actual lease. So the landlord is 'having his cake and eating it'. On the one hand, he is able to restrict the way the tenant can actually use the premises (eg by requiring the tenant to covenant not to use the premises for anything other than offices within Class A2). On the other hand, he is not penalised at review for imposing such restrictions (eg because the valuer must assume the premises can be used for either Class A2 or Class B1). Such an extended hypothetical use should be strongly resisted by the tenant, since he would find himself paying on review for a freedom he did not in fact enjoy. A compromise would be to widen the user covenant within the actual lease to match the use specified in the assumption.

18.5.7 The parties are to assume that the premises are to be let 'otherwise on the terms of this lease other than as to the amount of the annual rent but including the provisions for review of the annual rent, and other than the provision in this lease for a rent-free period'

The valuer is directed to assume the hypothetical lease will be on the same terms as the actual lease, except for:

(a) any variations stipulated elsewhere in the rent review provisions. This would cover, for example, a hypothetical term that differed from the actual contractual term in the lease (see **18.5.5**);

(b) the amount of the annual rent specified in the lease. As the aim of the review exercise is to vary the amount of rent, it is clear that the rent initially reserved by the lease must not be incorporated into the hypothetical letting. But what about the rent review provisions? In the specimen wording above the valuer is directed to assume that the hypothetical lease will contain provisions for review of the annual rent. This is very important for the tenant, as most practitioners take the view that a lease without rent review provisions would be more attractive to a tenant and therefore command a higher rent. This is because the tenant would have certainty at the outset of the lease that his rent would remain the same for the duration of the term, protecting him against uplifts in rent in a rising market. So a hypothetical lease with no rent review provisions would command a higher rent than one with rent review provisions (unless the hypothetical term were less than five years, when no rent review provisions would be expected). An example of the dramatic impact this may have can be found in *National Westminster Bank plc v Arthur Young McClelland Moores & Co* [1985] 1 WLR 1123. In this case the provisions of a rent review clause were interpreted in such a way as to exclude from the hypothetical letting the rent review provisions. This alone led to the annual rent being increased from £800,000 to £1.209 million, instead of £1.003 million if the rent review clause had been incorporated. Courts today tend to shy away from interpreting a rent review clause in such a way as to exclude a provision for review from the hypothetical letting. In the absence of clear words directing the rent review clause to be disregarded, the court will give effect to the underlying purpose of the clause and will assume that the hypothetical letting contains provisions for the review of rent. However, the tenant must always check carefully that the review clause is not expressly excluded from the hypothetical letting, since the court would be bound to give effect to such clear words;

(c) any rent-free period granted in the actual lease. The tenant may have been granted a rent-free period at the outset of the lease to allow it to fit out the premises or as an inducement to enter the lease. The landlord, if it has granted such a rent-free period at the outset of the lease, will not want the hypothetical lease to have such a rent-free period. After all, the tenant will have already had the benefit of the actual rent-free period at the outset of the lease. The landlord will be concerned that the valuer will 'spread' the amount of the hypothetical rent-free period over the remaining rental period and thereby effectively discount the annual rent at review. Whilst a tenant will not normally object to the valuer ignoring any rent-free period actually granted at the outset of the lease, he will need to think more carefully about provisions that seek to ignore rent-free concessions that are being granted in the market place at the time of the rent review. The tenant must avoid ending up with a headline rent (see **18.5.8**).

18.5.8 The parties are to assume 'the willing lessee has had the benefit of any rent-free or other concession or contribution which would be offered in the open market at the relevant review date in relation to fitting out works at the premises'

This assumption assumes the hypothetical tenant has already had a rent-free period for fitting out purposes and will not therefore need a further rent-free concession in the form of

discounted rent. It is included to counteract problems associated with an assumption that the property is available to let with vacant possession (see **18.5.3.2**). It is generally acceptable to a tenant who in reality will not need to fit out at review and who may well have had a rent-free period at the commencement of the lease.

However, the tenant must be careful with this type of assumption to ensure it is limited to rent-free periods for fitting-out purposes. Rent-free periods for fitting-out purposes are typically for a period of between three and six months. However, in practice it is not uncommon to find rent-free periods in excess of six months. These are granted by a landlord to induce the tenant to take the lease at a rental level it might otherwise not be prepared to pay. These rent-free concessions granted as inducements have a distorting effect on rent in much the same way as the payment of reverse premiums (see **18.5.4**). Take, for example, a premises with a rental of £200,000 per annum, where the tenant was granted a rent-free period of 12 months. The rental figure that will appear in the lease, and which the parties would quote if asked the annual rent, is £200,000 per annum (the 'headline rent'). However, if you take into account the 12-month rent-free period, in reality the tenant will be paying only £800,000 over a five-year period, equating to an 'effective' annual rent of £160,000.

At rent review the tenant will wish to ensure that the valuer, when looking at comparables, is not looking at 'headline' rental figures which are artificially inflated. He should therefore ensure that the lease does not assume that the willing or hypothetical tenant has received the benefit of a rent-free period (other than in respect of fitting out) which it may be the practice to give incoming tenants at the time of the review. Similar wording or provisions aiming to achieve a headline rent should be avoided. An example of such wording can be found in *Broadgate Square plc v Lehman Brothers Ltd* [1995] 1 EGLR 97, where the OMR was defined as 'the best yearly rent which would reasonably be expected to become payable after the expiry of a rent free period of such length as would be negotiated in the open market between a willing landlord and a willing tenant upon a letting of the premises'. This case was one of a number of 'headline rent' cases, suggesting that while the courts will lean against a headline rent construction, they will not be able to do so in the face of clear, unambiguous language. In the *Broadgate* case itself, the Court of Appeal determined that the OMR in the lease should be the rent payable once any rent-free period had expired (ie a headline rent). This resulted in a total rent in excess of £12 million for Nos 1 & 2 Broadgate. If the rent for the two premises had been discounted to reflect inducement rent-free periods, it would have totalled less than £9.3 million.

18.5.9 The parties are to assume that the premises 'may lawfully be used, and are fitted out and equipped so that they are ready to be used, by the willing lessee (or any potential undertenant or assignee of the willing lessee) for any purpose permitted by this lease'

This assumption is intended to ensure that no discount is made by the valuer from the annual rent to reflect the fact that an incoming tenant would ordinarily expect a rent-free period in order to carry out its fit-out works. If it is assumed the premises are fitted out then no such rent-free period is necessary.

The tenant will be concerned that an assumption that the premises are 'fitted out and equipped' may result in a rentalisation of any fitting-out works actually carried out while it has been occupying the premises. A hypothetical tenant would certainly pay more for premises that had already been fitted out and did not require further work by the tenant. Whilst a disregard of tenant's improvements might seem to deal with the tenant's concern, it is not entirely clear how this would sit with a 'fitted out' assumption. Words such as 'fitted out and equipped' should therefore be avoided by the tenant. The landlord's concerns about rent-free periods can be dealt with by including an assumption along the lines set out at **18.5.8**.

18.5.10 The parties are to assume 'the [landlord and the] tenant [have/has] fully complied with [its/their] obligations in the lease'

This is really two separate assumptions combined in one sub-clause.

18.5.10.1 Tenant's compliance

Without such an assumption, a tenant in breach of, for example, its repairing obligations could argue that the OMR of the premises should be reduced because the premises are in disrepair. After all, no hypothetical tenant will pay as much for premises in a poor state of repair as for those in full repair. This would clearly be unfair, as the tenant would be benefiting from its own wrongdoing. Most leases therefore contain this assumption; and in its absence, the courts have shown a willingness to imply it in any event (see F*amily Management v Grey* (1979) 253 EG 369).

18.5.10.2 Landlord's compliance

Some leases also contain an assumption that the landlord has complied with its covenants. If the landlord were to be in breach of its obligations at the rent review date then, like a breach of the tenant's obligations, this would generally have a depressing effect on the OMR. If, for example, the landlord has failed to insure the building, a hypothetical tenant would consider the letting less attractive and be prepared to pay less rent for it. Tenants often resist this assumption. They argue that if the landlord is in breach of its covenants, it should suffer the consequences of such failure on review. The prospect of a negative impact on the rent review might well encourage the landlord to comply with its obligations. The landlord could point out that if it is in breach of its covenants, the tenant will be able to pursue other remedies for such breaches. It might consider the tenant sufficiently protected by these remedies without the need for the landlord to be penalised at review for a breach. The breach may be very minor or temporary, and it would be unfair to penalise this with a rent reduction that lasted until the next review. The extent to which this point is worth arguing between landlord and tenant really depends upon the extent of the landlord's covenants. The parties may consider compromising by accepting an assumption that the landlord's covenants have been complied with (other than in respect of material breaches).

18.5.11 The parties are to assume that 'if the premises, or any means of access to it or any service media serving the premises, has been destroyed or damaged, it has been fully restored'

The landlord needs this assumption to protect itself against a reduction in OMR arising through insured damage. If, for example, a fire causes serious damage to the premises shortly before the review date, it may well be impractical for the landlord to complete reinstatement by the review date. In the absence of this assumption, the valuer would therefore be valuing a fire-damaged building. This might result in the tenant paying a lower rent than would have otherwise been the case. Would this be a fair result? The tenant does, of course, have to suffer the consequences of damaged premises. However, this should only be temporary if the landlord is under an obligation to reinstate. Further, most leases contain a clause suspending the payment of rent during any period which the premises cannot be occupied as a result of insured damage. So, provided the rent suspension provisions are adequate, the tenant should not be prejudiced by accepting this assumption, although it might be advised to ensure it refers only to destruction or damage by insured risks.

18.5.12 The parties are to assume that 'no work has been carried out on the premises or any other part of the building that has diminished the rental value of the premises'

As a general premise, it seems fair that if the tenant has carried out works that have diminished the letting value of the premises then those works should be ignored at review. For example, if

the tenant requires business-specific building works that another tenant would find unappealing, why should a landlord's rental income be prejudiced by the carrying out of those works? What, however, if the tenant is forced by statute to carry out those works? Perhaps disability discrimination legislation or fire regulations require the tenant to carry out works that reduce the lettable space, or render the premises less aesthetically pleasing. A tenant will often suggest that work it is required by statute to carry out, as opposed to work it has carried out voluntarily, should not be ignored if it has reduced the OMR of the premises.

18.5.13 The parties are to assume 'the willing lessee and its potential assignees and undertenants shall not be disadvantaged by any actual or potential election to waive exemption from VAT in relation to the premises'

If the landlord has opted to tax in respect of VAT then VAT will be payable on the annual rent under the lease. Most leases will require such VAT to be paid by the tenant. Provided the tenant itself makes taxable supplies, it will be able to recover the VAT it pays on the rent by offsetting it against the VAT it charges on its taxable supplies. If the tenant makes only exempt supplies, however, it will not be able to recover the VAT it pays on rent, which will be an additional cost to it. Tenants who make exempt supplies and are therefore unable to recover VAT include banks, building societies and insurers. These types of tenants pay 17.5% more rent, in real terms, than other tenants, due to their inability to recover VAT. This gives rise to the question whether such tenants, when considering renting premises, would pay less than other types of tenant to reflect the additional VAT expense that they incur. If this might be the case, should a valuer, when assessing a hypothetical letting, take into account such potential discounted bids in determining the OMR? If a premises particularly lent itself to occupation by exempt suppliers, this might result in the valuer determining a lower OMR than for premises where this was not the case. To guard against this, the landlord will often insert an assumption that the tenant will not suffer if the landlord opts to tax. It is sometimes phrased that it will be assumed that the tenant can recover any VAT charged on rents. The result is the same. Any inability to recover VAT by the actual or hypothetical tenants is ignored. The tenant should try to delete such a provision on the basis that the valuer should be directed to look at the reality of the situation, and if there would be exempt suppliers in the hypothetical market, the discounted bids that such tenants might make should be used as comparable evidence. To date, however, there has been no evidence of a 'two-tier' market (of exempt and non-exempt suppliers) with differing bid levels.

18.6 The disregards

As with the assumptions discussed in **18.5** above, it is not possible to set out an exhaustive list of the disregards that may appear in a lease, and the advice of a rent review surveyor should always be sought before agreeing any particular form of wording. The following are examples of typical disregards that occur in leases of commercial premises.

18.6.1 The parties are to disregard 'any effect on rent of the fact that the tenant or any authorised under-tenant has been in occupation of the premises'

It is standard to disregard any effect on rent of the tenant's occupation. If this were not done, the landlord could argue at review that the actual tenant would bid more for the premises than other hypothetical tenants to save the trouble and expense of securing new premises. The tenant should ensure that the disregard extends to sub-tenants and any other type of occupier that may be permitted by the lease terms.

18.6.2 The parties are to disregard 'any goodwill attached to the premises by reason of any business carried out there by the tenant or by any authorised under-tenant or by any of their predecessors in business'

Goodwill generated by a business in the form of a regular flow of customers is a valuable asset. It therefore follows that a tenant will pay more for premises with established goodwill attached to the business than for one without. Since the goodwill will have been generated by the tenant, it seems unfair that the landlord should benefit from it at review. The tenant should ensure that the lease contains a disregard of goodwill generated by the tenant or any under-tenant (or their predecessors). While case law suggests that a valuer will imply such a disregard where occupation is disregarded (*Prudential Assurance Co Ltd v Grand Metropolitan Estate Ltd* [1993] 32 EG 74), it is good practice to do it expressly.

18.6.3 The parties are to disregard 'any effect on rent attributable to any physical improvement to the premises carried out after the date of this lease, by or at the expense of the tenant or any authorised under-tenant with all necessary consents, approvals and authorisations and not pursuant to an obligation to the landlord'

If the tenant carries out works to the premises that improve them, the premises are likely to be more valuable in the letting market. If the lease does not disregard the improvements, the valuer will take them into account when assessing the OMR. In consequence the tenant will end up paying for them twice: first, he will bear the cost of the works when they are carried out; secondly, he may end up paying more rent at review to reflect the increased letting value of the premises in consequence of the improvements. This would clearly be unfair on the tenant, and so he must ensure improvements are disregarded.

While most landlords have no objections to this in principle, differences in opinion can arise over exactly what improvements are to be disregarded. The following should be considered:

(a) *Works not carried out by the current tenant*. The tenant should ensure that improvements made by its predecessors in title or by any under-tenant are also disregarded.

(b) *Works carried out before the lease commenced*. The tenant must consider whether any works were carried out before the lease commenced. It is not uncommon for tenants to be granted access to the premises under the terms of an agreement for lease to carry out fitting-out works. If the lease disregards only works carried out after commencement of the lease (as in the specimen disregard above), such works would be rentalised at review.

(c) *Works the tenant was obliged to carry out*. A disregard of improvements will often be drafted so as to exclude from its remit improvements that the tenant is obliged to carry out. The specimen disregard above does exactly this. This is to ensure the tenant cannot seek to disregard repair works. However, it may also catch other works the tenant carries out to comply with statute, such as works carried out to comply with disability discrimination legislation. This is because the lease will normally contain a tenant's covenant to comply with statute, and therefore the tenant has a contractual obligation to the landlord to undertake works required by statute. This is clearly not ideal from the tenant's perspective, and it should seek to ensure that the disregard of improvements does cover works required by statute.

It is also wise to check any agreements for lease or licences for alterations to ensure that permissions to carry our works are not phrased as obligations to the landlord to undertake those works. If they are, the danger is the works will be excluded from the remit of the disregard. However, the courts have indicated that in order to exclude works carried out under a licence for alteration from a disregard of improvements, they would

expect very clear words to that effect in the licence itself. (See the judgment of Dillon LJ in *Historic Hotels Ltd v Cadogan Estates* [1995] 1 EGLR 117.)

18.6.4 The parties are to disregard 'any statutory restriction on rents or the right to recover them'

The above disregard requires the valuer to ignore any legislation that may be introduced by the Government restricting rent levels. Such restrictions may be introduced in times of high inflation as a counter-inflationary measure, although they have not been used since the early 1970s. The landlord is concerned that the valuer would be obliged to set a reduced OMR if such legislation were in force. This would then last until the next rent review, even though the legislation might be repealed at an earlier point. The tenant, of course, will not wish to pay a rental level higher than that of competitors whose rent levels are restricted by legislation, and he should seek to delete such a disregard. A compromise may be to agree to delay any rent review until such time as any statutory restrictions are removed. Nevertheless, the tenant will need to be aware of the risk that at the end of any such restrictions, rents could rise rapidly.

18.7 The mechanism for determining the rent

The following issues should be considered:

18.7.1 Is time of the essence?

Nearly all modern leases provide that the revised rent may be agreed in writing at any time between the parties. However, some older leases provide for the rent review process to be instigated by the service of a notice setting out the landlord's proposals for the revised rent. Such initial notices are often referred to as 'trigger notices'. The amount set out in the initial notice can be as exorbitant as the landlord wishes. The lease will then provide for the tenant to serve a counter-notice within a specified time period, setting out its proposals. The existence of time periods for the serving of this counter-notice raises the question of whether time is of the essence. The parties should ensure that the lease expressly states the position. In the absence of any 'contrary indications', there is a presumption that time is not of the essence (*United Scientific Holdings Ltd v Burnley Borough Council* [1977] 2 All ER 62). However, contrary indications have been found in a number of cases (*First Property Growth Partnership v Royal & Sun Alliance Services Ltd* [2002] EWHC 305 (Ch), [2002] 22 EG 140; *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] 32 EG 89 (CS); *Central Estates Ltd v Secretary of State for the Environment* [1997] 1 EGLR 239). Care must therefore be taken if the lease is silent on the issue.

If time is of the essence, a failure to respond to the landlord's trigger notice within the time periods stipulated in the lease could mean the tenant is fixed with the rent proposed by the landlord in the trigger notice, no matter how outrageous the level. In consequence, such trigger notice provisions should be avoided. and the tenant should look for provisions that stipulate that the revised rent will be such amount as the landlord and tenant shall agree between them.

18.7.2 Appointment of a valuer

The lease must provide a mechanism by which the parties can settle the review if they are unable to reach agreement through negotiation. Most leases provide for appointment of an independent valuer to determine the rent in the absence of agreement. The tenant should ensure that such a valuer has to be agreed upon by both parties (not just appointed by the landlord). The lease should also contain a mechanism for appointing such a valuer in the absence of agreement. Most leases provide that if the parties are unable to agree upon the appointment, it shall be made by the President of the
following an application by either party.

18.7.3 Capacity of the valuer

The lease should stipulate the capacity in which the valuer is to act. Is he to act as an arbitrator, or as an expert? There are considerable differences between the two.

(a) An arbitrator seeks to resolve a dispute by a quasi-judicial process, whereas an expert imposes his own expert valuation on the parties.

(b) The arbitrator is bound by the procedure under the Arbitration Act 1996, which deals with hearings, submission of evidence and the calling of witnesses. An expert is not subject to such external controls and is not bound to hear the evidence of the parties. Whilst an arbitrator decides on the basis of the evidence put before him, an expert simply uses his own skill and judgement.

(c) There is a limited right of appeal to the High Court on a point of law against an arbitrator's award, whereas an expert's decision is final and binding unless it appears that he failed to perform the task required of him.

(d) An arbitrator is immune from suit in negligence, whereas an expert is not. Using an expert tends to be quicker and cheaper and is, therefore, often provided for in lettings of conventional properties at modest rents. Where there is something unorthodox about the premises, which might make it difficult to value, or where there is a good deal of money at stake in the outcome of the review, an arbitrator is to be preferred so that a fully-argued case can be put.

The tenant should resist any provision allowing the landlord to determine the capacity of the valuer at the time of his appointment, as this may lead to a more expensive arbitration that the tenant does not consider necessary. There is usually no reason why the capacity of the valuer can not be agreed upon when the lease is being negotiated.

18.7.4 The costs of the valuer's determination

If the valuer is to act an expert, it is usual for the lease to stipulate who will pay his costs. The tenant should avoid provisions that pass the entire cost to him. He should look for the costs to be shared equally.

If the valuer is to act as an arbitrator, it will be for him to determine who pays his costs and expenses.

18.8 The late review

The lease will contain rent review dates from which any revised rent will be payable. The lease will need to specify what is to happen if the revised rent has not been determined by the review date, as this is a common situation.

Most leases will provide that that the tenant should continue to pay rent at the current level until the rent review is complete. Once the outcome of the review is known, unless the rent has remained the same, balancing payments will need to be paid. As most leases contain upward only rent review provisions (see **18.2.4.1**), this will usually involve the tenant in making up the shortfall, being the amount by which the previous rent differs from the reviewed rent for the period from the rent review date until the date of determination. Most leases provide for interest to be paid by the tenant on the shortfall. This is to compensate the landlord for the late arrival of the increase. The tenant should look out for the following:

(a) The tenant should ensure the rate of interest is not penal, as there is no reason to assume it will be the tenant's fault that the rent review has not been concluded by the rent review date.

(b) The tenant should avoid provisions that require it to pay interest on the whole of the shortfall from the rent review date. Interest should be payable only from the date each

instalment of the rent fell due to be paid (which in most leases will be the usual quarter days).

(c) If the lease has an upward/downward rent review (see **18.2.4.2**), similar provisions for making balancing payments of any overpayment together with interest should apply to the landlord.

18.9 Recording the review

Most leases provide that once the rent has been determined, the landlord will prepare a memorandum recording the agreement reached for signature by both parties. This memorandum is then kept with the lease. The tenant should ensure that each party bears its own costs in the preparation and completion of this memorandum.

Chapter 19
Repair

19.1	Introduction	189
19.2	Tenant's covenant to repair	190
19.3	Definition of the subject matter of the covenant	190
19.4	Extent of liability	190
19.5	Tenant's concerns and amendments	194
19.6	Enforcement of covenant by landlord	195
19.7	Covenant to yield up in repair	195
19.8	Decorating	195
19.9	Landlord's covenant to repair	196
Review activity		196

19.1 Introduction

The commercial landlord's objective, on anything more than a short-term letting, will be to obtain a 'clear rent' (ie the landlord takes the entire income without any cost to itself) by imposing a 'full repairing' lease so that the tenant ends up paying the cost of any repairs, regardless of who carries them out. How the landlord achieves this depends on the nature of the premises being let:

(a) *Whole of a building*

Examples of this include a warehouse or an entire office block. In this situation, the landlord will usually impose a full repairing covenant on the tenant for the entire building.

(b) *Part of a multi-occupied building*

Examples of this include one unit in a shopping mall or one floor in an office block. In this situation, the landlord will usually make the tenant responsible for internal non-structural repairs of its part of the building, whilst itself taking responsibility for the remainder of the building (the exterior, structure and common parts, eg the circulation areas of a shopping mall). The landlord will recover the costs of complying with its obligation from the various tenants of the building, usually through the service charge provisions. The particular issues associated with a lease of part of a building, including repair and service charges, are dealt with in **Chapter 26**.

In the absence of a comprehensive code of implied obligations (the nature of which is not dealt with in this book), it is imperative that the responsibility for repairs is dealt with expressly in the lease. However, even though most leases do contain express terms, there is a glut of illustrative cases on disputes over the extent of liability for repair arising out of the:

(a) meaning of 'repair';

(b) scope of the repair covenant;

(c) standard of repair required.

Please note that each of the cases turns on its own specific facts, lease clauses, premises and works of repair, and many are in the non-commercial property sector; so although guidance can be taken from them, in practice the circumstances of each particular case are crucial.

To explore the disputed areas listed above and other issues on repair, we are going to use clause 26 (the example clause) of the lease set out in **Appendix 4** (the example lease), which is reproduced at **19.2** for convenience.

19.2 Tenant's covenant to repair

26. REPAIRS

26.1 The Tenant shall keep the Property clean and tidy and in good repair [and condition] [except that the Tenant shall not be required to put the Property into any better state of repair or condition than it was in at the date of this lease as evidenced by the schedule of condition initialled by the parties to this lease and annexed to this lease].

26.2 The Tenant shall not be liable to repair the Property to the extent that any disrepair has been caused by an Insured Risk, unless and to the extent that:

(a) the Landlord's insurance has been vitiated or any insurance proceeds withheld in consequence of any act or omission of the Tenant, any person deriving title under the Tenant or any person at the Property or on the Common Parts with the actual or implied authority of the Tenant or any person deriving title from the Tenant; or

(b) the insurance cover in relation to the disrepair is excluded, limited or unavailable.

19.3 Definition of the subject matter of the covenant

As you can note from the example clause in **19.2**, the tenant's covenant will apply to the subject matter of the lease, and so a clear definition of the subject matter will be required. In the example clause, the defined term is 'Property', but other terms are commonly used such as 'premises' or, often in older leases, 'the demised premises' or 'the demise'.

Without a clear definition, the obvious risk (particularly on a lease of part of a building where the responsibility for repairs is to be divided between the parties) is that there may be a dispute as to who is responsible for repairing each part of the building. See **26.3**, where the definition of the subject matter of a lease of part is dealt with in more detail.

An issue which could arise in the context of defining the subject matter, particularly on a lease of a whole building, is the question of responsibility for site contamination. If the site on which the building stands is subsequently discovered to be contaminated, could the tenant be required to remove the contamination under a repairing covenant? There may be a problem for a landlord in persuading the court that a repairing covenant can be extended to the soil as well as the buildings. In the absence of judicial guidance, the matter should be dealt with expressly in the lease. The landlord could expressly include the remediation of site contamination in the tenant's repairing covenant. Where appropriate, given the nature of the premises, the tenant could exclude any possible liability by expressly excluding the sub-soil from the definition of the subject matter, and excluding remediation of contaminated land from the usual tenant's covenant in the lease to comply with all statutory obligations (for an example of a clause obliging the tenant to comply with statutory obligations see clause 32 of the example lease) which, depending on the wording used, may be broad enough to extend to requirements under environmental law.

19.4 Extent of liability

In examining the extent of the tenant's liability, a number of important matters arise.

19.4.1 Meaning of repair

19.4.1.1 There must be disrepair and damage

Under an obligation to repair, the tenant will incur liability only if the landlord can show that the premises have 'deteriorated from some previous physical condition' (*Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055) so that they are in 'a condition worse than it was at some earlier time' (*Quick v Taff-Ely Borough Council* [1986] QB 809).

There needs to be damage to the subject matter of the covenant. In *Quick v Taff-Ely Borough Council*, a landlord covenanted to keep in repair the *structure and exterior* of a dwelling which became virtually unfit for human habitation due to condensation. However, damage was

caused only to *furnishings and decoration* and not to the structure or exterior, and so the landlord was under no obligation to make good.

In *Post Office v Aquarius Properties Ltd*, the basement of a building regularly flooded due to a defect in the structure of the building which had existed since construction. Incredibly, no damage to the building (eg to the plaster on the walls, to the flooring or to electrical installations) had been caused by the flooding, and the defect itself had not worsened. As the landlord could not show damage, the tenant was not under any obligation to repair.

It is clear from other cases that if damage had been done to the basement when the water entered, this would have constituted disrepair and the tenant would have been liable for the repair (see comments on inherent defect liability at **19.4.1.3**).

19.4.1.2 To keep in repair means to put in repair

If the premises are in disrepair at the date of the lease, a covenant *to keep* in repair (as in the example clause) will require the tenant first to *put* the premises into repair (*Payne v Haine* (1847) 153 ER 1304) and then to *keep* them in repair (according to their age, character and locality) (*Proudfoot v Hart* (1890) 25 QBD 42).

The tenant may perceive this obligation to put premises into repair as onerous. See **19.5** for tenant's amendments in this respect.

19.4.1.3 Inherent defects

As with all kinds of disrepair (see **19.4.2** below), it will be a question of degree, having regard to the nature of the premises, whether what the tenant is being asked to do can properly be described as repair or, to the contrary, whether it would involve giving back to the landlord something wholly different from that which it was demised (*Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12).

So, contrary to previous belief, a tenant can be required to repair *damage* caused by 'inherent defects' (ie defects in design or construction of the building) under a covenant to repair. Liability for damage caused by an inherent defect may require not only repair of the damage, but also eradication of the defect itself if this is the only realistic way of carrying out the repairs (*Ravenseft Properties Ltd v Davstone (Holdings) Ltd*).

If, however, the inherent defect has not caused any damage to the premises, they are not in disrepair and accordingly the tenant is not liable on its covenant (*Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055).

The possibility that they may have to put right defects in the building which have occurred through no fault of their own and which pre-date their occupation is deeply worrying for tenants. See **19.5** below for tenant's amendments (and **9.5.2.4** for further comment on inherent defects).

19.4.2 Scope of repair

In the example clause, the tenant is under an obligation to 'repair'. Do the works which the tenant is being asked to carry out fall within that obligation, or are they more properly classified as works of renewal or improvement, for which the tenant is not responsible under a covenant to repair?

19.4.2.1 Factors to consider

Several factors to consider have evolved from the many authorities which can help in deciding the question of whether the works fall within the scope of a covenant to repair. Three particular factors are set out below, which can be approached separately or concurrently as the circumstances of the case may demand, but all are to be 'approached in the light of the nature

and age of the premises, their condition when the tenant went into occupation, and the other express terms of the tenancy' (*McDougall v Easington DC* (1989) 58 P & CR 201, CA).

Whether the works go to the whole or substantially the whole of the structure, or only to a subsidiary part?

It was said in *Lurcott v Wakeley & Wheeler* [1911] 1 KB 905 that:

> Repair is restoration by renewal or replacement of subsidiary parts of the whole. Renewal, as distinguished from repair, is the reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole …

It will be a question of degree in each case whether the work to be done can properly be described as repair, involving no more than renewal or replacement of defective parts, or whether it amounts to renewal or replacement of substantially the whole. In *Lurcott v Wakeley*, the rebuilding of a defective wall of a building was held to be within the tenant's covenant to repair because it was the replacement of a defective part rather than the replacement of the whole. However, the tenant may be required to replace part after part until the whole is replaced.

Whether the effect of the works is to produce a building of a wholly different character from that which had been let?

This is commonly thought to be the overriding factor, in that the tenant cannot be required to give back something wholly different from that which it took.

In *Lister v Lane & Nesham* [1893] 2 QB 212, where the tenant was held not to be liable for the cost of rebuilding an old house built on muddy soil which had become unsafe due to poor foundations, Lord Esher MR said:

> A covenant to repair … is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing …

As indicated previously in **19.4.1.3**, it will always be a question of degree whether what the tenant is asked to do will involve simply repair or giving back to the landlord a wholly different thing from what it took (*Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12).

What is the cost of the works in relation to the previous value of the building, and what is their effect on the value and lifespan of the building?

In deciding whether the tenant is being asked to give back to the landlord a wholly different thing from that demised, guidance may sometimes be found by considering the proportion which the cost of the disputed work bears to the value or cost of the whole premises.

It must be stressed, however, that decided cases can do no more than lay down general guidelines, and each case will turn on its own facts.

19.4.2.2 Repair v improvement/renewal/replacement

In the same way that the tenant need not renew the entire premises under a covenant to repair, a covenant to repair does not impose any obligation on the tenant to improve them. A tenant may sometimes be concerned that its landlord is trying to get it to upgrade or improve the premises under the guise of carrying out repairs.

The distinction is not always easy to make, but Lord Denning stated in *Morcom v Campbell-Johnson* [1955] 3 All ER 264 that:

> if the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking, an improvement; but if it is only the replacement of something already there, which has become dilapidated or worn out, then, albeit that is a replacement by its modern equivalent, it comes within the category of repairs and not improvements.

Repair (as indicated at **19.4.2.1**) can include the renewal or replacement of subordinate parts.

19.4.3 Standard of repair

19.4.3.1 Generally

The standard of repair required is determined to be such as 'having regard to the age, character and locality … would make it [the premises] reasonably fit for the occupation of a reasonably minded tenant of the class likely to take it' (*per* Lopes LJ in *Proudfoot v Hart* (1890) 25 QBD 42). The age, character and locality by which repair is judged is that which existed at the time the lease was granted, so even if the locality now attracted a superior or inferior class of tenant, the standard required from the tenant would be neither higher nor lower than at the date of the lease (*Anstruther-Gough-Calthorpe v McOscar and Another* [1924] 1 KB 716).

It follows that:

(a) the standard required would be different for a brand new purpose-built shopping centre than for your local parade of shops (*Proudfoot v Hart*, where the standards required for Spitalfields and Grosvenor Square in London were contrasted);

(b) the premises need not be kept in perfect repair (*Proudfoot v Hart*, where Esher LJ stated that the property need not be 'put into perfect repair. It need only be put into such a state of repair as renders it fit for the occupation of a reasonably minded tenant of the class likely to take it').

In *Commercial Union Life Assurance Co v Label Ink Ltd* [2001] L & TR 29, a case which involved a leaking roof, the tenant's covenant was to keep the premises in 'good and substantial repair and condition'. The judge in this case stated that 'good and substantial does not mean pristine or even perfect repair' and that 'substantial' fell short of a requirement for perfection. It was considered that the expert evidence about the works needed to comply with the covenant was based on 'a standard of perfection: what a pristine building should look like, not what was required by a covenant to keep, what had been a pristine building, in good and substantial repair'.

19.4.3.2 Clause wording

In drafting the repairing obligation, it is possible to restrict or widen its scope from that imposed by a covenant to repair.

Additional adjectives and verbs

In the example clause, the word 'repair' is qualified by the addition of the word 'good'. Other qualifying word(s) commonly seen in practice are 'sufficient', or 'good and substantial' or 'tenantable'.

It is uncertain whether additional qualifications would strengthen (or potentially limiting words such as 'tenantable' dilute) the tenant's repair obligation. Scrutton LJ, commenting in *Anstruther-Gough-Calthorpe v McOscar and Another* [1924] 1 KB 716, suggested that they would not add anything to the word 'repair', there being 'no substantial difference in construction between 'repair', which must mean 'repair reasonably and properly', and 'keep in good repair' or 'sufficient repair' or 'tenantable repair'; but Atkin LJ held a dissenting view, stating that 'effect should be given to every word used'. The more recent case *Credit Suisse v Beegas Nominees Ltd* [1994] 11 EG 151, determined that it was the court's duty to give a full and proper effect to each word used.

In any event, the same words could be used in two separate leases but be given a different meaning due to the age, character and condition of the premises in question.

To avoid being under a less or more onerous obligation than that intended, the landlord and tenant should give careful consideration to each word used, as the cases do not provide a definitive guide.

Good condition

In *Welsh v Greenwich London Borough Council* [2000] PLSCS 149 (which involved a short-term residential lease, so a court might take a different view in a commercial context), the Court of Appeal held that a reference to keeping the premises in 'good condition' in the repairing obligation was a significant addition and would extend the obligation to defects which had not caused any damage to the structure of the premises (on the facts, damage caused by condensation). See tenant's amendments at **19.5**.

Renew or improve

The landlord can extend the liability of the tenant by the use of clear words which make the tenant liable to renew, or improve or even rebuild the demised premises (see, eg, *Credit Suisse v Beegas Nominees Ltd* [1994] 11 EG 151, where it was held that the verbs 'amend' and 'renew' were capable of going outside the verb 'repair').

However, a landlord should always bear in mind that imposing onerous provisions could mean that it is penalised on any rent review.

19.5 Tenant's concerns and amendments

A tenant's broad concerns are reflected in the 2007 Code for Leasing Business Premises, which provides:

> **7 Repairs**
>
> Tenants' repairing obligations should be appropriate to the length of term and the condition of the premises.
>
> Unless expressly stated in the heads of terms, tenants should only be obliged to give the premises back at the end of their lease in the same condition as they were in at its grant.

From what has been said above, the tenant may be concerned to reduce its liability, and there are a number of ways in which it may seek to do so:

(a) If the premises are in disrepair at the commencement of the lease, a tenant may seek to limit its obligation to put premises into repair by reference to a schedule of condition with appropriate photographic evidence, which should be prepared by a surveyor, agreed by the parties and annexed to the lease (see the wording in parenthesis in the example clause). This should also mean that the tenant never has to give anything back to the landlord which is better than that which was given to it.

(b) The tenant may be alarmed at the prospect of having to repair inherent defects. For that reason, tenants of new buildings will often seek to limit their liability, by excluding from their obligation liability for defects caused by design or construction faults, at least for a specified period of time. From the tenant's point of view, the landlord should covenant to repair damage caused by these defects (see **9.5.2.4**).

(c) In most leases the landlord will insure the premises against a number of stated risks. The tenant should always insist that his repairing covenant does not render him liable to repair damage caused by a risk against which the landlord has or should have insured (see the example lease at clause **26.2**). The landlord should not object, since he should be able to claim on the insurance policy. However, the landlord will insist that the tenant remains liable if the insurance is avoided because of an act or omission of the tenant or someone at the premises with the tenant's consent (see the example clause and **24.5.1**). The tenant may also want to address the position relating to damage caused by uninsured risks (see **24.8**).

(d) The tenant may seek to dilute the wording of the covenant by excluding the various words designed to strengthen the obligation (eg, 'good', 'substantial') or to extend the obligation (eg, 'rebuild', 'reconstruct', 'replace'), or by the rejection of any obligation to keep in good 'condition' as well as repair.

(e) Although this is rarely acceptable to commercial landlords, the tenant could also try to qualify the covenant by excluding 'fair wear and tear', so excluding the normal effects of time and weather and of normal and reasonable use of the premises.

19.6 Enforcement of covenant by landlord

The tenant's covenant to repair is often followed by a covenant to permit the landlord to enter the premises, usually upon reasonable notice, to ascertain their state and condition (for an example of such a clause, see clause 34 of the example lease). As you can see, that well-drafted clause further includes:

(a) a provision for the landlord to serve a notice of disrepair on the tenant if it is found to be in breach of its repairing obligation;

(b) a right for the landlord, if the tenant had not commenced the works within a specified time, to enter the premises to carry out the repairs, at the tenant's expense;

(c) the expenses incurred by the landlord acting under such a power being recoverable 'as a debt'. This is an attempt to avoid the restrictions imposed by the Landlord and Tenant Act 1927 (LTA 1927) and the Leasehold Property (Repairs) Act 1938 on the recovery of damages, as opposed to a debt, for disrepair (see **29.1.2.1**).

Note that if the landlord reserves the right to enter the premises to carry out repairs in default, it will, in certain circumstances, become liable under the Defective Premises Act 1972.

The landlord may be able to forfeit the lease for breach of the tenant's covenant to repair (for an example of a clause allowing this, see clause 38.1(b) of the example lease). See **30.5** for more detail on the right to forfeit.

The landlord may bring a claim for damages in respect of the tenant's breach of a repairing covenant, but this may be limited by the operation of the Leasehold Property (Repairs) Act 1938 (see **29.1.2.1**).

19.7 Covenant to yield up in repair

The tenant will often enter into a covenant to yield up the premises in repair at the end of the term (for an example of such a clause, see clause 29 of the example lease). The usual form of covenant requires the tenant to yield up in the repair required under the terms of the lease and to remove any alterations made if required by the landlord. A tenant should ensure that the requirement must be reasonably made and that it is given notice in advance of the requirement (see clause 29.2 of the example lease).

19.8 Decorating

Because some doubt exists as to the amount of decoration required by a covenant to repair, the matter is best dealt with expressly in the lease (see clause 27 of the example lease).

The usual form of covenant requires the tenant to decorate the premises at specified intervals during the term, and during the last year of the term.

The obligation to decorate in the last year could require the tenant to decorate in two consecutive years depending on when the lease is terminated (eg, in a 10-year lease with a decorating obligation every three years). The tenant may therefore wish to provide that the obligation to decorate in the last year shall not apply if it has decorated in the previous, say, 18 months.

The landlord may also wish to retain some control by requiring the tenant to obtain consent (not to be unreasonably withheld) before any change in the colour scheme is made. Some covenants in older leases specify the materials to be used. Unfortunately, the materials specified are sometimes inappropriate to the type of building concerned and its method of construction, so more modern covenants simply require the tenant to carry out its obligation 'in a good and workmanlike manner with good quality materials'.

On the grant of a lease of part of a building, the exterior decoration would normally be undertaken by the landlord who would recover his expenses under the service charge.

19.9 Landlord's covenant to repair

The only common situation in which a landlord will covenant to repair is on the grant of a lease of part of a building, where the landlord will covenant to repair the exterior, structure and the common parts, and will be able to recover his expenditure under the service charge provisions. A landlord's covenant to repair will be subject to the same rules of construction as a tenant's covenant so, for example, the landlord need not carry out works so as provide the tenant with something wholly different from that originally demised.

Review activity

1. Consider the amendments that you might make to the example clause if you were acting for a tenant on the grant of a 10-year lease of one floor of an old office building. The office premises have been left in a poor state by the previous tenant.
2. Consider the amendments that you might make to the example clause if you were acting for a tenant on the grant of a 10-year lease of a newly-constructed warehouse which was built on a brown field site.

Chapter 20
Alienation

20.1	Dealings with the premises	197
20.2	Restrictions on alienation	199
20.3	Seeking consent from the landlord	203
20.4	Notice of assignment or sub-letting	206
20.5	Virtual assignments	207

20.1 Dealings with the premises

The term 'alienation' refers to the tenant's ability to deal with the lease. Unless the lease contains some restriction, the tenant will be free to deal with his interest in any way he wishes.

There are various ways in which a tenant may seek to deal with his premises. He may seek to divest himself of the entirety of his interest by assigning the lease. Alternatively, he might retain his own lease and create a new interest through sub-letting (otherwise known as under-letting). He might also seek to mortgage the lease or grant licences for third parties to occupy the premises, or he might seek to share possession of the premises. Complete freedom like this is unlikely to prove acceptable to the landlord for a number of reasons, and thus a fair balance between the competing concerns and aims of both parties will have to be reached. In consequence, each side must understand the concerns of the other and the type of restriction that may be appropriate for each type of potential dealing.

20.1.1 Assignment

Assignment involves the tenant transferring the whole or part of its leasehold estate to another party. From the tenant's point of view, the lease may become a burden if he is unable to assign it freely when he no longer has any use for the premises. This situation may arise, for example, where the premises have become surplus to his requirements, or because they are no longer suitable for the tenant's needs. The tenant would also be in difficulty if his business venture failed and he could no longer afford the rent. However, from the landlord's point of view, close control over assignment is essential, because without it the landlord may find his premises occupied by an unsatisfactory tenant, and the value of his reversionary interest may be reduced. The assignee will become responsible for the rent and the performance of the other covenants in the lease, and the landlord will want to ensure that he is of good financial standing. The identity and status of any potential assignee is, therefore, important to the landlord for financial reasons. Further, there may be estate management reasons why the landlord will wish to exercise some control over assignees, for example where the landlord owns the adjoining premises.

20.1.2 Sub-letting

When a tenant sub-lets, he retains his own lease and creates a new lease carved out of his term in favour of a third party. There are several situations in which a sub-letting of the premises, or part of it, may be appropriate (see **28.2**).

The landlord will want the ability to control sub-letting, because in certain circumstances the head tenancy may cease to exist and the sub-tenant will become the immediate tenant of the landlord. This could happen, for example, on the surrender of the head-lease or on the forfeiture of the head-lease followed by the sub-tenant's successful application for relief. A similar situation could arise at the end of the contractual term if the head tenant does not

apply (or is unable to apply) for a new tenancy under Pt II of the Landlord and Tenant Act 1954 (LTA 1954) but the sub-tenant does; the sub-tenant may be granted a new tenancy of his part against the head landlord. In all these situations the landlord would want to be sure that the sub-tenant was able to pay the rent and perform the covenants, and will, therefore, wish to have some control over the identity and status of any proposed sub-tenant.

20.1.3 Parting with/sharing possession

Most leases contain covenants prohibiting the tenant from either parting with possession or sharing occupation of the premises. 'Parting with possession' and 'sharing occupation' are, however, two different things.

A covenant preventing the tenant from *parting with possession* of the premises prevents the tenant from doing anything that means he will no longer have legal possession of the premises. Such a covenant will prevent both assignment and sub-letting, but will go further than that. For example, it has been held to prevent parting with possession of the premises to a purchaser pending completion of an assignment (*Horsey Estate Limited v Steiger* [1899] 2 QB 79). It will not, however, prevent the tenant from allowing another person to use the premises, provided the tenant retains legal possession. It will not, therefore, prohibit a tenant from granting a licence of the premises to another, unless the licence confers exclusive possession on the licensee (see *Street v Mountford* [1985] AC 809). In practice, of course, it can be very difficult to grant a third party rights of occupation without allowing exclusive possession.

Covenants which prohibit the tenant from *sharing possession* of the premises will prevent the tenant from granting licences. Such a prohibition will prevent the tenant from sharing occupation of the premises with a group company member. It will also prevent the sort of concession arrangements frequently made by retailers, whereby another business is allowed to promote its products or services within the tenant's store. The tenant should therefore try to resist an absolute prohibition against sharing possession, unless there is no possibility of the tenant or any future tenant wishing to share with a group company or grant concessions.

20.1.4 Dealings with part

Landlords often impose much stricter control on dealing with part only of the premises because of the estate management problems which dealings of part can create. For example, if assignment of part were permitted, there would need to be an apportionment of rents and other outgoings under the lease. It is therefore usual for rack rent leases of commercial premises to prohibit any dealings with part other than, possibly, sub-letting.

When considering whether to permit sub-letting of part, the landlord will bear in mind that a sub-tenant can in certain circumstances become the immediate tenant of the head landlord (see **20.1.2**). If a number of sub-leases have been granted, a landlord who had let a building as a whole to a single tenant could, at some future date, be faced with the estate management problems associated with having a number of different tenants, each with a lease of a different part of the building. Further, if the tenant was allowed to grant a sub-lease of part only of the premises, this could lead to the division of the premises into commercially unattractive units. If the landlord inherited tenancies of part, he might have difficulty in re-letting any part that became vacant, if that part is no longer attractive to the market.

For these reasons, landlords often prohibit sub-letting of part only of the premises, as well as other dealings with part. In considering the acceptability of any such prohibition, the tenant will need to have regard to the nature of the premises. The design of some premises does not lend itself to sub-division. However, other premises (eg office blocks) can often be sub-let with relative ease (say, by sub-letting one or more floors). Clearly a prohibition on sub-letting part would prevent the tenant from disposing of a surplus of space. It also reduces his ability to deal with the premises flexibly if he wishes to dispose of them as a whole. For example, if at the time the tenant comes to dispose of the premises the market is demanding smaller units, the

tenant's chances of disposing of the premises will be increased if he can divide the premises up into smaller units. A tenant should therefore consider carefully a complete prohibition on sub-letting part.

Sometimes a landlord can be persuaded to agree to sub-letting of part if the extent of the parts to be sub-let is specified (eg not less than one complete floor of the demise) and the sub-tenancy is excluded from the LTA 1954. (The latter requirement will ensure that the landlord can, if he wishes, require the sub-tenant to vacate the premises at the end of the contractual term of the sub-lease.)

20.1.5 Charging or mortgaging

A tenant may wish to mortgage or charge his leasehold interest in the premises. This is usually done by way of either a fixed or a floating charge. A fixed charge may be taken where the lease has some capital value, or where the premises are critical to the success of the tenant's business. Often, however, rack rent leases of commercial premises do not have a capital value. In addition, the forfeiture provisions within the lease may make it unattractive as security. Fixed charges over commercial leasehold property are not, therefore, a common way of raising finance.

The lease may, however, be caught by a floating charge granted by a corporate tenant over all its assets and undertaking. Such floating charges are often granted by a company borrower when raising finance. They do not fix upon the assets in question unless and until certain events specified in the charge arise. These are usually events of default or insolvency.

If the tenant wants to grant either a fixed or a floating charge, it will need to check the provisions of its lease to see what is permitted. It will also need to be aware of any floating charges already in existence at the time the lease is granted, as these normally cover future assets of the company.

Most leases will contain restrictions on charging, as the landlord will be concerned that, if the tenant defaults on the mortgage, the lender may take possession of the premises or exercise its power of sale. The lender under a legal charge also has a right to relief against forfeiture in much the same way as a sub-tenant.

20.2 Restrictions on alienation

For the reasons mentioned in **20.1** above, it is common for the landlord to impose restrictions on dealing. Such restrictions may be absolute or qualified.

20.2.1 Absolute covenants against dealings

An absolute covenant means that the tenant cannot carry out the specified dealing without being in breach of covenant. An example would be 'not to assign or sub-let the whole or any part of the premises'. This type of covenant would prevent an assignment of whole, an assignment of part, a sub-letting of whole and a sub-letting of part. While the landlord may be prepared to waive the covenant in a given case, the tenant will be entirely at the mercy of his landlord, who may refuse consent quite unreasonably subject only to the restrictions imposed by the Sex Discrimination Act 1975, Race Relations Act 1976 and Disability Discrimination Act 1995. (At the time of writing, these statutes are due to be consolidated into the Equality Act 2010.) Also, if the covenant is absolute, the landlord is not obliged to give any reason for his refusal.

An absolute covenant against all dealings is unusual in business leases, except in very short-term leases or to the extent that it prohibits dealings with part of the premises (see **20.1.4**). Any wider form of absolute restriction should be resisted by the tenant and if, exceptionally, there is such a restriction, the tenant should make sure its presence is reflected in the rent he has to pay.

20.2.2 Qualified covenants against dealings

A qualified covenant prohibits alienation by the tenant without the landlord's consent. An example would be 'not to assign or sub-let the whole or any part of the premises without the consent of the landlord'. Sometimes, the covenant will state that the landlord's consent is not to be unreasonably withheld; this is known as a fully qualified covenant. An example would be 'not to assign or sub-let the whole or any part of the premises without the consent of the landlord, such consent not to be unreasonably withheld'. However, even if these words are not expressly stated, they will be implied by s 19(1)(a) of the Landlord and Tenant Act 1927 (LTA 1927). This provides that a covenant not to assign, underlet, charge or part with possession of the premises or any part thereof without the landlord's licence or consent, is subject to a proviso that such licence or consent is not to be unreasonably withheld. In other words, a qualified covenant against dealings will be converted into a fully qualified covenant by the operation of s 19(1)(a). The section has no application to the operation of an absolute covenant, where the landlord remains free to refuse his consent quite unreasonably.

20.2.3 What is usually permitted and prohibited?

In practice the form of covenant found in a rack rent commercial property lease will contain elements of both the absolute and qualified restrictions. It will usually cover all types of potential dealing, as if a specific dealing is not referred to it will not be prohibited or restricted. So, for example, a restriction on assignment will not be broken by a sub-letting of the premises. Neither will a covenant against sub-letting prevent the tenant from granting licences. Similarly, a covenant against sub-letting 'the demised premises' will not be broken by a sub-lease of part only (*Cook v Shoesmith* [1951] 1 KB 752). If such restrictions are intended, they must be dealt with expressly.

The precise terms of the covenant will of course vary from transaction to transaction, but it is common to find that a lease will:

(a) prohibit absolutely dealings in relation to part only of the premises, unless the premises lend themselves to subdivision (see **20.1.4**);

(b) prohibit absolutely dealings which stop short of an assignment, sub-letting or charging of the whole, eg parting with possession or sharing occupation of the premises (see **20.1.3**);

(c) prohibit without the landlord's prior written consent assignments, charges or sub-lettings of the whole.

Such a clause attempts to strike a balance between both landlord and tenant. It will allow the tenant to assign, charge or sub-let the whole of the premises subject to obtaining the landlord's prior consent (and the landlord will not be able to unreasonably withhold his consent). This should meet the tenant's main concern of being unable to divest himself of the lease should his circumstances change. At the same time, it will allay the landlord's fears by imposing an absolute prohibition on dealings with part only of the premises. Whether or not the tenant considers the balance to be a fair one will depend on the facts of the transaction. The tenant will need to bear in mind the issues discussed in **20.1.3** and **20.1.4** when deciding whether a total prohibition on dealings with part and sharing occupation is acceptable.

20.2.4 What detailed requirements will apply to assignments?

20.2.4.1 Leases granted before 1 January 1996

Prior to the Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995), the landlord knew that the original tenant would be liable throughout the term of the lease even if he had assigned it on. Whilst this did not stop the landlord being concerned with the identity of any assignee, it meant the landlord had a safety net if such assignee failed to comply with the lease covenants. In consequence, leases granted prior to 1 January 1996 (often referred to as 'old

leases') tend to have less stringent requirements relating to assignment than those granted after that date. Such leases will, however, invariably require the assignee to enter into a direct covenant with the landlord to perform the covenants in the lease. This will make the assignee liable on the covenants in the lease during the whole term, rather than just during the currency of his ownership. There may also be additional requirements, such as the assignee providing guarantors or a rent deposit, although this will vary from lease to lease.

20.2.4.2 Leases granted on or after 1 January 1996

For tenants entering into leases on or after 1 January 1996 (often referred to as 'new leases') the position changed. Such tenants are automatically released from liability under the lease once they assign it on. This is subject to two significant caveats. First, the LT(C)A 1995 specifically states that nothing in the statute prevents the tenant from entering into an authorised guarantee agreement (AGA), whereby the outgoing tenant guarantees the performance of the tenant's lease covenants by the incoming assignee (see **20.2.4.3**).

Secondly, the LT(C)A 1995 inserted s 19(1A) into the LTA 1927. Section 19(1A) operates only in relation to qualified covenants against assigning in commercial leases granted on or after 1 January 1996. The consequences of s 19(1A) are as follows:

(a) the landlord can stipulate in the lease conditions which need to be satisfied, or circumstances which must exist, before the landlord will give his consent to the assignment;

(b) if the landlord withholds his consent on the grounds that the specified circumstances do not exist, or that the specified conditions have not been satisfied, then the landlord will not be unreasonably withholding his consent;

(c) if the landlord withholds his consent on grounds other than those specified, s 19(1)(a) of the LTA 1927 will apply in the usual way (see **20.2.2** and below).

The nature and type of condition to be satisfied (or circumstances which must exist) are left to the parties to decide, but s 19(1C) of the LTA 1927 envisages their falling into two categories: those which can be factually or objectively verified; and those where the landlord has a discretion.

Factual conditions or circumstances might include a requirement that the proposed assignee is a publicly-quoted company on the London Stock Exchange or has pre-tax net profits equal to three times the rent, or a requirement that the assignor enter into an AGA (see **20.2.4.3**) or that the assignee procure guarantors.

Discretionary circumstances or conditions are those which cannot be verified objectively, and a judgement or determination will have to be made as to whether they have been satisfied. This type of condition will be valid only if either it provides for an independent third-party reference (in the event of the tenant disagreeing with the landlord's determination), or the landlord commits himself to making a reasonable determination. Typical examples of discretionary circumstances or conditions might include a provision that the proposed assignee must, in the opinion of the landlord, be of equivalent financial standing to the assignor and, should the tenant not agree, the matter is to be referred to an independent third party; or a provision that the assignee must not, in the reasonable opinion of the landlord, be in competition with other tenants in the same development.

The tenant must consider the impact of each circumstance and condition carefully before agreeing to its inclusion in the lease. For example, a blue-chip tenant who accepts a condition requiring any assignee to be of equivalent financial standing, will finds its pool of potential assignees severely restricted (effectively it will contain only other blue-chip companies). This may result in the tenant being unable to assign the lease. It will be too late for the tenant to argue at the time of an assignment that this condition is unreasonable if it has been included in the lease. It can help to remind the landlord during lease negotiations that restrictions on

alienation will generally have a downward effect on rent at review, as the lease is less marketable. As a result, the trend in recent years has been away from long lists of circumstances and conditions. Indeed, it is not uncommon to find that the only pre-condition for assignment is the provision of an AGA. Even where this is the only condition, the tenant should consider whether it is appropriate for the provision of an AGA to be an absolute requirement in *all* circumstances. What, for example, if the tenant is assigning to someone of greater covenant strength? In such circumstances the landlord would not be disadvantaged in any way by the assignment, and so is it fair he can require the tenant to enter into an AGA (see **20.2.4.4**)?

It should be noted that by virtue of s 19(1)(a) of the LTA 1927, the landlord can always refuse to give consent on grounds not listed in the lease, if it is reasonable to do so. So a failure to list a circumstance or condition in the lease will not prevent its being relied upon if it is a reasonable ground for refusal to the application in question.

20.2.4.3 Authorised guarantee agreements

Although the LT(C)A 1995 has abolished privity of contract in relation to leases caught by the Act, an outgoing tenant may sometimes be required to guarantee his immediate assignee's performance of the obligations contained in the lease. This is achieved by the outgoing tenant entering into an AGA with the landlord. The landlord may require an AGA from an outgoing tenant where:

(a) the lease provides that the consent of the landlord (or some other person) is required to the assignment;

(b) such consent is given subject to a condition (lawfully imposed) that the tenant is to enter into the AGA. For example, the requirement of an AGA may be one of the conditions which the parties had previously agreed had to be satisfied before the landlord was prepared to give his consent to an assignment (see **20.2.4.2**);

(c) the assignment is entered into by the tenant pursuant to that condition.

The terms of the guarantee are left to the parties (provided that the purpose of the LT(C)A 1995 is not frustrated), but the Act specifically permits the guarantee to require the outgoing tenant to enter into a new lease should the current lease be disclaimed following the assignee's insolvency (as to which, see **32.9**).

Whilst it is clear an outgoing tenant can be required to enter into an AGA, the position regarding any guarantor of the outgoing tenant has been less certain. Can the landlord validly ask the guarantor of the outgoing tenant to guarantee the obligations of the incoming tenant? In the absence of confirmation on the point from either the Act itself or case law, landlords in practice have been doing one of two things. The first is to require the outgoing tenant's guarantor to guarantee the obligations of the *assignee* in the AGA (sometimes referred to as a 'direct guarantee'). The second is to require the tenant's guarantor to guarantee the *outgoing tenant's* guarantee (sometimes referred to as a 'sub-guarantee'). Unfortunately for landlords, in the case of *Good Harvest Partnership LLP v Centaur Services Ltd* [2010] EWHC 330 (Ch), the High Court held that direct guarantees are invalid and questioned the validity of sub-guarantees (without ruling on the latter point). So any direct guarantee from an outgoing tenant's guarantor of an incoming assignee will be unenforceable. The initial hopes of landlords that this decision might be overturned by the Court of Appeal have been thwarted after the appeal was settled out of court. Landlords who are tempted to accept a weak tenant offering a strong guarantor should be very mindful of this decision and the fact that the guarantor will be released on assignment of the lease.

20.2.4.4 The 2007 Code for Leasing Business Premises

In relation to assignments, the 2007 Code for Leasing Business Premises ('the 2007 Code') provides:

> Leases should … not refer to any specific circumstances for refusal, although a lease would still be Code compliant if it requires that any group company taking an assignment, when assessed together with any proposed guarantor, must be of at least equivalent financial standing to the assignor (together with any guarantor of the assignor).
>
> Authorised Guarantee Agreements should not be required as a condition of the assignment, unless at the date of the assignment the proposed assignee, when assessed together with any proposed guarantor:
>
> - is of lower financial standing than the assignor (and its guarantor); or
> - is resident or registered overseas.
>
> For smaller tenants a rent deposit should be acceptable as an alternative.

So, a 2007 Code-compliant lease would not contain an absolute requirement that the tenant enter into an AGA. This requirement would be appropriate only where the landlord was being asked to accept an assignee of reduced covenant strength. In addition, the 2007 Code recommends that the lease does not contain any other specific circumstances for refusal, except for one dealing with group company assignments. This is to address the concern of landlords that the lease might be passed from a parent company to a much weaker subsidiary, in order ultimately to divest the parent company of the lease liabilities. A landlord clearly would wish to prevent such dilution of the tenant's covenant strength. In consequence, sometimes leases prohibit absolutely group company assignments. The 2007 Code recommends something less than that, which would allow the tenant to make a group company transfer, but only where the covenant strength is not weakened.

20.2.5 What detailed provisions will apply to sub-lettings?

Since there is a risk that the landlord may inherit a sub-tenant (see **20.1.2**), the lease will usually contain detailed provisions prescribing what terms any permitted sub-lease must contain. For example, the lease may contain the following:

(a) a prohibition on the sub-tenant doing any act inconsistent with the terms of the sub-lease;

(b) a requirement that the sub-tenant enter into a direct covenant with the head landlord;

(c) a requirement that the sub-lease prohibit any further dealings other than an assignment of whole;

(d) a requirement that the sub-lease contain similar rent review provisions to the headlease;

(e) restrictions on the level of rent that can be charged under the sub-lease.

As with assignment, the tenant should check any such requirements carefully before agreeing to them. For example, a tenant should avoid any provision requiring it to sub-let at no less than the rent currently payable under the headlease. If rents have fallen since the rent was last reviewed under the headlease, this will make it virtually impossible to sub-let lawfully. The 2007 Code recommends in paragraph 5 that the tenant should be allowed to sub-let at the market rent at the time of the sub-letting. A requirement that any sub-lease be excluded from the LTA 1954 should also be resisted, as it would limit the pool of potential sub-tenants who would be interested in the premises. If such a restriction does have to be accepted then the lease should not be prescriptive about the terms of the sub-lease (see paragraph 5 of the 2007 Code).

20.3 Seeking consent from the landlord

Whether the landlord can refuse consent will depend upon whether the landlord has made use of s 19(1A) of the LTA 1927 or, if not, his reasonableness in the circumstances of the case. The landlord should also be mindful of his statutory obligations under the Landlord and Tenant Act 1988 (LTA 1988) (see **20.3.4**) and s 144 of the Law of Property Act 1925 (LPA 1925) (see **20.3.6**).

20.3.1 Applications for consent to assign

The landlord can lawfully withhold consent to assign if:

(a) the lease contains an absolute prohibition on assignment; or

(b) a circumstance or condition listed in the lease under s 19(1A) of the LTA 1927 has arisen (see **20.2.4.2**); or

(c) it is otherwise reasonable to do so under s 19(1)(a) of the LTA 1927 (see **20.3.3**).

20.3.2 Other applications for consent

Section 19(1A) of the LTA 1927 has no application to covenants against sub-letting, charging or mortgaging, and does not apply in relation to leases granted before 1 January 1996. In consequence, the landlord can lawfully withhold its consent to such applications if:

(a) the lease contains an absolute prohibition against the dealing in question; or

(b) it is reasonable to do so under s 19(1)(a) of the LTA 1927 (see **20.3.3**).

20.3.3 Section 19(1)(a) of the LTA 1927

Where the lease contains a qualified covenant against dealings, even if the lease says otherwise, the landlord cannot unreasonably withhold consent to an application to deal with the lease. Whether the landlord is acting reasonably in such cases has to be judged from the circumstances existing at the time of the landlord's decision. Here, the parties to the lease cannot lay down in advance that refusal of consent for a particular reason shall be deemed to be reasonable since that is for the court to decide. However, it is open to the landlord to agree that he will not refuse his consent to an assignment or a sub-letting in favour of, for example, 'a respectable and responsible person'. If the proposed assignee or sub-tenant is respectable and responsible, the landlord will be unable to refuse his consent, even on other reasonable grounds (*Moat v Martin* [1950] 1 KB 175).

The Court of Appeal laid down a number of guidelines on the issue of the landlord's reasonableness under s 19(1)(a) in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 All ER 321. The case concerned an application to assign, and the court held that:

(a) the purpose of a fully qualified covenant against assignment is to protect the landlord from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee;

(b) a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease;

(c) it is unnecessary for the landlord to prove that the conclusions which led him to refuse to consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances;

(d) it may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease;

(e) in general a landlord is bound to consider only his own relevant interests when deciding whether to refuse consent to an assignment of a lease. However, it would be unreasonable for a landlord not to consider the detriment which would be suffered by the tenant if consent were to be refused, if that detriment would be extreme and disproportionate in relation to the benefit gained by the landlord;

(f) subject to the above propositions, it is, in each case, a question of fact, depending on all the circumstances, whether the landlord's consent to an assignment is being withheld unreasonably.

The following are examples of situations where consent has been held to have been reasonably withheld:

(a) where the proposed assignee's references were unsatisfactory (*Shanley v Ward* (1913) 29 TLR 714);

(b) where there was a long-standing and extensive breach of the repairing covenant by the assignor and the landlord could not be reasonably satisfied that the assignee would be in a position to remedy the breach (*Orlando Investments v Grosvenor Estate Belgravia* [1989] 2 EGLR 74);

(c) where the assignee would be in a position to compete with the landlord's business (*Whiteminster Estates v Hodges Menswear* (1974) 232 EG 715);

(d) where the assignment would reduce the value of the landlord's reversion. However, this will not be a reasonable ground for withholding consent if the landlord has no intention of selling the reversion (*Ponderosa International Development v Pengap Securities* [1986] 1 EGLR 66 and *FW Woolworth v Charlwood Alliance Properties* [1987] 1 EGLR 53);

(e) where the proposed assignee intends to carry on a use detrimental to the premises, or a use inconsistent with the landlord's 'tenant mix' policy (see *Moss Bros Group plc v CSC Properties Ltd* [1999] EGCS 47);

(f) where the assignee would, unlike the assignor, acquire protection under Pt II of the LTA 1954 (*Re Cooper's Lease* (1968) 19 P & CR 541);

(g) where the terms of a sub-lease, when read together with a collateral agreement proposed between tenant and sub-tenant, did not mirror the terms of the lease (*Allied Dunbar Assurance v Homebase Ltd* [2002] 2 EGLR 23). In this case the lease required any sub-lease to mirror its terms, and the court held that the landlord was therefore entitled to see any collateral agreement between the tenant and sub-tenant.

The following are examples of situations where consent has been held to have been unreasonably withheld:

(a) where the landlord has refused consent in an attempt to obtain some advantage for himself. See, for example, *Bates v Donaldson* [1896] 2 QB 241 and *Re Winfrey and Chatterton's Agreement* [1921] 2 Ch 7, where the landlord's refusal to grant consent to an assignment on the grounds that he wanted possession of the premises himself was held unreasonable. See also *Norwich Union Life Insurance Society v Shopmoor Ltd* [1999] 1 WLR 531, where, on an application to sub-let the premises, the landlord refused consent because the underlease rent was to be less than the market value. This was not prohibited by the terms of the lease, but the landlord argued that it would adversely affect the reversionary value of *neighbouring* properties it owned. The landlord did not make any argument that it would affect the reversionary value of the premises, and the court held this to be a case of the landlord seeking a collateral advantage unconnected with the demised premises;

(b) where there are minor breaches of the repairing covenant (*Farr v Ginnings* (1928) 44 TLR 249);

(c) where premises had been on the market for 18 months, the rent was significant and the slight harm to the landlord would be outweighed by prejudice to the tenant (*Footwear Corporation Ltd v Amplight Properties* [1999] 1 WLR 551).

An issue which has been before the court on more than one occasion is whether the landlord would be acting unreasonably in refusing consent where he anticipated a breach of the user covenant by the assignee. In *Ashworth Frazer Ltd v Gloucester City Council* [2002] 05 EG 133, the court considered that the correct approach is to examine what the reasonable landlord would do when asked to consent in the particular circumstances. It would usually be reasonable for a landlord to withhold consent where an assignee proposed to use the premises

in breach of the terms of the lease. However, there could be circumstances where the refusal of consent on this ground alone would be unreasonable (although the court did not say what these circumstances might be). In other words, each case will be looked at on its own merits in light of what a reasonable landlord would do.

Under the provisions of the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995, any discrimination in withholding consent for the disposal of the demised premises on grounds of race, sex or disability is generally unlawful. (At the time of writing, these statutes are due to be consolidated into the Equality Act 2010.)

20.3.4 Delays in obtaining consent

The LTA 1988 further strengthens the position of a tenant seeking consent to deal with its lease. The Act applies where the lease contains a fully qualified covenant against alienation (whether or not the proviso that the landlord's consent is not to be unreasonably withheld is express or implied by statute). It applies to assignment, sub-letting, charging and parting with possession of the premises. When the tenant has made written application for consent to such a dealing, the landlord owes a duty, within a reasonable time:

(a) to give consent, unless it is reasonable not to do so. Giving consent subject to an unreasonable condition will be a breach of this duty; and

(b) to serve on the tenant written notice of his decision whether or not to give consent (see LTA 1988, s 1(3)(b), and *Footwear Corporation Ltd v Amplight Properties Ltd* [1999] 1 WLR 551), specifying in addition:

  (i) if the consent is given subject to conditions, the conditions; or

  (ii) if the consent is withheld, the reasons for withholding it.

The burden of proving the reasonableness of any refusal or any conditions imposed is on the landlord. The sanction for breach of this statutory duty is liability in tort for damages. The LTA 1988 does not specify what is to be regarded as a reasonable time, nor when refusal of consent is to be deemed reasonable. Again, this Act has to be read in the light of s 19(1A) of the LTA 1927. The operation of the LTA 1988 and relevant case law is considered further in **Chapter 27**.

20.3.5 What if consent is refused?

If, having applied for consent to assign or sub-let, the tenant thinks his landlord is being unreasonable in his refusal to give such consent, the tenant has a number of options open to him. These are dealt with at **27.1**.

20.3.6 Restrictions on requiring payment for consent

In the case of a qualified covenant against dealings, s 144 of the LPA 1925 implies a proviso that no fine or similar sum of money shall be charged for giving consent to assignment, sub-letting or parting with possession, unless the lease expressly provides for this. However, this does not prevent a landlord from requiring his tenant to pay a reasonable sum for legal and other expenses incurred in connection with the grant of consent.

20.4 Notice of assignment or sub-letting

There is no common law obligation for a tenant to give his landlord notice of any dealing with the lease, but a well-drafted lease will provide for this so that the landlord knows at any given time in whom the lease is vested and whether any sub-lease has been granted.

The clause should specify the occasions on which the covenant is to operate (eg assignment, sub-letting, mortgage). The tenant is usually required to pay a registration fee to the landlord with each notice served. When negotiating the lease the tenant should ensure such registration fee is not excessive.

In the case of assignment, it will fall to the assignee to give notice (and pay any registration fee prescribed by the lease), since it will be his interest that will be jeopardised by the breach of covenant involved in failing to give notice.

20.5 Virtual assignments

The usual leasehold covenants preventing assignment, etc without the landlord's consent often prove inconvenient to tenants, eg on the sale of leasehold portfolios, where time is tight and consents would have to be obtained from a multiplicity of landlords. To deal with this, a handful of large city law firms acting for tenants with a large property portfolio developed a device that became known as the 'virtual assignment'.

A virtual assignment is an arrangement under which all the economic benefits and burdens of a lease are transferred to a third party, but without any actual legal (or equitable) assignment of the lease itself or any change in the occupation of the premises. Thus, as far as the landlord is concerned, the virtual assignor remains the legal tenant and the tenant avoids the need to seek the landlord's consent to the assignment. However, as between the parties to the virtual assignment, responsibility for the premises passes to the virtual assignee. The virtual assignee then acts as agent for the virtual assignor in all dealings connected with the property. This means it will be collecting rent from sub-tenants and paying it to the landlord, even though the assignor remains legally the tenant.

The question is whether such an arrangement is in breach of the terms of the lease. In *Clarence House Ltd v National Westminster Bank plc* [2009] EWHC 77 (Ch), the High Court held that although the virtual assignment did not amount to an assignment, sub-letting or declaration of trust, it was a breach of a provision in the lease preventing parting with or sharing of possession. On appeal, the Court of Appeal overturned the High Court decision (see *Clarence House Ltd v National Westminster Bank plc* [2009] EWCA Civ 1311). It was held that the appellant had not shared or parted with possession by entering into the virtual assignment, since there were sub-tenants in possession of the premises in question and the virtual assignee collected rents only as agent of the virtual assignor. While the Court accepted that being in receipt of the rents could amount to 'possession', it did not in this case, just as it would not have if the virtual assignor had appointed a managing agent to collect the rent for him. This was despite the fact that the contract between the virtual assignor and virtual assignee entitled the virtual assignee to keep the rents once they were collected.

Some landlords may feel uncomfortable with this type of arrangement being possible. It puts a third party right in the middle of the landlord and tenant relationship, and if that third party gets into financial difficulty, may affect the ability of the tenant to pay the rent. In consequence, some draftsmen have already been adapting their precedents to prohibit virtual assignments. The effect this type of restriction may have on rent review, however, remains unclear. It will of course still be possible to effect a virtual assignment under standard alienation provisions drafted prior to this case. It should be borne in mind, though, that the cases where a virtual assignment would be appropriate are limited. If the virtual assignee were to have taken occupation, or have been entitled to take occupation of the premises itself, it seems clear there would have been a breach. Given the limited circumstances in which it is therefore likely to be appropriate, the issue of the virtual assignment is unlikely to be a cause for concern for the vast majority of landlords and tenants.

Chapter 21
User

21.1	The need for a user covenant	209
21.2	The permitted use	210
21.3	The extent of the landlord's control	212
21.4	Ancillary clauses	213

21.1 The need for a user covenant

There are several ways outside the terms of the lease in which the tenant's use of the premises may be restricted:

(a) *Planning legislation*. The tenant may not be able to carry out any building or other operations at the premises, and he will not be able to make a material change in the use of the premises without obtaining planning permission from the local planning authority. Generally, there is no implied warranty by the landlord that the tenant's use of the property is an authorised use under the planning legislation. It is, therefore, for the tenant to satisfy himself that planning permission is available for the use intended.

(b) *Covenants affecting a superior title*. There may be restrictive covenants affecting the landlord's reversionary title (or if the landlord is himself a tenant, affecting a superior title) which bind the tenant and prevent him from carrying out certain activities at the premises. Despite being restricted by statute as to the evidence of title he can call for, the tenant should always press the landlord for evidence of all superior titles.

(c) *Common law restraints*. The law of nuisance may prevent the tenant from using the premises in a such a way as to cause disturbance to a neighbour.

While these restraints operate to exert some degree of control over the tenant, they do not provide the landlord with any remedy should the tenant act in breach. A user covenant (together with several ancillary clauses) will, therefore, be required to give the landlord the desired level of control.

21.1.1 The landlord's concerns

There are various financial and estate management reasons why a landlord will wish to control use of the premises by the tenant:

(a) to maintain the value of the landlord's interest in the premises;

(b) to maintain the rental value of the premises;

(c) to avoid damaging the reputation of the premises by immoral or undesirable uses;

(d) to maintain the value of adjoining premises owned by the landlord;

(e) to avoid the tenant competing with other premises of the landlord in the vicinity;

(f) to maintain a good mix of different retail uses in a shopping precinct owned by the landlord.

The landlord has to be careful when drafting the user covenant to ensure that he does not restrain the tenant's use of the premises any more than is strictly necessary for the landlord's purposes, since a tight user covenant may have an adverse impact from the landlord's point of view on rental values both initially and at rent review. The wider the scope of the user covenant, the more attractive would be a letting of the premises on the open market and, therefore, the higher the rental value may be, both initially and at review. The tighter the

covenant, the less attractive would be a letting of the premises on the open market (since the number of potential bidders for this letting would be restricted by the narrowness of the user covenant) and, therefore, the lower the rental value would be. The landlord is not able to argue at rent review that the valuer should assess the revised rent on the basis that the landlord might be prepared to waive a breach of the user covenant in order to permit a more profitable use (thereby increasing the rental value of the tenant's interest), nor is he allowed to vary the lease unilaterally in order to gain a benefit at review (see *Plinth Property Investments Ltd v Mott, Hay & Anderson* [1979] 1 EGLR 17 and *C&A Pension Trustees Ltd v British Vita Investments Ltd* [1984] 2 EGLR 75).

The landlord will, therefore, need to perform a balancing act between control of the tenant and good estate management on the one hand, and maximisation of rental values on the other. Valuation advice may be necessary here.

21.1.2 Tenant's concerns

From the tenant's point of view, a narrow user covenant ought to be avoided since, although the clause would work favourably for the tenant on rent review, his ability to dispose of the premises at some stage in the future will be hampered in that he will only be able to assign or sub-let to someone who is capable of complying with the covenant and who does not require any greater flexibility.

Additionally, the tenant must have regard to his own future use of the premises. There is a risk that the nature of the tenant's business may change to such a degree that he is taken outside the scope of the user covenant and, therefore, finds himself in breach. The tenant must ensure that sufficient flexibility is built into the covenant to permit future diversification of the tenant's business. However, he should not allow the landlord to insert a covenant that is wider than is strictly necessary for his purposes, since this may penalise the tenant at rent review by increasing the rental value of the tenant's interest. Once again a balancing act is required.

The user clause usually contains a principal covenant by the tenant governing the permitted use of the premises, followed by a range of ancillary clauses prohibiting or controlling a range of other activities.

21.1.3 The 2007 Code for Leasing Business Premises

The 2007 Code provides:

> **8 Alterations and Changes of Use**
>
> Landlords' control over alterations and changes of use should not be more restrictive than is necessary to protect the value, at the time of the application, of the premises and any adjoining or neighbouring premises of the landlord.

21.2 The permitted use

There are several ways in which the permitted use can be defined in the lease. First, the landlord may be prepared to permit a wide range of uses by broadly stipulating the type of use to be permitted on the premises, for example, use as offices, or as a retail shop, or for light industrial purposes. This would give the tenant a large degree of flexibility and enable him to diversify his business operations within the broad range permitted.

Alternatively, the landlord may choose to restrict the tenant to a very narrow range of uses by defining the permitted use by reference to the nature of the business to be carried on at the premises, for example, use as offices for the business of an estate agency, or as a retail shop for the sale of children's footwear, or as a factory for the manufacture of computer software. This would give the tenant no flexibility to diversify and would hamper the tenant in any efforts to assign his lease, or sub-let the premises to someone who was not in the same line of business.

As a third possibility, the landlord may adopt an approach which is mid-way between the first two by restricting the tenant's use of the premises to a class of similar uses by, for example, defining the permitted use as offices for the business of a solicitor, accountant, architect or other professional person. If the landlord intends permitting the tenant to use the premises for one of a number of similar uses, he may consider defining the use by reference to the Town and Country Planning (Use Classes) Order 1987 (SI 1987/764) (as amended).

21.2.1 Making use of the Town and Country Planning (Use Classes) Order (UCO)

It is often considered desirable that the permitted user is linked to available planning permission. For example, if planning permission is available for any office use within class B1 of the UCO, then the landlord, being quite happy for the premises to be used for any such office purposes, may choose simply to prohibit any use other than B1 office use. However, if this approach is to be adopted, the landlord should check carefully to ensure that there are no uses which could conceivably fall within the definition of B1 office use which the landlord would consider to be unattractive. The same principle is more clearly demonstrated if the lease prohibits any use other than as a retail shop within class A1. This is a very wide-ranging class of uses and there are likely to be several types of shop uses within that class which the landlord would not be prepared to tolerate at the premises.

If the landlord is to make use of the UCO in the user covenant, he should ensure that the lease clearly states that any reference to the UCO is intended to refer to the Order as enacted at the time the lease was granted. The danger is that at some stage during the term the UCO could be amended to bring within the class of use permitted by the lease a use which the landlord considered to be undesirable, thereby converting that use into a permitted use under the lease.

21.2.2 A covenant that names the tenant

It is sometimes difficult to define the type of business to be carried on by the tenant at the premises because of its peculiar nature, and so the landlord feels inclined to restrict use of the premises to the tenant's particular business. This is a dangerous approach to adopt, and it can lead to problems for the tenant (in terms of his ability to dispose of the premises) and can give rise to complicated valuation problems at rent review (*Sterling Land Office Developments Ltd v Lloyds Bank plc* (1984) 271 EG 894 and *Post Office Counters Ltd v Harlow District Council* [1991] 2 EGLR 121).

If the user covenant restricts the use of the premises to, for example, the offices of a particular company which is named in the lease, this would effectively prevent an assignment or sub-letting by the original tenant, even if the lease otherwise anticipated alienation (*Law Land Co Ltd v Consumers Association Ltd* (1980) 255 EG 617).

If the user covenant, without specifically naming the tenant, restricts use of the premises to 'the tenant's business', problems of interpretation will arise. Does the clause refer to the original tenant, or the current tenant? Does it refer to the business being conducted at the outset or the business being conducted from time to time? The danger from the landlord's point of view is that if, as is usually the case, the lease defines 'the Tenant' to include his successors in title, such a clause is likely to be construed by the court as permitting whatever business is currently being carried on by whoever is then the tenant. In other words, the landlord will have lost control. If reference is made to 'the tenant's business as a solicitor', does that mean that only the original tenant can comply with the covenant, or can an assignee? Would sub-letting be impossible since a sub-tenant, not being a tenant under the lease, would inevitably be in breach?

In view of these complications, it is advisable to avoid the use of covenants which either name the tenant, or refer to the tenant's business without sufficient clarity.

21.2.3 A positive or negative covenant?

If the covenant is positive, it will require the tenant 'to use the premises for the purposes of [the named permitted use]'. The benefit from the landlord's point of view is that non-use (eg, because of a temporary shut-down during a recession) will amount to a breach of covenant entitling the landlord to damages should the landlord suffer loss. Loss can arise if the premises form part of a shopping precinct which is dependent upon the continued presence of the tenant's shop in order to generate a flow of shoppers into the precinct. If the tenant's shop is a large food store, its closure will reduce the number of shoppers in the precinct, thereby affecting the profitability of other shops in the precinct and resulting eventually in an adverse effect on the value of the landlord's reversion. The tenant ought to resist a positive covenant (see **29.1.3**).

Most user covenants are negative obliging the tenant 'not to use the premises other than for the purposes of … [permitted purpose]' in which case a breach is committed by the tenant only if he uses the premises for a purpose not authorised by the landlord. A negative user covenant is not breached by non-use.

Neither form of covenant will be breached if the tenant uses the premises for a purpose ancillary to the permitted use. For example, use of some rooms in a shop for storage purposes where the user covenant permits the retail sale of books, magazines and periodicals would not amount to a breach.

21.3 The extent of the landlord's control

The principal covenant may be absolute, qualified or fully qualified.

21.3.1 Absolute covenants

An absolute covenant gives the landlord absolute control over any change in the use of the premises in that it permits the tenant to use the premises for the purpose of the permitted use and no other. The tenant will not be able to use the premises for a use falling outside the scope of the covenant without obtaining from the landlord a waiver of the tenant's breach, or getting the landlord to agree to a variation of the lease. If the permitted use is narrowly defined, the tenant should be advised to resist an absolute covenant, unless he is sure that he will not want to assign or sub-let the premises, or diversify his business. If the permitted use is sufficiently widely defined (eg, use as offices only), then an absolute covenant should not unduly concern the tenant.

21.3.2 Qualified covenants

A qualified covenant allows the tenant to alter the use of the premises from a permitted use to some other use with the landlord's prior consent, which is usually required to be given in writing. However, such a covenant gives the tenant little extra comfort than is afforded by an absolute covenant since, unlike qualified covenants relating to alienation and improvements, there is no statutorily implied proviso that the landlord's consent is not to be unreasonably withheld. This means that, despite the additional wording added to the covenant, the tenant is still at the mercy of the landlord who may decline the request for a change of use for whatever reason he chooses. The only benefit from the tenant's point of view of a qualified covenant is derived from s 19(3) of the LTA 1927 which states that, provided the change of use will not entail any structural alterations to the premises (which would not often be the case), the landlord is not allowed to demand as a condition of his giving consent the payment of a lump sum or an increased rent (as to which, see *Barclays Bank plc v Daejan Investments (Grove Hall) Ltd* [1995] 18 EG 117). However, s 19(3) does allow the landlord, as a condition of his consent, to insist upon the payment of reasonable compensation in respect of damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord (which

might occur if a valuable use of the premises is abandoned), and the payment of expenses incurred in the giving of consent, such as legal and surveyor's fees.

Section 19(3) does not apply to agricultural or mining leases.

21.3.3 Fully qualified covenants

A fully qualified covenant allows the tenant to change the use of the premises from a permitted use to some other use with the prior consent (in writing) of the landlord, whose consent is not to be unreasonably withheld. Most covenants of this kind will also stipulate (either in the wording of the covenant, or in the interpretation section of the lease) that the landlord cannot unreasonably delay giving consent. Should the landlord, in the tenant's opinion, be guilty of an unreasonable refusal of consent, the tenant may, if he is certain of his ground, change the use of the premises without the landlord's consent. However, this course of action carries a risk and, therefore, most tenants would prefer to follow the safer course of action which is to apply to the court for a declaration that the landlord is acting unreasonably, and then proceed without the landlord's consent. The question of the landlord's reasonableness is ultimately left in the hands of the court. The only potential drawbacks of such a clause for the tenant are that, without an express provision in the lease, there is no obligation on the landlord to provide the tenant with reasons for refusing consent (making it difficult for the tenant to assess whether he has a good chance of success in his application for a declaration) and there is no positive duty upon the landlord to give consent along the lines of the statutory duty imposed by the LTA 1988 in respect of alienation covenants, which means that the tenant does not have a remedy in damages if he suffers loss as a result of an unreasonable refusal.

Section 19(3) of the LTA 1927 applies equally to fully qualified covenants.

21.4 Ancillary clauses

It is usual for the landlord to impose many other covenants upon the tenant which also impact upon user, obliging the tenant:

(a) to comply in all respects with the Planning Acts (as defined in the definitions section of the lease). It is important for the landlord to have the benefit of this covenant since enforcement action for a breach of planning control committed by the tenant could be taken against the landlord, resulting in a possible fine;

(b) not to apply for planning permission, or to carry out acts of development at the premises. This covenant may be absolute, qualified or fully qualified. The landlord will not want the tenant to have freedom to change the authorised use of the premises as this may result in an existing profitable use being lost, thereby reducing the value of the premises. Although, as owner of the reversion, the landlord may be able to raise objections at the application stage, he would prefer to be able to veto the application under the terms of the lease in the first place. It should be noted that such a covenant may restrict the tenant's ability to alter or change the use of the premises even if elsewhere in the lease such action is more freely permitted;

(c) where the landlord has consented to an application for planning permission, and development has commenced, to fully implement all permissions obtained before the end of the term in accordance with any conditions attached to the permission;

(d) not to cause a nuisance, annoyance or inconvenience to the landlord or the tenants of adjoining premises. Whether an activity amounts to a nuisance is to be determined on the basis of ordinary tortious principles. An annoyance is anything which disturbs the reasonable peace of mind of the landlord or an adjoining occupier, and is a wider concept than nuisance. The concept of inconvenience is probably wider still;

(e) not to use the premises for any immoral or illegal use (since such uses may tarnish the reputation of the building and reduce its value);

(f) not to carry out any dangerous activities, or bring any noxious or inflammable substances onto the premises. The landlord's primary purpose behind this covenant is to preserve the premises. One consequence of a breach by the tenant might be an increase in the insurance premium for the premises, and although the tenant is likely to be obliged to pay the increased premium by virtue of the insurance covenant, the landlord would not want the level of insurance premiums to rise;

(g) not to overload the premises in any way. The landlord is simply trying to preserve the premises with this covenant;

(h) not to allow anyone to sleep or reside at the premises;

(i) not to allow any licence which benefits the premises to lapse (eg, gaming licences, liquor licences). If the premises consist of a betting shop, the value of those premises will depend to a large extent on the continued existence of a betting office licence. The tenant will, therefore, be obliged by the landlord to maintain and where necessary renew the licence.

Chapter 22
Alterations

22.1	Introduction	215
22.2	Lease controls	216
22.3	Restrictions outside the lease	219
22.4	Compensation for improvements	220
22.5	The 2007 Code for Leasing Business Premises	220
Review activity		220

22.1 Introduction

A tenant will often wish to be able to make alterations to the premises, either immediately at the start of the lease (eg fitting-out works at shop premises to enable it to start trading, or to erect partitioning in an open-plan office) or during the term of the lease to suit its changing business needs. A tenant will be concerned that the proposed restrictions in the lease are flexible enough to allow it to carry out its plans, that they will not affect assignability and that it will not suffer at rent review if the provisions are too flexible.

A landlord, however, usually wants to restrict the tenant's ability to make alterations for a number of reasons:

(a) to maintain the rental and capital value of the premises by preserving the character, reputation, appearance and physical integrity of the premises;

(b) to ensure that at the end of the lease the tenant gives back premises which are substantially the same as those demised to the tenant at the beginning;

(c) to ensure the landlord does not inadvertently become responsible for any breach by the tenant of the external restrictions which impact on alterations (see **22.3**).

The extent to which the landlord will want to restrict the tenant's ability will depend on the following:

(a) *The nature of the premises*

For example, in a letting of a large warehouse, or factory or other industrial premises, the landlord may require absolute control only over alterations affecting the structure and exterior of the premises, leaving the tenant free to do more or less as he pleases on the inside, as the landlord will know that the state of the interior will not affect its rental or capital interest. However, in a shopping parade, in order to maintain the general appearance of the parade and the quality of the development, and therefore its rental and capital value, the landlord may feel that it wants to have a very tight control over all alterations, inside and out.

In office leases, where the initial design of the building is open-plan, the landlord often allows the tenant to erect internal partitioning walls without having to obtain the landlord's prior consent, as long as the tenant notifies the landlord and agrees to remove them at the end of the term if the landlord so requires.

(b) *The length of the proposed term*

In a short-term letting (three years or less) the landlord is likely to want tight control over the tenant's ability to make alterations, in which case an absolute prohibition against all alterations may be appropriate.

However, in a longer-term letting (10 years or more), where the tenant may need to adapt the premises during the term to suit its changing business needs, or may

anticipate the possibility of assigning the lease to an assignee who may wish to make alterations, the landlord will usually be prepared to allow the tenant a greater degree of freedom. Severe restrictions on a longer-term letting would give the landlord problems at the outset in securing a letting of the premises, and later on at rent review where the restrictive alterations covenant may be taken into account to reduce the rental value of the premises.

(c) *The type of alterations*

The landlord may allow the tenant unrestricted freedom to carry out non-structural alterations or additions, for example the partitioning in an open-plan office mentioned above, which will not affect the rental or capital value of the landlord's interest.

In most cases the landlord will impose an absolute covenant against structural alterations, for the simple reason that the structure, being such a fundamental part of the building, should not be tampered with by the tenant.

22.2 Lease controls

22.2.1 Alterations clause

As with other covenants, the covenant against alterations may be absolute (completely prohibited), qualified (prohibited unless the landlord consents) or fully qualified (prohibited unless the landlord consents, such consent not to be withheld unreasonably). The alterations clause may be a mixture, so that some alterations are completely prohibited, some are prohibited unless consent is obtained and some may be carried out without consent.

For example, a typical lease of office premises might contain the following alterations clause:

> 12.1 The Tenant shall not make any alteration to the Property except those expressly permitted by this clause.
>
> 12.2 The Tenant shall not make any internal non-structural alterations without the prior written consent of the Landlord.
>
> 12.3 The Tenant may erect internal demountable partitioning without the consent of the Landlord provided that the Tenant makes good any damage to the Property caused and within one month of completion of the alterations the Tenant provides the Landlord with a copy of 'as built' drawings.

In all cases, the landlord must first consider the type of premises involved, and the length of term proposed.

22.2.1.1 Absolute covenants

Subject to certain exceptions mentioned below, if the lease contains an absolute covenant against the making of any alterations or a particular type of alteration (for example in clause 12.1 of the typical office lease set out above structural alterations are absolutely prohibited), the landlord will have total control over the tenant. The tenant can always ask the landlord for permission to make the prohibited alteration, but the landlord can simply refuse. If the landlord did agree then this could be by way of a one-off waiver of the proposed breach of covenant, or by a permanent variation of the lease (by deed of variation).

There are statutory exceptions to the landlord's absolute control. For example, the tenant can obtain a court order to enable it to carry out works required by some statutory bodies (eg a fire authority ordering the tenant to install a fire escape). In addition, the tenant can (although rarely does) use the provisions of the LTA 1927 (see **22.4**) to enable it to carry out works in the face of an absolute covenant.

The tenant should be advised to argue against an absolute covenant except, perhaps, where the covenant relates only to structural or external alterations (in which case the tenant may agree that it is reasonable that it should not be allowed to tamper with the structural parts of the

building), or where the letting is for a short term and the tenant is confident that it will not need to alter the premises in the future to accommodate changes in his business, and that it will not need or want to assign the lease during the term. However, the longer the term, the more the tenant should ensure that it has sufficient flexibility to alter the premises.

22.2.1.2 Qualified covenants

A qualified covenant against alterations prohibits alterations to the premises by the tenant without the landlord's prior consent (which is usually required to be given in writing). An example of this is clause 12.2 of the typical office lease set out at **22.2.1**.

Other than in mining and agricultural leases, s 19(2) of the LTA 1927 implies into a qualified covenant against making *improvements* a proviso that the landlord's consent is not to be withheld unreasonably. Improvements are works carried out which increase the value or usefulness of the premises seen through the tenant's eyes (*Lambert v FW Woolworth & Co Ltd (No 2)* [1938] 2 All ER 664). There will therefore be few occasions where the landlord can argue that s 19(2) would not apply.

22.2.1.3 Fully qualified covenants

As said in **22.2.1.2** above, s 19(2) of the LTA 1927 converts a qualified covenant against alterations into a fully qualified covenant in so far as the alterations are *improvements*. To avoid any argument that the tenant's works are not improvements, most tenants will insist on converting a qualified covenant into a fully qualified covenant expressly by adding to the qualified covenant drafted by the landlord the words 'such consent not to be unreasonably withheld or delayed'.

22.2.1.4 Landlord's consent

Where landlord's consent is required, it will usually be given by deed in a document known as a licence for alterations or licence for works. The licence is often negotiated between the landlord's solicitors and tenant's solicitors, and once agreed it will be produced in original and counterpart (or in duplicate) for signature by the landlord and the tenant.

The licence will often impose conditions on how the works are to be carried out to protect the landlord in respect of its concerns set out in **22.1** above. Common conditions are that the tenant must comply with statute in carrying out the works, obtain all necessary consents, carry out the works in a good and workmanlike manner, using good quality materials, comply with approved plans and specifications, and reinstate the premises to their previous condition at the end of the term. See **22.2.2** below.

Where s 19(2) of the LTA 1927 applies, or where there is a fully qualified covenant in the lease, consent from the landlord cannot be withheld unreasonably. The tenant must have supplied the landlord with all the information necessary for the landlord to reach an informed decision (*Kalford Ltd v Peterborough City Council* [2001] EGCS 42). If that has been done then a landlord will be acting reasonably in refusing consent only where his reasons follow the principles laid down in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513 (see **Chapter 20**). This effectively means that the refusal must have something to do with the relationship of landlord and tenant, and must not involve the landlord simply seeking a collateral advantage outside the landlord and tenant relationship.

Section 19(2) allows the landlord to be compensated for damage to or reduction in the value of the premises or adjoining premises owned by the landlord, and to have its properly incurred legal and other (eg surveyor's fees) expenses met. It is therefore not reasonable for the landlord to refuse consent simply because the works will reduce the value of the reversionary interest.

Where the tenant thinks that the landlord is unreasonably withholding consent, the tenant could seek a declaration from the court that the landlord is acting unreasonably or, with more

risk, it could proceed with the works without consent and then use the landlord's alleged unreasonable withholding of consent as a defence to any claim for breach of covenant brought by the landlord.

The tenant does not have a claim in damages against the landlord if the refusal of consent results in loss to the tenant (eg where the tenant's well-advanced business plans are thwarted by the landlord's refusal) since the words 'such consent not to be unreasonably withheld' are only a qualification on the tenant's covenant (*Rose v Gossman* (1966) 201 EG 767).

22.2.2 Other lease clauses

The landlord is likely to include many other covenants in the lease which will affect the tenant's ability to carry out alterations to the premises. For example:

(a) *Reinstatement*

Section 19(2) of the LTA 1927 enables the landlord to impose a reinstatement obligation on the tenant in the case of an improvement which does not add to the value of the premises, where it is reasonable to do so.

The lease, however, usually contains an express reinstatement provision in any event for all alterations and additions (if requested by the landlord), so that it is less likely to be viewed as an unreasonable condition in giving consent. The tenant is likely to want to qualify an absolute obligation to reinstate by requiring that any such request be reasonable.

By obliging the tenant to reinstate the premises at the end of the term, the landlord may be able to avoid paying compensation to the tenant for improvements (see **22.4**) as, if the improvements have been removed, there is nothing to which the compensation requirement can attach.

(b) *Access to inspect*

The lease may contain an express right to inspect a tenant's works to ensure that it is carrying them out properly. This should avoid any argument that a condition to that effect in the licence for alterations is an unreasonable one.

(c) *Waste*

The doctrine of waste may operate to prevent the tenant from altering the premises. Waste is any act which changes the nature of the premises, and can be voluntary, permissive, ameliorating or equitable. If required, reference should be made to textbooks on land law for a more detailed consideration of the doctrine of waste. It is common to find a prohibition on waste (save to the extent that it might otherwise be permitted in the lease) in the alterations covenant.

(d) *Electrical supply and installations*

Many landlords impose a covenant on the tenant not to tamper with the electrical supply or installations, especially in a lease of part of a building.

(e) *Planning applications*

The landlord will want to control the tenant's ability to make applications for planning permission with an absolute, qualified or fully qualified covenant.

(f) *Signs and advertisements*

The landlord will usually require a qualified covenant by the tenant not to display any signs or advertisements at the premises, to guard against a proliferation of signs or advertising hoardings giving the premises an unsightly appearance which might reduce the value of the landlord's interest in the building. The landlord may require control over the size or type of sign or advertisement.

(g) *Decoration*

The decorating covenant may control the manner in which the tenant may alter the premises since it is likely to dictate that the tenant is not to change the colour of the premises (either inside or outside, or both) without the landlord's prior consent.

(h) *No nuisance*

There will usually be a covenant imposed on the tenant not to do anything that would causes a nuisance or an annoyance to other tenants or owners or occupiers of adjoining properties, which may act as a control on how the tenant is able to carry out any works (eg noise, times).

(i) *Rent review*

See **Chapter 18** for the treatment of alterations and improvements at rent review.

If the tenant secures an alterations covenant that is too flexible, in that it gives the tenant extensive freedom to alter and improve the premises as it sees fit, the rental value of the letting may be increased at review as a result. On the other hand, if the landlord secures a very restrictive covenant, it may be penalised at review.

22.3 Restrictions outside the lease

As with user covenants, there are external restraints, outside the scope of the lease, which may prevent the tenant from altering the premises, or may at least regulate the way in which they are carried out. For example:

(a) *Planning legislation*

Any alterations falling within the definition of 'development' within s 55 of the TCPA 1990 will require planning permission.

(b) *The Building Regulations*

Works to be carried out by the tenant may have to comply with the Building Regulations.

(c) *Covenants affecting a superior title.*

The tenant's proposed works may be prohibited by the terms of a covenant affecting the landlord's reversion (which may either be the freehold title, or a leasehold title if the landlord is itself a tenant), or may require the consent of the current beneficiary of the covenant.

(d) *The common law*

The tenant will have to ensure that any works it carries out at the premises do not give rise to a cause of action in the tort of nuisance. The tenant will also have to ensure that it will not, in executing its works, infringe an easement benefiting an adjoining property (eg, a right to light or air over the tenant's premises).

(e) *Fire legislation*

The tenant will have to bear in mind any requirements of the fire authority in regard to fire safety.

(f) *Environmental legislation*

If the tenant's works are more than just minor works, the tenant must have regard to environmental legislation regarding noise and other kinds of pollution.

(g) *Equality Act 2010*

Where reasonable, a landlord may have to waive or modify an absolute prohibition on alterations to allow the tenant to carry out 'reasonable adjustments' so that a disabled person is not put at a substantial disadvantage in the building under the Equality Act 2010. Such alterations, however, would still be subject to the landlord's consent which may be reasonably withheld, which will depend on the circumstances in question.

The landlord may 'have to carry out' reasonable adjustments in respect of any common parts. It is likely to want to pass on any costs incurred to its tenants through the service charge. The landlord will need to ensure that the service charge provision allows for this.

On rent review the tenant will be concerned to ensure that any works it carries out to comply with statute, including those pursuant to the 2010 Act, are disregarded (see **18.6.3**).

22.4 Compensation for improvements

The tenant may claim compensation for improvements at the end of the term under Pt I of the LTA 1927 (as amended by Pt III of the LTA 1954). The concept is fair in that the tenant will be returning to the landlord an asset that has increased in value as a result of the tenant's expenditure.

In addition, the LTA 1927 provides a mechanism whereby the tenant may obtain permission for improvements it would like to carry out to the premises even in the face of an absolute covenant.

In order to be entitled to compensation on quitting, the tenant must have obtained prior authorisation from the landlord to make the improvements by using a statutory procedure, and it must claim within the statutory time limits. It does not matter that the covenant in the lease is absolute, or is qualified and the landlord has reasonable grounds to withhold consent.

The amount of compensation payable to the tenant is a sum deemed to be either the additional value of the premises directly resulting from the improvements, or the reasonable cost (as at the date of termination of the tenancy) of carrying out the improvement.

Although the parties cannot contract out of the provisions relating to compensation for improvements, it is a procedure that is rarely relevant in practice given that most leases will contain a requirement to reinstate.

22.5 The 2007 Code for Leasing Business Premises

The 2007 Code provides:

> **8 Alterations and Changes of Use**
>
> Landlords' control over alterations and changes of use should not be more restrictive than is necessary to protect the value, at the time of the application, of the premises and any adjoining or neighbouring premises of the landlord.
>
> Internal non-structural alterations should be notified to landlords but should not need landlords' consent unless they could affect the services or systems in the building.
>
> Landlords should not require tenants to remove permitted alterations and make good at the end of the lease, unless reasonable to do so. Landlords should notify tenants of their requirements at least six months before the termination date.

Review activity

1. You are acting for a landlord of a multi-let office block. You have received a letter from a tenant's solicitor stating that the tenant wishes to carry out works. The tenant has a lease of the first floor of the office block (with six years left to run). The lease is in the form set out in **Appendix 4** (assume all bracketed wording in clause 28 has been incorporated). The proposed works are:
   (a) to fix an aerial to the exterior of the Building (ie the office block);
   (b) to erect internal partitioning; and

(c) to drill holes in an internal structural wall of the Property (ie that part of the Building demised to the tenant and defined in the lease) in order to hang the modern art collection of the tenant.

Advise the landlord whether the tenant is entitled to carry out the proposed works.

2. Acting for a prospective tenant of premises at the office block under a lease in the form set out in **Appendix 4** (assume all bracketed wording has been incorporated), advise whether the lease is compliant with the 2007 Code.

Chapter 23
The Landlord's Covenant for Quiet Enjoyment

23.1	Nature of the covenant	223
23.2	Acts constituting a breach	223

23.1 Nature of the covenant

Most leases will contain an express covenant for quiet enjoyment by the landlord (and, even in the absence of an express covenant, one will be implied). The usual form of express covenant provides that if the tenant pays the rent and performs his covenants, he may quietly hold and enjoy the demised premises without interruption by the landlord or anyone lawfully claiming under him. This usual form of covenant is restricted in that it only extends to interruption of or interference with the tenant's enjoyment of the demised premises by the landlord or any person lawfully claiming under him; it does not extend to the acts of anyone with a title superior to that of the landlord. However, the parties are free to negotiate a more extensive covenant for quiet enjoyment which does extend to the acts of those with a superior title, thereby providing the tenant with a greater degree of protection.

The covenant only extends to the lawful acts of those claiming under the landlord since, if they are unlawful (eg, trespass) the tenant will have his own remedies against the person committing the act. This means that there is no breach of the covenant in the event of an interruption by an adjoining tenant which is unauthorised by the landlord.

23.2 Acts constituting a breach

The covenant will provide the tenant with a remedy in the case of unlawful eviction or where there is substantial interference with the tenant's use or enjoyment of the demised premises. While this is a question of fact in each case, the following situations have given rise to a breach:

(a) Where the landlord erected scaffolding on the pavement in front of a shop which blocked the access to the shop (*Owen v Gadd* [1956] 2 QB 99). This illustrates that it is not necessary for there to be any physical intrusion into the demised premises provided (it would seem) that there is physical interference with the enjoyment of the premises.

(b) Where the demised premises were flooded due to the landlord's failure to repair a culvert on his adjoining land (*Booth v Thomas* [1926] Ch 397).

(c) Where the landlord carried out work to the building in a manner which caused prolonged and substantial interference to the tenant by reason of 'dust, noise, dirt … deterioration of common parts … general inconvenience … and water penetration' (see *Mira v Aylmer Square Investments Ltd* [1990] 1 EGLR 45). If the landlord is under an obligation to repair the premises, he must take all reasonable precautions to prevent disturbance (*Goldmile Properties Ltd v Lechouritis* [2003] EWCA Civ 49, [2003] 15 EG 143).

Until recently, it had been thought that the word 'quiet' in the covenant did not refer to the absence of noise and that some direct and physical interference was required before the landlord incurred liability under it. However, in the case of *Southwark London Borough Council v Mills and Others; Baxter v Camden London Borough Council* [1999] 3 WLR 939, the House of Lords held that no such limitation exists. The fact that the tenant was complaining of noise from adjoining premises in the block due to poor sound insulation did not in itself preclude a claim for breach of the covenant for quiet enjoyment. However, it was also held that

the covenant applies only to the subject matter of the lease at the date of the grant. If, at that date, the premises already suffer from poor soundproofing qualities, the covenant is one not to interfere with the tenant's use or enjoyment of premises with that feature.

The covenant for quiet enjoyment is closely linked with the landlord's implied obligation not to derogate from his grant. This requires a landlord not to do anything which substantially interferes with the use of the demised premises for the purpose for which they were let. (See **29.2.2.2**.)

Chapter 24
Insurance

24.1	Introduction	225
24.2	The obligation to insure	226
24.3	The obligation to pay for the insurance	228
24.4	Compliance with the terms of the insurance	228
24.5	The obligation to reinstate	229
24.6	Rent suspension	230
24.7	Termination	231
24.8	Damage by uninsured risks	233
24.9	Additional provisions	233
24.10	Insurance by the tenant	233

24.1 Introduction

There is no implied obligation on either party to insure the premises demised by the lease. However, it is very important to both parties and their lenders that their respective interests are fully protected, and it is therefore essential for the lease to make express provision for insurance.

There are a number of important issues which will need to be addressed by the draftsman. These include not only imposing an obligation to insure, but also specifying what will happen if damage does occur: Who will reinstate? Will the tenant continue to pay rent? Should the lease be terminated? As with any lease negotiation, there will be some areas that prove contentious between the parties. This chapter highlights some of those areas and identifies issues of which the parties should be particularly aware. The 2007 Code for Leasing Business Premises ('the 2007 Code') also contains recommendations as to how some of these difficult issues should be dealt with. It provides as follows:

> **9 Insurance**
>
> Where landlords are insuring the landlord's property, the insurance policy terms should be fair and reasonable and represent value for money, and be placed with reputable insurers.
>
> Landlords must always disclose any commission they are receiving and must provide full insurance details on request.
>
> Rent suspension should apply if the premises are damaged by an insured risk or uninsured risk, other than where caused by a deliberate act of the tenant. If rent suspension is limited to the period for which loss of rent is insured, leases should allow landlords or tenants to terminate their leases if reinstatement is not completed within that period.
>
> Landlords should provide appropriate terrorism cover if practicable to do so.
>
> If the whole of the premises are damaged by an uninsured risk as to prevent occupation, tenants should be allowed to terminate their leases unless landlords agree to rebuild at their own cost.

Unless specifically drafted to be compliant with the 2007 Code, many leases will not contain such obligations, and the tenant will have to amend the lease it if wishes the landlord to be bound by such obligations. For an example of a lease that complies with the 2007 Code, see **Appendix 4** to this book.

24.2 The obligation to insure

24.2.1 Who is to insure?

In a lease of commercial premises, it is common practice for the landlord to take out the insurance cover. On a lease of part of a building (eg one unit in a shopping centre, or a suite of offices in a block) it is more appropriate for the landlord to arrange insurance for the whole building, including any car parks, pedestrian areas, etc, as in this way only one policy is needed. Further, all the common parts of the building will be covered under the same policy and there is no danger of any parts of the building being left uninsured. On the grant of a lease of the whole of a building, either party could be made to insure, but the landlord will usually wish to assume the responsibility rather than face the risk of the tenant failing to comply with his covenant to insure. While the landlord would be able to sue the tenant for breach of covenant, the tenant may have insufficient funds to satisfy the judgment.

If the landlord takes out the insurance before completion of the lease, the tenant should ask to see a copy of the policy so that he can satisfy himself as to the amount and terms of cover. As the tenant has a continuing interest in the insurance of the premises, he should also impose an obligation on the landlord in the lease to produce evidence of the terms of the policy and of payment of the premiums, at any time during the term of the lease.

24.2.2 What is to be insured?

On the grant of a lease of the whole of a building, it is quite clear that the insurance and reinstatement obligations will need to apply to the whole of that building.

On the grant of a lease of part, the insurance and reinstatement obligations should also apply to the whole of the building of which the premises form part. The building will often provide access or contain services essential to useful occupation of the premises. Even if it does not, most tenants would consider it undesirable to occupy premises in a damaged building, even if their premises were undamaged,

In the case of either a lease of whole or a lease of part, if the building is on an estate or business park owned by the landlord, the tenant should check that the insurance and reinstatement obligations apply to any other essential common parts. It would clearly be unacceptable to the tenant if, for example, the building it occupied were reinstated but the estate roads needed to access that building were not.

24.2.3 In whose name?

Where the landlord is to insure, the tenant should consider amending the lease to require the insurance to be effected in the joint names of the landlord and tenant. This will be to the tenant's advantage because the insurance company will not allow the policy to lapse unless both parties have been given notice. It will also ensure that the proceeds of the policy will be paid out to both parties jointly, and thus give the tenant some control over how they are spent.

Another advantage to the tenant is that insurance in joint names may prevent subrogation. This is the right of the insurer to step into the shoes of the insured and pursue any claims that the insured has against third parties to recover the loss. This means that, where the tenant is not named on the policy, if the landlord had a cause of action against the tenant arising out of some default on the tenant's part which caused the damage, the insurers would be able to pursue that claim. If, however, the insurance is in the joint names of the landlord and tenant, subrogation may not be possible, depending on the intentions of the parties (see the judgment of Rix LJ in *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls Royce Motor Cars Ltd* [2008] EWCA Civ 286).

However, even in those cases where the insurance is in the landlord's name alone, the tenant may still be able to prevent subrogation occurring where it can be shown that the insurance

has been taken out for the mutual benefit of both parties (eg see *Mark Rowlands Ltd v Berni Inns Ltd* [1986] 1 QB 211, where the tenant agreed to reimburse the landlord the premiums paid; see also *Lambert v Keymood Ltd* [1997] 43 EG 131).

Whether the landlord agrees to the insurance being in joint names depends to a large extent on the nature of the tenant's interest in the premises. If the tenant occupies only part of the property that is insured, the landlord should not agree to the insurance being in joint names. It would be impractical to have more than one tenant named as a joint insured, and in any event, the landlord will be reluctant to share control of the insurance monies with a tenant who does not occupy the whole of the insured property. Institutional landlords will often have block insurance policies under which their whole portfolio of properties is insured. In those circumstances joint insurance will not be possible.

If, however, the tenant occupies the whole of the insured property and it is not insured under a block policy, in theory there is nothing to stop the insurance being in joint names. However, the landlord will be conscious of the fact that it has the more valuable interest in the premises and that it has the obligation to reinstate. It may therefore still be reluctant to agree to joint insurance.

If the landlord objects to insurance in joint names, the tenant should ensure that the lease provides that its interest will be 'noted' on the landlord's policy. This will mean the tenant will be notified of any claim or of any event that might invalidate the insurance. It might also be possible for the landlord to obtain a non-subrogation clause for the benefit of the tenant in the insurance policy.

24.2.4 Risks and losses covered

The lease should contain a comprehensive definition of the risks against which the insured party is to insure. A definition of 'insured risks' will typically include fire, lightning, explosion, impact, storm, tempest, flood, overflowing and bursting of water tanks or pipes, riot, civil commotion and many other risks commonly included in a buildings insurance policy. To give the landlord flexibility, at the end of the definition there should be a 'sweeping-up' provision along the lines of 'and such other risks as the landlord may from time to time reasonably consider to be necessary'.

It is important that the tenant carefully checks the definition of insured risks. If a risk is not insured against, the cost of any damage caused by it will usually be borne by the tenant, either under the repairing obligation or through the service charge provisions. The tenant must therefore make sure that the definition of insured risks includes all risks normally covered by a comprehensive buildings insurance policy. It should look out for any provisions allowing the landlord to vary the list of insured risks or be relieved from the obligation to insure against them.

Consideration also needs to be given to the issue of insurance cover against terrorist acts. The 2007 Code provides that 'the landlord should provide appropriate terrorism cover if practicable to do so'. However, such cover is no longer provided automatically by all insurers of commercial properties following a series of terrorist incidents in London in the early 1990s linked to the troubles in Northern Ireland. Cover can still be obtained, however, through a Government-backed scheme called Pool Re. This was set up in 1993 in response to the withdrawal of terrorist cover by the insurance industry.

The landlord and the tenant must therefore decide whether they think cover against terrorism is necessary. This will depend on the location of the property and the nature of the occupier and its business. It will also, of course, depend on the cost of obtaining such insurance. If it is required, it should be referred to in the list of insured risks. If it is not specified there will be no requirement on the landlord to insure against it. Any damage caused in consequence of

terrorism would then be an uninsured loss. Both parties to the lease need to be aware of who is responsible for such uninsured loss (see **24.8**).

Most leases will also allow the landlord to insure against loss of rent for a specified period, usually three or five years. The landlord will wish to carry such insurance, as in most leases the tenant's obligation to pay rent will be suspended if the premises cannot be occupied due to damage caused by insured risks (see **24.6**).

24.2.5 The sum insured

The tenant should ensure the landlord is obliged to insure the premises for their full reinstatement value. This will mean the landlord will have adequate funds to replace the building should it be totally destroyed. Care must be taken to ensure that site-clearance costs, professional fees and fees for any necessary planning applications, and any VAT are also covered. As to the actual amount of cover, specialist advice will be needed and the insuring party should consult experienced insurance brokers. The tenant, if it has obtained a covenant from the landlord to insure for the full reinstatement value, will have a claim for breach of covenant if the policy proceeds are inadequate due to the landlord underinsuring. A successful claim would mean the landlord would have to make up any shortfall from its own resources.

24.3 The obligation to pay for the insurance

Where the landlord has insured the premises, there will be a covenant in the lease requiring the tenant to reimburse the cost of insurance to the landlord. This sum is likely to be reserved as rent in order to give the landlord better remedies for recovery. If the premises are part of a larger building which the landlord has insured, recovery can either be through the service charge provisions or, alternatively, there may be a separate covenant by the tenant to reimburse an apportioned part of the premium. The tenant must ensure that the apportionment of the premium between the tenants is fair, particularly if the business of some of the tenants involves hazardous activities which lead to an increase in the premium.

It should be noted that a covenant by the tenant to reimburse premiums that the landlord 'shall from time to time properly expend' does not impose an obligation on the landlord to shop around for a reasonable level of premium (see *Havenridge Ltd v Boston Dyers Ltd* [1994] 49 EG 111). The 2007 Code does provide that 'the insurance policy terms should be fair and reasonable and represent value for money' (see **24.1**). However, for this to bind it must be specifically provided for in the lease.

In addition to reimbursement of the buildings insurance, the landlord will usually also require the tenant to reimburse it for the cost of insuring against loss of rent. This will protect the landlord if the rent payments by the tenant are suspended (see **24.6**).

24.4 Compliance with the terms of the insurance

Anyone who has ever read an insurance policy will know there are usually various requirements that need to be complied with for the insurance to be effective. Most leases will require that the tenant complies with these requirements. This is another reason for the tenant to ensure that the lease requires the landlord to supply a copy of the insurance policy. Further, the lease will often provide that the tenant must not invalidate the policy. A failure to comply with, for example, a requirement to service a security alarm, may lead to a policy being invalidated in the event of theft from the premises. In these circumstances, the tenant would then be left to bear the loss.

Being entitled to sight of the policy obviously means that the tenant has the information to enable him to comply with its requirements. However, what if he is unhappy with the requirements or terms of the policy? In an ideal world, the tenant would ensure that the lease stipulated that the terms of the insurance policy were subject to his approval. This

qualification may be possible where the tenant is a tenant of whole. However, a landlord will resist such a provision where the tenant occupies part only, as seeking approval of more than one tenant to the terms of a policy becomes administratively cumbersome, if not impractical, in the event of disagreement between the tenants. Nonetheless, even a tenant of part should seek to ensure that he is obliged to comply only with the reasonable requirements of the insurer of which he has received written notice. He should also ensure that the landlord is obliged to place the insurance with a reputable and substantial insurer. This will minimise the risk of unusual terms and conditions. The 2007 Code does provide that the insurance should 'be placed with reputable insurers' (see **24.1**).

The tenant should also be wary of any excess payable under the insurance policy. The terms of the lease may require the tenant to bear the cost of such excess. This could be quite an onerous liability if the landlord accepts a large excess in return for a lower premium. The tenant should resist such a requirement, or restrict it to reasonable excesses of the kind usually imposed by insurers.

If the tenant sells combustible or flammable goods (eg lighter fuel, fireworks), it should be aware of any restriction on the storage of such items in the lease and insurance policy, and qualify such provisions accordingly.

24.5 The obligation to reinstate

If the premises are damaged or destroyed, the lease should contain provisions dealing with who will be liable for their repair and reinstatement.

24.5.1 Will the tenant's repairing covenant apply?

Since the tenant will be paying for the insurance taken out by the landlord, he should ensure that he is not obliged to repair the premises if they are damaged by one of the insured risks. It is common practice to exclude from the tenant's repairing covenant liability for damage caused by an insured risk. However, this exclusion will not usually apply if the insurance policy has been invalidated, or the insurance proceeds are not fully paid out by reason of the act or omission of the tenant (or some other person who was at the premises with the tenant's authority). The landlord may also attempt to stipulate that the exclusion will not apply to damage caused by insured risks for which it has not been able to obtain insurance on reasonable terms. The tenant should be wary of this exclusion as it passes the responsibility for uninsured losses to the tenant (see **24.8**).

24.5.2 Who will reinstate?

If the insurance is in the joint names of landlord and tenant, the proceeds of the policy will be paid to both of the insureds, who have equal control over the application of the proceeds and therefore the reinstatement of the premises. However, where the policy is in the sole name of the landlord, unless the lease provides to the contrary, there is no obligation on the landlord to use the proceeds of the policy to reinstate the premises. In those cases where the tenant is under an obligation to pay the cost of the insurance, it has been held that the landlord may be presumed to have insured on behalf of the tenant as well as himself, and thus the tenant can require the proceeds to be laid out on reinstatement (*Mumford Hotels Ltd v Wheler and Another* [1964] Ch 117).

Nonetheless, in any event, it is good practice to for the lease to contain an express obligation on the party obliged to insure, to apply the proceeds of insurance in reinstating the premises. This will usually be the landlord. The landlord should make it clear that any insurance money in respect of loss of rent is not to be applied in the reinstatement of the premises, as this is to compensate him for the loss of the tenant's rent when the rent suspension clause is operating (see **24.6**).

From the tenant's point of view, he should pay particular attention to the wording of the covenant, which is often an obligation just to lay out the insurance monies received in respect of damage to the premises in their reinstatement. This does not deal with the situation where the insurance proceeds are insufficient to cover the entire cost of reinstatement. Although the landlord might be in breach of covenant for underinsuring the premises, the tenant should nevertheless press for a covenant by the landlord to make up the difference, or for an unqualified covenant to reinstate. Where this latter form of covenant is chosen, the landlord should qualify the absolute nature of his obligation to reinstate by providing that he is not liable in the event that the policy is invalidated, or where the proceeds are irrecoverable by reason of the act or omission of the tenant (or anyone at the premises with the tenant's consent). If the landlord accepts an obligation to make up any shortfall in the proceeds of the insurance then, again, this obligation should exclude any shortfall arising from the act or omission of the tenant (or anyone at the premises with the tenant's consent).

In any event, the landlord would not want to be liable to reinstate the premises for so long as circumstances beyond the landlord's control contrive to prevent him from doing so (eg strikes, lock-outs, shortages of materials, a failure to obtain planning).

The tenant should look out for any provision allowing the landlord to vary the premises on reinstatement. Whilst it is useful for the landlord to have flexibility to reflect changes in building practices, the tenant does not want reinstated premises that are unsuitable for his needs. Any such provision should therefore be amended to require the landlord, as a minimum, to provide premises that are of a similar size and no less suitable for the tenant than the original premises.

24.6 Rent suspension

24.6.1 What is rent suspension?

Unless the lease is frustrated, rent continues to be payable by the tenant where the premises are damaged, even if the damage is extensive. It is therefore common to include a provision in the lease that if the premises are damaged by an insured risk, and become unfit for occupation or use by the tenant, the rent (or a fair proportion of it, depending on the extent of the damage) should cease to be payable. This is often referred to by practitioners as 'rent suspension' or 'rent cesser'. The landlord does not usually lose out by including such a provision, as he will usually insure against loss of rent when he takes out buildings insurance (see **24.2.4**).

24.6.2 When will rent suspension apply?

A tenant of part of a building should ensure that the rent suspension provisions apply if any part of the building is damaged so as to render the premises unusable. For example, a tenant would not want to pay rent for undamaged premises on the fifth floor of the building if all the staircases and lifts leading to the premises were unusable. A tenant of the whole of a building should give consideration as to whether he has any essential services or rights running over any other land of the landlord. If he does, the rent should be suspended in the event that such essential services are damaged or destroyed, Provided the landlord owns and controls the land over which such services or rights run, he will not usually object to such a provision.

The lease will usually provide for suspension of rent only if the damage results from an insured risk, so that the tenant will remain liable for rent where the premises become unusable as a result of damage by uninsured risks. Again, it is therefore important that the tenant examines the defined list of insured risks to ensure that they are adequate. Otherwise, it will not benefit from rent suspension where it was expecting to, and may also be left with an unexpected repair bill (see **24.8**).

Thought will need to be given as to whether rent will be suspended when damage arises as a result of a risk that the landlord has been unable to insure against, such as terrorism. The 2007

Code envisages that rent will be suspended where such uninsured loss arises (see **24.1**). However, the landlord may be reluctant to accept this given that he is unlikely to receive loss of rent insurance where damage is caused by an uninsured risk (see **24.8**).

The landlord will want to qualify the rent suspension further by stipulating that rent continues to be payable where the landlord's insurance policy has been invalidated by the act or omission of the tenant (or someone at the premises with the tenant's consent). Without this qualification, the landlord would not receive rent or loss of rent insurance proceeds**.**

24.6.3 How long will rent suspension last?

The suspension will continue for such period as is specified in the lease. It is usual for the rent to become payable as soon as the premises have been reinstated and are again fit for use and occupation, for the purpose permitted by the lease. It should be noted that there is a subtle difference between premises being fit for occupation *and* use, and the premises being fit for occupation *or* use. The tenant should ensure that the premises have to be fit for occupation *and* use, as premises can sometimes be occupied without being usable for the purposes of the tenant's business.

The lease will often specify a maximum period of rent suspension. This is usually the period for which the landlord has loss of rent insurance, and is therefore normally either three or five years. The problem for the tenant is that the rent suspension will end on the expiry of this three- or five-year period, even if the premises have not been fully reinstated. One way of dealing with this is to insist that there be no time limit on the rent suspension. Practitioners sometimes refer to this as an 'unlimited rent cesser'. The other method is to insert in the lease an option for the tenant to end the lease if the premises have not been reinstated by the end of the rent suspension period (see **24.7**).

24.6.4 Will other payments be suspended?

The tenant should also press for a similar suspension in respect of other payments under the lease, such as the service charge and insurance rent. If the premises are damaged and the tenant is unable to occupy them, he will not be able to take advantage of the services provided by the landlord. In addition, he will probably have to relocate while the premises are reinstated, and will have to pay service charge and insurance rent for the alternative premises.

The landlord may try to argue against suspension of these additional sums. If damage is occasioned to the tenant's premises alone, this is not likely to reduce significantly the level of services provided to the rest of the tenants. The landlord may therefore argue that he is not prepared to suffer any reduction in the amount of service charge income. He will also have to continue to insure the premises, even while the tenant is not in occupation.

One way forward may be for the landlord to insure against loss of service charge in the same way as he insures against loss of rent. Some policies do cover loss of service charge as well as loss of rent. This may extend to insurance rent, depending on the wording of the policy. Much will depend on the bargaining strength of the tenant and the landlord's willingness to be dictated to on the terms of his insurance policy. Institutional landlords in particular will resist the suspension of these sums if their loss is not insured, as they generally require FRI (full repairing and insuring) leases with clear rents. A tenant who has business interruption insurance cover may be able to recover the increased costs arising from operating alternative premises, depending on the wording of its policy.

24.7 Termination

Although the doctrine of frustration is capable of applying to leases (*National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675), it will do so only in exceptional circumstances. Accordingly, unless the doctrine applies, the lease will continue notwithstanding any

accidental damage to the premises, and the loss will fall on the party obliged to repair. As a result, the lease will need to specify the circumstances (if any) in which the lease can be terminated following damage or destruction.

24.7.1 By the tenant

If the premises are damaged or destroyed by an insured risk so as to be unfit for occupation or use, the tenant will be faced with the possibility of relocating its business during the reinstatement period. Ideally, in such circumstances, the tenant would be able to end the lease of the damaged premises, leaving it free to take up a lease of new premises on a permanent basis. To do this the tenant would need a break clause in the lease of the damaged premises operable in these circumstances.

If the landlord agreed to this, however, it would be left with no tenant and potentially no loss of rent insurance (because once the lease is gone, no rent is contractually payable on it). For these reasons the landlord will usually require the tenant to reoccupy the premises once they have been reinstated. The problem for the tenant is it does not know how long such reinstatement might take.

Most landlords will not accept an obligation to reinstate within any particular timescale, as there are too many factors that may cause delay. Planning permission may prove difficult to obtain, there maybe historic contamination that has to be dealt with of which the parties were unaware when the site was originally developed, or there may be delays in the building programme caused by weather or shortage of materials or labour. Rather than have complex clauses in the lease to deal with these possibilities, the parties often agree that the landlord will reinstate the premises as soon as reasonably practicable. This creates a lack of certainty for the tenant, who does not know how long it will be left operating out of temporary premises.

On possible solution is for the tenant to have an option to end the lease in the event that the premises have not been reinstated within a particular time period. This time period is usually identical to the loss of rent insurance period. The option to end the lease then deals with two possible problems – the lack of a time-specific reinstatement obligation and a limited rent suspension.

24.7.2 By the landlord

For the reasons explored above, the landlord will not usually want the lease to be terminated where damage or destruction by an insured risk occurs. However, if reinstatement proves impossible (eg because planning permission cannot be obtained), the landlord will need the ability to end the lease and its reinstatement obligations. The landlord will usually insert into the lease a provision allowing it to terminate the lease in these circumstances.

The landlord should always bear in mind that the tenancy may be protected by Part II of the LTA 1954, and consequently the lease would need to be terminated in accordance with the provisions of that Act (see **Chapter 31**).

24.7.3 Who retains the insurance monies?

If reinstatement is not possible (or the parties do not desire it), in the absence of an express provision in the lease it is unclear to whom the insurance proceeds will belong, and it will be left to the court to ascertain the intention of the parties by looking at the lease as a whole.

For this reason the lease will often provide that following termination in the circumstances discussed above, the landlord will retain the insurance monies. The tenant may consider this unfair – after all, it is usually the tenant who will have reimbursed the landlord for the insurance premium. The tenant should try to insert a provision that the insurance monies will be shared between the landlord and tenant according to the values of their respective interests in the premises. The tenant would need to be aware that this may result in his receiving

nothing, as a lease where an open market rent is paid on a quarterly basis often has no capital value. The landlord may also resist the amendment using this argument. Further, if reinstatement still remains a possibility, payment of a portion of the insurance monies to the tenant will leave the landlord with a reduced fund from which to reinstate.

24.8 Damage by uninsured risks

Historically, the risk of damage caused by an uninsured risk has been carried by the tenant. The landlord would not be obliged to reinstate the property, there would be no rent suspension and the terms of the tenant's repairing covenant would probably be wide enough to require him to carry out the necessary remedial work.

However, in recent years tenants have become more aware of the potential financial consequences of accepting such provisions. Should, for example, terrorism cover become unavailable for a particular type of property, a tenant who accepted the responsibility for uninsured losses would find himself in an unenviable position if his premises were destroyed by a terrorist act. Despite the fact that he might have a short-term lease with little time left to run, he could be left paying the cost of rebuilding the premises while continuing to pay rent on it.

Lawyers for both landlords and tenants now tend to be more attuned to the issue of uninsured losses. The problem is, of course, that the risk has to be borne by one party or the other for such losses, despite no one being at fault for the loss having arisen.

Given that it is the landlord who has the long-term capital interest in the premises, the view might be taken that the landlord is the more appropriate party to bear the risk of such losses. Whilst an institutional landlord in particular may be resistant to this, the 2007 Code does take this line. Indeed, para 9 of the 2007 Code contains a number of recommendations in respect of uninsured risks, namely:

> If the whole of the premises are damaged by an uninsured risk so as to prevent occupation, tenants should be allowed to terminate their leases unless landlords agree to rebuild at their own cost.
>
> Landlords should provide appropriate terrorism cover if practicable to do so.
>
> Rent suspension should apply if the premises are damaged by an uninsured risk other than where caused by a deliberate act of the tenant.

24.9 Additional provisions

Certain other covenants on the part of the tenant are commonly included in relation to the insurance of the premises:

(a) to pay any increased or additional premiums that become payable by reason of the tenant's activities at the premises;

(b) to pay the cost of annual valuations for insurance purposes (which the tenant should specify must be reasonable and proper);

(c) to insure and reinstate any plate glass at the premises. Some retail tenants prefer to pay the cost of plate glass replacement themselves rather than insure against it. If this is the case, a requirement in the lease to insure plate glass will need to be amended so that it does not apply to the tenant in question.

24.10 Insurance by the tenant

If, exceptionally, the tenant covenants to insure the premises, the landlord must make sure that his interest as landlord is fully protected. The landlord will have concerns similar to those expressed above on behalf of the tenant, and so will wish to ensure:

(a) that insurance is taken out in the joint names of the landlord and tenant, with insurers to be approved by the landlord;

(b) that the insurance is taken out on terms to be approved by the landlord (eg as to the basis of cover, the risks insured, the amount and any excesses);

(c) that in the event of damage or destruction, the tenant covenants to reinstate the premises.

There will not usually be a rent suspension clause if the tenant assumes the insuring obligation.

Chapter 25
Forfeiture

The lease should always contain a forfeiture clause, usually expressed as a proviso enabling the landlord to re-enter the demised premises and prematurely end the lease on breach by the tenant of any of his covenants, or upon the happening of certain specified events. The right to forfeit the lease is a valuable remedy for the landlord but the right is not automatic; it only exists where the lease expressly includes such a right (or where, rarely, the lease is made conditional upon the performance by the tenant of his covenants; or where the tenant denies his landlord's title).

The forfeiture clause should specify the events giving rise to the right. These are commonly:

(a) where the rent reserved by the lease is in arrear for 21 days after becoming payable (whether formally demanded or not);

(b) where there is a breach by the tenant of any of the covenants, agreements and conditions contained in the lease;

(c) where the tenant has execution levied on his goods at the demised premises;

(d) upon the bankruptcy or liquidation of the tenant, or the happening of other insolvency events such as:

  (i) the presentation of a petition in bankruptcy;

  (ii) the presentation of a petition for a winding-up order, or the passing of a resolution for a voluntary winding up;

  (iii) the presentation of a petition for an administration order, or the making of such an order;

  (iv) the creation of a voluntary arrangement; or

  (v) the appointment of a receiver or an administrative receiver.

The landlord's intention is to give himself as many opportunities as possible to forfeit the lease where the tenant is in financial difficulty. In some insolvency proceedings, the landlord will want to give himself two attempts at forfeiting the tenant's lease (eg, once on the presentation of the petition in bankruptcy and once on the making of the bankruptcy order) in case the landlord inadvertently waives his right to forfeit on the first occasion.

A tenant should resist the inclusion of some of the less serious events (eg, the mere presentation of the petition) or those insolvency events which are designed to cure insolvency (eg, administration proceedings, voluntary arrangements, liquidations for the purpose of restructuring). Further, if the tenant's lease is likely to possess sufficient capital value to provide security for a loan (though this may be unlikely), the tenant should try to restrict the landlord's right to forfeit in these circumstances.

Despite the existence of a right of forfeiture and the happening of one of the above events, the lease does not end automatically; but the landlord will have the right to end the lease. The way in which that right is exercised, and the complex formalities surrounding its exercise, are dealt with at **30.5**.

Chapter 26
Lease of Part

26.1	Introduction	237
26.2	Boundaries and easements	237
26.3	Responsibility for repairs	237
26.4	Service charges	238
26.5	Sinking and reserve funds	242
26.6	Insurance	243
26.7	RICS Code of Practice for Service Charges	243

26.1 Introduction

The purpose of this chapter is not to deal with every single issue of relevance on the lease of part of a building; some can only be dealt with in the context of particular clauses. The reader will, therefore, find references to leases of parts elsewhere in this book. However, there are some important issues which can be dealt with separately and by drawing these together in this chapter, particularly the service charge provisions, the reader will become aware of the special considerations which apply whenever a lease of part of a building is contemplated.

26.2 Boundaries and easements

It is important that the parcels clause fully and accurately identifies the boundaries of the property to be let. This is particularly important bearing in mind that the tenant's liability to repair is often co-extensive with the demise; if he has to repair the 'demised premises' it must be clear where they start and finish.

As far as easements are concerned, the tenant will usually need to be granted rights over the parts of the building retained by the landlord or let to other tenants. The case of *B&Q plc v Liverpool and Lancashire Properties Ltd* [2000] EGCS 101, illustrated the way in which rights granted to tenants may hinder the landlord's future development proposals. In the same way, the landlord will wish to reserve certain rights over the property being let.

These matters are more fully considered in the Legal Practice Guide, ***Property Law and Practice***.

26.3 Responsibility for repairs

On the grant of a lease of part of a building, for example, one floor in an office block or one unit in a shopping precinct, it would be unusual to impose the responsibility for repairing the demised premises on one party alone. It is more practical for the responsibility to be shared between the parties. While every lease and building is different, a common division of the repairing obligation in a large multi-occupied building is to make the tenant responsible for the internal non-structural parts of the demised premises while the landlord covenants to repair the remainder of the building. Any expense incurred by the landlord in complying with this obligation will usually be recoverable under the service charge provisions, see **26.4**.

Great care must be exercised in drafting the appropriate obligations.

26.3.1 Drafting considerations

The whole building must be covered; there must be no doubt over who is responsible for the repair of each part of the building. If the tenant's covenant is limited, as it often is, to repairing the internal non-structural parts of the demise, he must make sure that the landlord assumes

responsibility for the structure (including the roof, main loadbearing walls and foundations), the common parts, the conducting media, and the exterior (including any landscaped areas, forecourts, roadways and fences). To guard against the inadvertent omission of a part of the building from the landlord's repairing obligation, many repairing covenants begin by obliging the landlord generally to repair the 'Building and Grounds' (as defined in the lease) and then go on to list the items intended to be covered, adding 'without prejudice to the generality of the foregoing'. The following are some of the matters which will need consideration:

(a) Walls. It must be made clear who is responsible for each wall in the building. Often the landlord will assume responsibility for the structural walls and possibly the outer half of the internal non-structural walls dividing the demised premises from the other parts of the building. The obligation to repair should be attributed as regards each physical layer of the wallcovering, plaster, brick etc.

(b) The same meticulous approach is required for floors, ceilings and the joists and girders, etc, which lie between them.

(c) Windows. There are conflicting authorities on the responsibility for the repair of windows and thus the matter should be dealt with expressly in the lease, usually by making the tenant responsible.

(d) Roofs and roof spaces. Again, this is a notoriously grey area and the matter must be dealt with expressly in the lease.

(e) Conducting media. Often the landlord will be made responsible (unless perhaps the conduits exclusively serve the demised premises), but the lease must put the matter beyond doubt.

(f) The plant, including all heating and cooling systems, generators, boilers etc.

(g) Decorative repairs. The landlord will usually assume responsibility for the exterior decoration and recover his costs under the service charge (see **26.4**).

The obligation to repair is often co-extensive with ownership, and care must be taken to link together the repairing obligations with the definition of the demised premises in the parcels clause.

The draftsman must also appreciate the precise meaning of certain words and phrases which have been judicially defined in a plethora of case law. Thus, for example, 'structural repairs', 'main walls', 'external walls' and 'exterior' have all been judicially considered; and reference should be made to one of the standard works on landlord and tenant law for a more detailed analysis of such technicalities.

26.3.2 Other considerations

The lease should attribute responsibility for repair of every part of the building. If, however, the lease is silent on a particular point the question arises as to whether the courts will imply a repairing obligation on behalf of either the landlord or tenant? In this regard there are a number of cases in which the landlord of residential properties have been held impliedly liable to carry out various repairs. For example, in *Barrett v Lounova (1982) Ltd* [1990] QB 348, it was held that a covenant by a periodic tenant of an old house to keep the interior in repair would lack business efficacy unless there were implied a corresponding obligation on the landlord to maintain the structure and exterior. It remains to be seen to what extent cases like this will be applied to business leases. See **Chapter 19** for a discussion of repairing covenants in general.

26.4 Service charges

In a letting of the whole of a property the landlord will normally wish to impose all responsibility for the repair and maintenance of the property on the tenant. This will not usually be possible in the case of lettings of part of a building, but the landlord will seek to

achieve the same economic effect by the use of a service charge. The landlord will be responsible for repair and maintenance and the provision of services but will require the costs he incurs on these matters to be reimbursed by the tenants. The landlord could charge a higher inclusive rent to cover his anticipated costs, but he then runs the risk of inflation or unexpected outgoings making his estimate incorrect. The inclusive rent method is unpopular with institutional landlords and lenders who prefer a 'clear lease', where the rent will always represent the landlord's clear income from the property and the landlord is reimbursed for the expenditure on the provision of services by means of a service charge which fluctuates annually according to the actual costs incurred.

From the landlord's point of view, it is necessary to decide whether the service charge should be reserved as additional rent. The advantages of reserving it as rent have already been considered (see **17.4**).

26.4.1 Services to be provided

Tenants need only pay for the provision of those services specified in the lease. If there is no provision for the tenant to pay, the landlord cannot recover his expenditure. Therefore, when drafting the service charge provisions, the landlord's solicitor needs to be careful to include all the expenditure to be laid out on the building (excluding those parts for which the tenant is made responsible). This will require a thorough examination of all the lease terms. The following is not a comprehensive list of items to be included in a service charge as each lease needs individual consideration. However, some common items of expenditure are set out below.

26.4.1.1 Repairs and decoration

The clause should allow the landlord to recover all his expenses in performing his repairing obligation. Thus it may need to allow him to recover his expenses in inspecting, cleaning, maintaining, repairing and decorating the common parts and any other parts of the building for which he is responsible, for example, the conducting media, roof, structural parts, plant, etc. Whether the landlord can go beyond 'repair', and rebuild or carry out improvements is a question of construction of the relevant clause but the tenant must be aware of the danger of having to contribute to work which would be outside a simple covenant to 'repair', for example, the replacement of defective wooden window frames with modern double glazed units. In such a case the landlord would be unduly profiting at the tenant's expense. Another concern of the tenant is that the clause may require his contribution to expenditure incurred by the landlord in remedying inherent defects in the building, for example, those caused by a design defect or through the use of defective materials. The tenant should resist such an onerous obligation.

The landlord should pay particular attention to the wording of the service charge provision. In *Northways Flats Management Co v Wimpey Pension Trustees* [1992] 31 EG 65, the clause required the landlord, before carrying out the work, to submit details and estimates to the tenants. The court held that this was a pre-condition to the recovery of the service charge and since it had not been complied with, the landlord was unable to recover his expenditure.

26.4.1.2 Heating, air-conditioning, etc

The landlord will wish to recover his costs in supplying heating, air-conditioning and hot and cold water to the common parts of the building and possibly the demised premises as well. Sometimes, the landlord will restrict the provision of heating to the winter months. The tenant may want some minimum temperature to be specified but the landlord may be unwise to agree to this, preferring to provide heating to a temperature which the landlord considers adequate. The landlord should also ensure that he is not liable to the tenant for any temporary interruption in supply due to a breakdown.

26.4.1.3 Staff

The landlord will wish to recover his costs in employing staff in connection with the management of the building such as receptionist, maintenance staff, caretakers and security personnel. The clause should also extend to any staff employed by the managing agents for the purpose of providing services at the building. From the tenant's point of view he should guard against having to pay the full-time wages of staff who are not wholly engaged in providing the services.

26.4.1.4 Managing agents

If the landlord employs managing agents to provide the services, he should ensure that the service charge allows him to recover their fees since in the absence of an express provision it is unlikely that the landlord would be able to recover those fees. A company owned by the landlord can be employed as managing agents provided such an arrangement is not a sham (*Skilleter v Charles* [1992] 13 EG 113).

The tenant must make sure that the amount of fees recoverable is reasonable and may want some restriction placed on them in the lease.

If the landlord performs his own management services, the service charge should enable him to recover his reasonable costs for so doing.

26.4.1.5 Other common items of expenditure

Other common items of expenditure include:

(a) maintaining the lifts, boilers and other plant and machinery;
(b) lighting of the common parts;
(c) refuse removal;
(d) fire prevention equipment;
(e) window cleaning;
(f) legal and other professional fees;
(g) service staff accommodation;
(h) insurance (although sometimes this is dealt with outside the service charge provisions);
(i) interest on the cost of borrowing money to provide the services;
(j) maintenance of landscaped areas;
(k) outgoings payable by the landlord;
(l) advertising and promotion costs, in the case of a shopping centre.

26.4.1.6 'Sweeping-up' clause

No matter how comprehensive the landlord thinks he has been in compiling the list of services to be provided, it is advisable to include a sweeping-up clause to cover any omissions and to take account of any new services to be provided over the lifetime of the lease. However, careful drafting of such a clause is required as the courts construe them restrictively (see *Mullaney v Maybourne Grange (Croydon) Ltd* [1986] 1 EGLR 70). From the tenant's point of view he should guard against the clause being drafted too widely and insist on the service being of some benefit to him before having to pay for it.

26.4.2 Landlord's covenant to perform the services

The services to be provided often fall into two categories: essential services which the landlord should be obliged to provide (eg, heating and lighting the common parts and repairing and maintaining the structure) and other non-essential services which he has a discretion to provide. From the tenant's point of view, he must make sure that, in return for paying the service charge, the landlord covenants to provide the essential services. Without such an

express provision, it is by no means certain that one would be implied, leaving the tenant with no remedy if the services were not provided (see, however, *Barnes v City of London Real Property Co; Webster v City of London Real Property Co; Sollas v City of London Real Property Co; Oakley, Sollas & Co v City of London Real Property Co* [1918] 2 Ch 18).

In drafting the covenant the tenant should require the services to be provided in an efficient and economical manner; and to a reasonable standard, rather than a standard the landlord considers adequate. The Supply of Goods and Services Act 1982 provides that where a service is provided in the course of a business there is an implied term that the supplier will carry out the service with reasonable care and skill but it is obviously better for the tenant to deal with the matter expressly. In *Finchbourne v Rodrigues* [1976] 3 All ER 581, the view was expressed that the costs claimed should be fair and reasonable to be recoverable under the service charge. However, this view may no longer reflect current judicial thinking (see *Havenridge Ltd v Boston Dyers Ltd* [1994] 49 EG 111) and therefore, again, an express provision is preferable. From the landlord's point of view, he may wish to restrict the covenant so that he is liable to use only 'reasonable endeavours' or 'best endeavours' to provide the services, rather than be under an absolute obligation to do so. In any event, the covenant should be limited so that the landlord is not liable to the tenant for failure to provide the services due to circumstances outside his control such as industrial action.

Another consideration for tenants is the length of the unexpired residue of their lease as they will be understandably reluctant to pay for works which are calculated to benefit future interests in the property rather than tenants under the current lease. This was held to be a relevant factor in deciding what was recoverable by the landlord under the service charge provisions in the case of *Fluor Daniel Properties Ltd v Shortlands Investments Ltd* [2001] PLCS 10 (although much will, of course, depend on the exact form of wording used).

As a general rule, the obligation to provide the services is independent of the obligation to pay for them. Therefore, in the event of non-payment by the tenant, the landlord cannot withdraw services (and in any event it is unlikely that the landlord could withdraw services from one tenant alone).

26.4.3 The tenant's contribution: basis of apportionment

In addition to setting out the items which can be charged to the tenant, the clause must deal with how the total cost is to be apportioned between the tenants in the building. The following are some commonly used methods:

(a) By reference to rateable value. This can be arbitrary since rateable values can vary for reasons which bear no relationship to the amount of services consumed.

(b) According to floor area. This can be a reasonable method, depending on the nature of the building, but some method of measurement will have to be agreed.

(c) According to anticipated use of services. This can be difficult to assess and depends on the nature of each tenant's business and its location within the building.

(d) As a fixed percentage. This provides certainty for both parties but is inflexible. Further, the landlord must make provision for any future enlargement of the building which would necessitate a recalculation of the percentages.

Each method has its own advantages and disadvantages and reference should be made to one of the standard works on the drafting of business leases for further consideration of the matter. Whatever method is adopted, the tenant will want to ensure that he does not become liable for any unlet units; the landlord should be required to pay the service charge for these.

26.4.4 Payment of the charge

26.4.4.1 Advance payments

Typical service charge provisions stipulate that the service charge is to be paid by the tenant periodically in advance (usually on rent days). Advance payments are necessary because otherwise the landlord would have to fund the provision of work and services out of his own resources and recoup his expenditure from the tenants later. The amount of the advance payments can give rise to disputes between the parties unless the tenant can be sure such payments are not excessive. There are different ways of calculating the payments, for example, it can be based on the previous year's actual expenditure or on an estimate of the likely expenditure in the current year. If the latter method is adopted, the tenant should insist on the amount payable being certified by, for example, the landlord's surveyor, and that the payment is only to be made upon receipt of such a certificate (see **26.4.4.3**).

The tenant may wish to consider a requirement that the landlord is to pay the advance payments into a separate account to be held on trust in order to avoid the problems which will arise if the landlord becomes insolvent.

26.4.4.2 Final payments and adjustments

At the end of the year the service charge provisions will, typically, require the landlord to prepare annual accounts showing his actual expenditure in the year: such accounts to be certified by the landlord's accountant (see **26.4.4.3**). Where advance payments have been made an adjustment will be necessary to correct any over or underpayment. In the case of underpayment the tenant will be required to pay this amount within a specified time. If there is an overpayment, the lease may provide for its refund to the tenant or, more usually, it will be credited to the following year's payments.

26.4.4.3 Certification of amounts due

It is common for the service charge provisions to stipulate that the landlord provides a certificate given by his surveyor or accountant, acting as an expert, in connection with the amount of both the advance and end of year payments. Unless the lease provides to the contrary, the expert must be independent from the landlord (*Finchbourne v Rodrigues* above), although the tenant may wish this to be expressly stated in the lease. If the certificate is said to be 'final and conclusive as to the facts stated', its finality is likely to be upheld by the courts. If the lease makes the expert's certificate conclusive on matters of law, for example, as to the construction of the lease, there are conflicting views on its validity but it may be that it will be upheld if the expert is given the exclusive right to determine the issue and the lease is clear on the party's intention to exclude the jurisdiction of the courts (see *National Grid Co plc v M25 Group Ltd* [1999] 08 EG 169 and *Morgan Sindall v Sawston Farms (Cambs) Ltd* [1999] 1 EGLR 90).

26.5 Sinking and reserve funds

The object of sinking and reserve funds is to make funds available when needed for major items of irregular expenditure. A sinking fund is a fund established for replacing major items such as boilers and lifts which may only be necessary once or twice during the lifetime of the building. A reserve fund is established to pay for recurring items of expenditure such as external decoration which may need attending to, not annually, but perhaps every four or five years. The estimated cost of such decoration will be collected over each five-year period to avoid the tenants from being faced with a large bill every five years.

The advantage of such funds is that money is available to carry out these major works when needed without any dramatic fluctuations in the service charge payable from one year to another. However, the creation of such a fund needs careful thought and many difficult

questions will need to be addressed at the drafting stage. Who is to own the fund? Is it to be held absolutely or on trust? What is to happen to the fund when the landlord sells the reversion? What will be the position upon termination of the lease? (See *Secretary of State for the Environment v Possfund (North West) Ltd* [1997] 39 EG 179.) Further, there may be considerable tax disadvantages. Such matters are beyond the scope of this book, but the parties will need specialist advice about these matters.

26.6 Insurance

On a lease of part of a building in multi-occupation the landlord will usually insure the whole building and recover the premium from the tenants under the service charge provisions or in a separate insurance clause. Insurance is dealt with in **Chapter 24**.

26.7 RICS Code of Practice for Service Charges

Unfortunately, disputes over service charges in commercial properties are commonplace. Because of such problems, the RICS has published a new *Code of Practice for Service Charges* which came into force on 1 April 2007. This is aimed at surveyors who administer the services on a day-to-day basis and represents best practice. It cannot override the terms of existing leases, but does require that such leases should, as far as possible, be read in a way that is consistent with the Code. The Code also requires surveyors to try to ensure that the service charge provisions in leases granted or renewed on or after 1 April 2007 reflect the provisions of the Code.

The Code gives much greater protection for tenants, including the following:

(a) use of alternative dispute resolution (ADR) in relation to any disputes;
(b) better communication, including consultation on proposed expenditure;
(c) a right to challenge unreasonable expenditure;
(d) 'transparency' in the accounts, particularly in relation to management and other charges;
(e) management charges should not be linked to a percentage of the total expenditure;
(f) costs should be reasonable and works carried out to a reasonable standard;
(g) the apportionment of costs to each tenant should be fair and reasonable;
(h) sinking funds should be held on trust in an interest bearing account.

It remains to be seen how far these matters will be incorporated into the drafting of new leases, but the existence of the Code should give those negotiating and approving leases on behalf of tenants strong grounds for resisting any service charge terms not complying with the Code.

To reinforce this, the 2007 Code for Leasing Business Premises provides:

> **6 Service Charges**
>
> Landlords must, during negotiations, provide best estimates of service charges, insurance payments and any other outgoings that tenants will incur under their leases.
>
> Landlords must disclose known irregular events that would have a significant impact on the amount of future service charges.
>
> Landlords should be aware of the RICS 2006 Code of Practice on Service Charges in Commercial Property and seek to observe its guidance in drafting new leases and on renewals (even if granted before that Code is effective).

Chapter 27
Selling the Lease

27.1	Applications for consent to assign	245
27.2	The landlord's licence	247
27.3	Authorised guarantee agreements	247

27.1 Applications for consent to assign

It will nearly always be the case that the lease will restrict the tenant's right to assign the lease. There may be an absolute covenant against assignment, in which case the tenant is absolutely prohibited from assigning his lease. The landlord may (or may not) agree to waive the breach in a particular case but the tenant will be entirely at the mercy of his landlord. An assignment in breach of an absolute covenant will be effective, but the lease will be liable to forfeiture by the landlord because of the breach of covenant. More commonly, there will be a qualified covenant, ie, not to assign without the landlord's prior written consent. In the case of a qualified covenant against assignment, s 19(1)(a) of the LTA 1927 implies a proviso that, notwithstanding any contrary provision, the landlord's licence or consent is not to be unreasonably withheld. The reasonableness of the landlord's refusal of consent has been dealt with earlier in this book (see **20.3),** and it will be recalled that if the parties have specified for the purposes of s 19(1A) of the LTA 1927 conditions to be satisfied, or circumstances to exist, before consent is to be given, a refusal of consent on the grounds that they are not satisfied, or they do not exist, is not an unreasonable withholding of consent.

Assuming the alienation covenant is qualified, the first step is for the tenant to make written application to his landlord for consent to assign. If the landlord consents, the tenant can proceed with the assignment. If the landlord unreasonably refuses consent, the tenant can proceed to assign and will not be deemed in breach of covenant. The danger for the tenant is in knowing whether the landlord's refusal is unreasonable or not, because if the landlord's refusal turns out to have been reasonable, the landlord will have the right to forfeit the lease. Further, for the purposes of the LT(C)A 1995, the assignment will be an excluded assignment, meaning that the assignor will not be released from the tenant covenants in the lease. Alternatively, the tenant may pursue the safer course of action by seeking a court declaration that the landlord is acting unreasonably in withholding consent, but this may prove costly and time-consuming. A further problem, prior to the passing of the LTA 1988, was that the tenant could not, in the absence of an express covenant by the landlord, obtain damages if the landlord withheld consent unreasonably.

Section 1 of the LTA 1988 (which only applies to qualified covenants) provides that where the tenant has made written application to assign, the landlord owes a duty, within a reasonable time:

(a) to give consent, unless it is reasonable not to do so. Giving consent subject to an unreasonable condition will be a breach of this duty; and
(b) to serve on the tenant written notice of his decision whether or not to give consent, specifying in addition:
    (i) if the consent is given subject to conditions, the conditions; or
    (ii) if the consent is withheld, the reasons for withholding it.

No doubt the landlord will wish to see a bank reference, audited accounts (eg, for the last three years) and, if appropriate, trade references for the proposed assignee and these should

accompany the tenant's application. If the landlord needs any further information to enable him to process the application, he should request this from the tenant.

The LTA 1988 does not define what amounts to a reasonable time and each case will turn on its own facts. However, in *Go West Ltd v Spigarolo* [2003] EWCA Civ 17, [2003] 07 EG 136, the judge commented:

> I find it hard to imagine that a period of … almost four months could ever be acceptable, save perhaps in the most unusual and complex situations … it may be that the reasonable time … will sometimes have to be measured in weeks rather than days; but, even in complicated cases, it should be measured in weeks rather than months.

In *Blockbuster Entertainment Ltd v Barnsdale Properties Ltd* [2003] EWHC 2912, a landlord who was asked for consent on 28 May and gave it on 15 July was held to have unreasonably delayed in giving that consent. Similarly, in *Mount Eden Land Ltd v Folia Ltd* [2003] EWHC 1815, the judge, while emphasising that each case turned on its own facts, thought that a period of four to five weeks was 'generous'.

As to whether the landlord is unreasonably withholding his consent, this is left to the general law. The burden of proving the reasonableness of any refusal or any conditions imposed is on the landlord and the sanction for breach of the statutory duty is liability in tort for damages. As a result of the Act, landlords must give careful consideration to the financial consequences of having delayed or refused consent unreasonably and they should set up efficient procedures to ensure that each application for consent is dealt with expeditiously and in accordance with the Act.

If the landlord is himself a tenant and the applicant for consent is the sub-tenant, then if the head-lease requires the superior landlord's consent to the assignment, the Act imposes a duty on the immediate landlord to pass on a copy of the application to the superior landlord within a reasonable time.

Section 3 of LTA 1988 deals with the situation where a head-lease contains a covenant by the tenant not to consent to a disposition by a sub-tenant without the consent of the head landlord, such consent not to be unreasonably withheld. In such circumstances, a similar duty to that contained in s 1 is imposed on the head landlord towards the sub-tenant.

In considering whether or not to give consent, the landlord does not owe earlier tenants a duty of care to ensure that the assignee is of sufficient financial standing. If the assignee turns out to be unsatisfactory, the landlord will still be able to serve a default notice on those former tenants who may still be liable to the landlord (according to whether it is an 'old' or 'new' lease for the purposes of the LT(C)A 1995) (*Norwich Union Life Insurance Society v Low Profile Fashions Ltd* (1992) 21 EG 104). In such a situation, the earlier tenants may then be able to secure an overriding lease under the provisions of the LT(C)A 1995 (see **29.1.4**).

The landlord's solicitor, on receiving the tenant's application to assign, will often seek an undertaking from the tenant's solicitor to pay the landlord's legal and other costs of dealing with the application and preparing the licence (plus VAT) (see *Dong Bang Minerva (UK) Ltd v Davina Ltd* [1996] 31 EG 87). This does not infringe s 144 of the LPA 1925. Care should be taken in drafting the undertaking to make it clear whether the obligation to pay the landlord's costs applies in the event of the licence not being granted; this may be a requirement of the lease in any case.

To prevent the court from finding that consent has been given before the licence to assign is entered into, the landlord must ensure that any correspondence with the tenant's advisers is expressly stated to be subject to the parties entering into a licence to assign. Heading the correspondence 'subject to contract' or 'subject to licence' will not be sufficient (see *Next plc v National Farmers Union Mutual Insurance Co Ltd* [1997] EGCS 181).

27.2 The landlord's licence

If the landlord is prepared to give his consent to the assignment, a licence to assign will usually be prepared by the landlord's solicitor in which the landlord will formally grant his consent. If the tenant and assignee are to enter into covenants in the licence then all three (ie, landlord, tenant and assignee) will be parties to the licence, which will be in the form of a deed. The licence will include various covenants and conditions such as:

(a) A direct covenant with the landlord to observe and perform the covenants in the lease. However, because of the provisions of the LT(C)A 1995, the licence to assign should not make the assignee liable on the lease covenants for the entire duration of the lease, but only for the period he is actually the tenant. The provisions of the LT(C)A 1995 in this regard are dealt with in **Chapter 20.** However, in an old lease, a covenant by the assignee to observe and perform the covenants in the lease for the entire duration of the term would be permitted and is usual.

(b) A covenant by the tenant:

  (i) to pay the landlord's costs and expenses in dealing with the tenant's application;

  (ii) not to allow the assignee to take up possession until the assignment has been completed.

(c) That the licence extends only to the transaction specifically authorised.

(d) That the licence is not to act as a waiver of any breach committed by the tenant prior to the date of the licence.

(e) That the licence shall cease to be valid unless the assignment is completed within, say, two months. This is because, although the proposed assignee is now acceptable to the landlord, the assignment might otherwise be delayed to a time when the assignee is of a poorer financial standing.

(f) In a new lease, the landlord will probably require the assignor to enter into an authorised guarantee agreement (see **20.2.4.3**). (This may well be a requirement set out in the lease under s 19(1A) of the LTA 1927 and which thus must be complied with before the landlord need give consent.) Note, however, the recommendations of the 2007 Code for Leasing Business Premises (set out at **20.2.4.4**), which provide that an authorised guarantee agreement should not be an automatic requirement on an assignment.

27.3 Authorised guarantee agreements

It is currently standard practice for a landlord to insist on an outgoing tenant entering into an authorised guarantee agreement on an assignment of a new lease guaranteeing that the assignee will perform the covenants in the lease. This is often a requirement set out in the lease in accordance with s 19(1A) of the LTA 1927. If it is not set out in the lease, it would be lawful to require an AGA provided that this was reasonable in the circumstances.

As noted (at **20.2.4.4**) the 2007 Code for Leasing Business Premises provides that an AGA should not be an automatic requirement on an assignment, but necessary only if the proposed assignee is of a lower financial standing than the assignor or is resident or registered overseas. Assignors should, therefore, cite the 2007 Code to landlords insisting on an AGA, but may well find that most landlords will not be sympathetic and will still insist on the guarantee.

27.3.1 Content of an authorised guarantee agreement

A specimen AGA is set out in **Appendix 5**. It will typically contain covenants by the assignor:

(a) guaranteeing that the assignee will perform the tenant's covenants in the lease;

(b) promising to perform such covenants if the assignee does not;

(c) promising to take a new lease if the liability of the assignee is disclaimed on insolvency.

It should be ensured that the assignor's liability does not extend beyond that of the assignee, and it should be provided that on the assignee being released from liability under the LT(C)A 1995 (see **12.3.2**), so is the assignor.

27.3.2 LTA 1954 considerations

If the original lease is contracted out of the security of tenure provisions of the LTA 1954 (see **Chapter 31**), it is likely that the landlord will require any new lease taken by the assignor under the terms of the AGA to be similarly excluded from the security of tenure provisions. The landlord must, therefore, ensure that the assignor signs the appropriate notice under s 38A of the LTA 1954 before the AGA is entered into (see **31.1.6**).

Chapter 28
Underleases

28.1	Liability of sub-tenants	249
28.2	Reasons for sub-letting	249
28.3	Drafting points	249
28.4	The sub-tenant's concerns	252

28.1 Liability of sub-tenants

Ordinarily, there is neither privity of contract nor privity of estate between a head landlord and a sub-tenant and, therefore, the head landlord is unable to sue a sub-tenant in respect of any breaches of the terms of the head-lease. However, it is a common practice for the head landlord to require a sub-tenant as a condition of granting consent to the sub-letting, to enter into a direct covenant with the head landlord to observe and perform the covenants in the head-lease. This will make the sub-tenant liable to the head landlord in contract. Further, a sub-tenant may be bound by those restrictive covenants in the head-lease of which he had notice when he took his sub-lease. As the sub-tenant is entitled to call for production of the head-lease on the grant of his sub-lease (LPA 1925, s 44), he will be deemed to have notice of the contents of the head-lease even if he does not insist on his right to inspect it (see the Legal Practice Guide, ***Property Law and Practice*** for further consideration of this matter).

28.2 Reasons for sub-letting

There are many reasons why a tenant may want to grant an underlease of all or part of the premises demised by the head-lease. It may be that the tenant finds that he has surplus accommodation which is not required for the purpose of his business and, therefore, instead of leaving that part vacant (thereby wasting money) the tenant may try and cut his losses by finding a sub-tenant. Indeed, the tenant may well seek to create space for a sub-letting in the knowledge that the current market would lead to the sub-tenant paying a rent per square foot in excess of what the tenant is paying to the head landlord.

On other occasions, the tenant may be sub-letting the premises as an alternative to assigning the lease. Where a tenant has a continuing liability (either under privity of contract or under an authorised guarantee agreement), despite his ability to call for an overriding lease in the event of later default by an assignee (see **29.1.4**), the tenant might prefer to retain control of the premises by sub-letting rather than assigning.

28.3 Drafting points

Where the tenant proposes to grant an underlease of all or part of the premises, he must have regard to the terms of his own lease, and in particular to the terms of the alienation covenant which is likely to control or regulate in some way the content of the underlease. The head-lease will usually require the tenant to obtain the consent of the head landlord before granting the sub-lease. Section 19(1)(a) of the LTA 1927 and s 1 of the LTA 1988 apply to qualified covenants against sub-letting.

In drafting the sub-lease, the tenant should bear in mind the following matters.

28.3.1 The term

The tenant should ensure that the term of the sub-lease is at least one day shorter than the unexpired residue of his head-lease term, since a sub-lease for the whole residue of the head-lease term will take effect as an assignment of that term. Not only will this be contrary to the tenant's intention, it will also probably breach the alienation covenant in the head-lease, as the landlord will have given his consent to a sub-letting, but not an assignment.

In taking up possession, the sub-tenant will be in occupation for the purpose of a business and may, therefore, enjoy security of tenure under Pt II of the LTA 1954 (see **Chapter 31**). The tenant may want to consider excluding the sub-letting from the protection of the Act so that he can be sure to resume occupation at the end of the sub-lease. Indeed, it may be a requirement of the alienation covenant in the head-lease that any sub-leases are to be contracted-out of the LTA 1954, so that if the tenant's interest is terminated in circumstances which result in the sub-tenant becoming the immediate tenant of the head landlord, the head landlord will be guaranteed possession at the end of the sub-lease.

28.3.2 The rent

The tenant will want to ensure that the rent to be paid by the sub-tenant is as high as the market will currently allow, and if the sub-lease is to be granted for anything longer than a short term, the tenant will want to review the rent from time to time. Careful attention must again be paid to the alienation covenant in the head-lease which might dictate the terms upon which any sub-lettings are to be granted.

It is common for the head landlord to attempt to include several requirements in the head-lease:

(a) that any sub-letting by the tenant is granted at a rent which is the greater of the rent payable under the head-lease, and the full open market rent for the premises;
(b) that any sub-letting is granted without the payment of a premium; and
(c) that the sub-letting contains provisions for the review of rent (in an upwards direction only) which match the head-lease review provisions in terms of frequency, timing and basis of review.

The reason the landlord seeks to impose such conditions is that at some future date, the interest of the intermediate tenant might determine (eg, by reason of surrender) leaving the sub-tenant as the landlord's immediate tenant upon the terms of the sub-lease. However, if the tenant, at the grant of his lease, had agreed to excessively restrictive conditions on sub-letting, he may now find it difficult to arrange a sub-letting, particularly at a time when the market is falling and potential sub-tenants are only prepared to pay a rent below the current rent payable under the head-lease. One popular way around this was for the tenant to enter into a side letter or collateral agreement with the proposed sub-tenant in which the tenant agrees to reimburse the sub-tenant the difference between the head-lease rent and the current market rent. However, the case of *Allied Dunbar Assurance plc v Homebase Ltd* [2002] EWCA Civ 666, [2002] 27 EG 144 has ruled that this is not a valid way of avoiding restrictions in the head-lease preventing sub-letting below the head-lease rent.

The sub-tenant should be wary of an obligation in the sub-lease which simply requires him to pay the rents payable from time to time under the head-lease, since such a provision would give him no input into any negotiations for the review of rent during the term, and is likely to give little incentive to the tenant to argue with any vigour against the landlord at review, since he knows that whatever figure is agreed, it will be paid by the sub-tenant.

If the head landlord has elected to waive the exemption for VAT purposes, so that VAT is payable by the tenant, the election in no way affects the sub-lease rents. It would, therefore, be wise for the tenant to waive the exemption in respect of these premises so that VAT can be

charged to the sub-tenant, although careful consideration must always be given to the effect of waiving the exemption.

Note that the 2007 Code for Leasing Business Premises requires that if sub-letting is allowed, the rent should be the market rent as at the time of sub-letting.

28.3.3 The covenants

In drafting the sub-lease, the tenant will attempt to mirror the provisions of the head-lease. He should be careful not to allow the sub-tenant scope to do anything at the premises which is forbidden under the provisions of the head-lease.

Particular attention should be paid to:

(a) *Alienation.* It is unlikely that the head-lease will allow any further sub-letting of the premises. Care should, therefore, be taken to impose appropriate restrictions in the sub-lease. There ought to be an absolute covenant against sub-letting (or sharing or parting with possession of the premises), with a qualified covenant against assigning the sub-lease.

(b) *Repair.* The same repairing obligation as affects the tenant (or an even tighter one) ought to be imposed upon the sub-tenant. In interpreting a repair covenant, regard is to be had to the age, character and locality of the premises at the time the lease was granted. If there has been a considerable lapse of time between the grant of the head-lease, and the grant of the sub-lease, different standards of repair might be required by the respective repair covenants, leading to a possible residual repair liability on the part of the tenant. The sub-tenant's obligation will be to repair 'the premises'. The tenant must make sure that 'the premises' are defined in the sub-lease to include all of the premises demised by the head-lease, or if a sub-letting of part is contemplated, that the division of responsibility is clearly stated.

(c) *Insurance.* In all probability, the head landlord will be insuring the premises, with the tenant reimbursing the premium. The sub-lease should, therefore, provide that the sub-tenant reimburses the premiums paid by the tenant (or a proportionate part if a sub-lease of part is contemplated).

(d) *Decoration.* The tenant should ensure that the sub-lease obliges the sub-tenant to decorate the premises as frequently as, and at the times, and in the manner required by the head-lease.

28.3.4 Rights of access

The tenant is unlikely to extend the usual covenant in the sub-lease for quiet enjoyment to cover liability for the acts and omissions of someone with a title paramount (eg, the head landlord). If he did so, he would be in breach of the covenant if the head landlord disturbed the sub-tenant's occupation by exercising a right of entry contained in the head-lease. However, in any case, to avoid a possible dispute, the tenant should ensure that in reserving rights of entry onto and access over the sub-let premises, those rights are reserved for the benefit of the tenant and any superior landlord.

28.3.5 An indemnity

Despite imposing broadly similar covenants in the sub-lease to those contained in the head-lease, the tenant will also want to include a sweeping-up provision obliging the sub-tenant to perform all of the covenants in the head-lease in so far as they affect the sub-let premises, and to indemnify the tenant against liability for breach. The sub-tenant might prefer, however, to enter into a negative obligation not to cause a breach of the head-lease covenants. Care must be taken on a sub-lease of part to ensure that a correct division of liability is made between tenant and sub-tenant in respect of the head-lease covenants.

28.4 The sub-tenant's concerns

Before the sub-lease is granted, the sub-tenant must ensure that the consent of the head landlord (if required) has been obtained. The usual condition of granting consent is that the sub-tenant is to enter into a direct covenant with the head landlord to perform the covenants in the head-lease (at least in so far as they relate to the sub-let premises). Ordinarily, there is no privity of contract or estate between a head landlord and a sub-tenant, but the direct covenant creates a contractual relationship.

As the head landlord is likely to be giving a direct covenant, and as he is also likely to covenant with the tenant in the sub-lease to perform the head-lease covenants, it is essential that the sub-tenant inspects the head-lease (including all licences and supplemental deeds which may have effected a variation of its terms). The sub-tenant's liability under the direct covenant with the head landlord should not extend beyond his liability on the tenant covenants in the sub-lease.

As an alternative to requiring the sub-tenant to enter into a direct covenant with the head landlord, use could be made of the Contracts (Rights of Third Parties) Act 1999. Under the provisions of this Act, a non-contracting party has the right to enforce a contract term if the contract expressly provides that he may or, subject to contrary intention, the term purports to confer a benefit on him. In the context of sub-leases, the head-lease could be drafted to require any permitted sub-lease to contain a covenant by the sub-tenant to observe and perform the head-lease covenants and conferring upon the head landlord the right to enforce that covenant. Such a covenant would be a tenant covenant of the sub-lease and thus the sub-tenant would be released from future liability following a lawful assignment (and, of course, the assignee would become bound by it). In the same way, the landlord's obligations in the head-lease may be expressed to be for the benefit of sub-tenants, thus giving sub-tenants the right to enforce, for example, the head landlord's obligation in the head-lease to provide services.

With regard to the drafting of the sub-lease, the following points may be borne in mind.

(a) Where there is to be a direct covenant in the licence to sub-let, it is important for the sub-tenant to remember that it will not work both ways, and so the sub-tenant does not have any means of enforcing a breach of covenant by the head landlord. The sub-tenant should consider insisting upon a covenant by the tenant in the sub-lease obliging the tenant to enforce a breach of covenant by the head landlord as and when required by the sub-tenant. The sub-tenant is likely to concede that he should bear the cost of any claim.

(b) The usual covenant for quiet enjoyment exempts an intermediate landlord from liability in respect of the acts or omissions of a superior landlord. The sub-tenant may consider extending the usual covenant.

(c) The sub-tenant should ask the tenant to covenant with him to pass on to him any notices received from the head landlord (eg, LPA 1925, s 146 notices).

(d) The sub-tenant should explore the possibility of having his interest noted on the head landlord's insurance policy. He should ask for details of the policy and ensure that provision is made to enable the policy to be produced to him from time to time. The provision referred to at (a) above should enable the sub-tenant to force the tenant to force the landlord to reinstate the premises if they are damaged by an insured risk.

Chapter 29
Remedies for Breach of Covenant

29.1	Landlord's remedies	253
29.2	Tenant's remedies	258

29.1 Landlord's remedies

Before the landlord takes any steps against a defaulting tenant, he should first consider whether any other party is also liable. For example, are there any sureties or guarantors, is the original tenant under a continuing liability, or did any of the previous assignees give the landlord a direct covenant on assignment upon which they may still be liable? The reader will recall that the ability of the landlord to proceed against some of these other parties is affected by the Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995). These issues have been dealt with earlier in the book.

Before proceeding against a former tenant or his guarantor for a 'fixed charge', that is:

(a) rent; or

(b) service charge; or

(c) any liquidated sum payable under the lease; or

(d) interest on such sums,

the LT(C)A 1995 requires the landlord to serve a notice of the claim (usually referred to as a 'Default Notice') upon the former tenant or his guarantor, as the case may be, within six months of the current tenant's default (there is no requirement to serve a notice also on a former tenant before serving a notice on that tenant's guarantor (*Cheverell Estates Ltd v Harris* [1998] 02 EG 127)). Failure to serve a valid notice will mean that the landlord is unable to recover that sum from the person concerned. This requirement applies to all leases and not just those granted after the commencement of the LT(C)A 1995.

The Court of Appeal, in *Scottish & Newcastle plc v Raguz* [2007] EWCA Civ 150, had held that a s 17 notice had to be served by a landlord where a rent review date had passed without the new rent having been assessed, whether or not there were actually any arrears outstanding. The House of Lords ([2008] UKHL 65) has now reversed this decision. Should the delayed fixing of the new rent result in an increased amount being payable (which would be backdated to the review date), this would normally be due as a lump sum on the date specified in the lease. The landlord would then have six months from that date to serve a s 17 notice should it not be paid by the current tenant.

Where the landlord does proceed against a former tenant or his guarantor, that person may be able to regain some control over the property by calling for an overriding lease (see **29.1.4**).

In addition to considering whether there are other parties that he can pursue, the landlord should check whether it has another fund from which to meet the sums that are due, for example a rent deposit. If so, then he should first check that the contractual terms of that deposit permit deduction of the relevant amount and that the necessary preconditions (perhaps due notice) have been satisfied.

29.1.1 For non-payment of rent

Only six years' arrears of rent are recoverable, whether by claim or distress (Limitation Act 1980).

29.1.1.1 By claim

If the tenant, or one of the parties mentioned above, is liable for the rent, the landlord may pursue his normal remedies for recovery through the High Court or county court. As to the choice of court and type of proceedings, see the Legal Practice Guide, ***Civil Litigation***.

29.1.1.2 Bankruptcy and winding up

If the sum owed to him exceeds £750, the landlord can consider starting insolvency proceedings against the tenant, in the hope that this will bring pressure to bear and the tenant will pay the debt rather than face insolvency. This approach has risks, though. If the tenant does not pay and the insolvency proceeds, the landlord may rank as only one of the unsecured (ordinary) creditors. These may not well not receive payment in full.

If the landlord wants to start insolvency proceedings (bankruptcy for an individual tenant, liquidation for a corporate tenant), it will first have to serve a statutory demand for payment of the debt. More details of insolvency processes are given in **Chapter 32**.

29.1.1.3 Distress

Distress is the landlord's ancient common law right, when the tenant is in arrears with his rent, to enter upon the demised premises and seize chattels to the value of the debt. Distress is not possible if the landlord has already obtained judgment for the outstanding sum. The Law Commission recommended abolition of the law of distress. The Tribunals Courts and Enforcement Act 2007 contains provisions which, when in force, will replace the common law distress regime with a court-based system called Commercial Rent Arrears Recovery. This is not yet in force (September 2010). In the meantime, the remedy may be challenged successfully under the Human Rights Act 1998 (see *Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681, ChD).

Distress may be carried out by the landlord personally, or, as is more often the case, by a certificated bailiff acting on the landlord's behalf. The rules concerning entry onto the demised premises are technical and easily broken, for example entry can be gained through an open window but a closed window must not be opened. Such rules are beyond the scope of this book. Once on the demised premises, the landlord (or bailiff) may seize goods to satisfy the outstanding debt. The seized goods are then impounded either on or off the premises. If they are impounded on the premises, they may be left there and the tenant will be asked to sign a 'walking possession agreement' to avoid any argument that the landlord has abandoned the distress. This agreement will list the goods against which distress has been levied. If the tenant removes the goods he commits 'pound-breach' and will become liable for treble damages. After the expiry of five days the landlord may remove the goods and sell them to pay off the arrears and the costs of distress. While a public auction is not essential, the landlord must obtain the best price, and for that reason most landlords will auction the goods.

Certain goods which are on the premises cannot be distrained against, for example cash, perishable goods, tools of the tenant's trade up to £150 in value, things in actual use and goods delivered to the tenant pursuant to his trade. In addition, there are provisions (in the Law of Distress Amendment Act 1908) to protect the goods of third parties. The landlord's freedom to distrain may well be restricted if the tenant is insolvent. For more details, see **Chapter 32**.

More detailed coverage on distress is contained in the standard works on landlord and tenant law.

29.1.1.4 Collecting the rent from a sub-tenant

If the premises have been sub-let, the superior landlord can serve notice on the sub-tenant under s 6 of the Law of Distress Amendment Act 1908, requiring the sub-tenant to pay his rent to the superior landlord until the arrears are paid off.

29.1.1.5 Forfeiture

Forfeiture for non-payment of rent is dealt with at **30.5.2**.

29.1.2 Breach of tenant's repairing covenant

From a practical point of view, and as a first step, the landlord, exercising his right of entry in the lease, should enter onto the demised premises with his surveyor to draw up a schedule of dilapidations. This should be served on the tenant with a demand that the tenant comply with his repairing obligation. If the tenant remains in breach of his obligation to repair the demised premises, the landlord has various remedies available to him.

29.1.2.1 Claim for damages

The measure of damages

The landlord may bring a claim for damages against the tenant either during the term or after its expiry. Section 18 of the LTA 1927 limits the maximum amount recoverable in all cases by providing that the damages cannot exceed the amount by which the value of the reversion has been diminished by the breach. It follows that the cost of repairs will be irrecoverable to the extent that it exceeds this statutory ceiling.

Where proceedings are commenced during the term of the lease, the reduction in the value of the reversion will be influenced by the length of the unexpired residue of the term. The longer this is, the less the reduction should be.

In proceedings commenced at or after the end of the lease, the court may be prepared, at least as a starting point, to accept the cost of repairs as evidence of the measure of damages, subject to the ceiling imposed by s 18 (see *Smiley v Townshend* [1950] 2 KB 311). See also *Ultraworth Ltd v General Accident Fire and Life Assurance Corporation* [2000] 2 EGLR 115, a case where the diminution in the value of the reversion was unaffected by the tenant's breach of the repairing obligation.

If a sub-tenant is in breach of a repairing covenant in the sub-lease, the measure of damages is the reduction in value of the intermediate landlord's reversion. If the sub-tenant knows of the terms of the superior tenancy, the intermediate landlord's liability to the superior landlord will be relevant in assessing these damages.

Section 18 of the 1927 Act further provides that no damages are recoverable for failure to put or leave the premises in repair at the termination of the lease, if the premises are to be pulled down shortly after termination or if intended structural alterations would render the repairs valueless. To benefit from this provision the tenant must show that the landlord had a firm intention (to pull down or alter) at the end of the lease.

It is important to appreciate that s 18 applies only to claims for damages by the landlord and has no application where the sum owed by the tenant is in the nature of a debt. If, therefore, the tenant covenants to spend £*x* per year on repairs, but fails to do so, the landlord may recover the deficiency as a debt without regard to the statutory ceiling in s 18. This is the reason behind the clause in many leases, which permits the landlord to enter and carry out repair work that the tenant has failed to do (the *Jervis v Harris* clause, discussed in more detail at **29.1.2.2**).

The need for leave to sue

If the lease was granted for seven years or more and still has at least three years left to run, the Leasehold Property (Repairs) Act 1938 lays down a special procedure which the landlord must follow before being able to sue for damages (or forfeit the lease) for breach of the tenant's repairing covenant. Where the Act applies, it requires the landlord to serve a notice on the tenant under s 146 of the LPA 1925. Apart from the normal requirements of such a notice (see **30.5.3**), it must in addition contain a statement informing the tenant of his right to serve a counter-notice within 28 days claiming the benefit of the Act. If such a counter-notice is served, the landlord cannot proceed further without leave of the court, which will not be given unless the landlord proves (and not just shows an arguable case):

(a) that the value of the reversion has been substantially diminished; or

(b) that the immediate remedying of the breach is required for preventing substantial diminution, or for complying with any Act or by-law, or for protecting the interests of occupiers other than the tenant, or for the avoidance of much heavier repair costs in the future; or

(c) that there are special circumstances which render it just and equitable that leave be given.

Even if the landlord makes out one of the grounds, the court still has a discretion to refuse leave, but this should be exercised only where the court is clearly convinced that it would be wrong to allow the landlord to continue. The court may, in granting or refusing leave, impose such conditions on the landlord or tenant as it thinks fit. The relevant date for determining whether the grounds are established is the date of the hearing; see *Landmaster Properties Ltd v Thackeray Property Services* [2003] 35 EG 83.

The Act does not apply to breach of a tenant's covenant to put premises into repair when the tenant takes possession or within a reasonable time thereafter.

29.1.2.2 Self-help

If the tenant is in breach of his repairing obligations, can the landlord enter the demised premises, carry out the necessary works and recover the cost from the tenant? In the absence of a statutory right or an express provision in the lease, the landlord has no general right to enter the demised premises even where the tenant is in breach of his obligations. Indeed, the tenant may be able to obtain an injunction to restrain the landlord's trespass. For that reason most leases will contain an express right for the landlord to enter the demised premises and carry out any necessary repairs at the tenant's expense, in default of the tenant complying with a notice to repair. In the case of *Jervis v Harris* [1996] Ch 195, the court accepted the landlord's argument that his claim against the tenant to recover this expenditure was in the nature of a debt claim rather than one for damages. Thus, the landlord was able to evade the statutory restrictions in the 1927 and 1938 Acts, mentioned above. However, in exceptional circumstances the court may refuse the landlord an injunction to enforce his right of entry in the lease (see *Creska Ltd v Hammersmith and Fulham London Borough Council (No 2)* (1999) 78 P & CR D46).

Although the self-help remedy is of particular use in respect of breaches of repairing covenants (for the reasons explained above), it can also be of use in respect of other breaches, but the wording of the lease should be checked in each case to see whether the self-help remedy extends to dealing with the breach in question.

29.1.2.3 Specific performance

In *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64, the court held that, in principle, there is no reason why the equitable remedy of specific performance should not be available to enforce compliance by a tenant with his repairing obligation. However, other remedies are likely to be

more appropriate, and the court stressed that specific performance will be awarded only in exceptional circumstances. In this case there was no alternative remedy for the landlord – unusually, the lease contained no forfeiture clause, nor a provision allowing the landlord to enter and carry out the repairs himself.

29.1.2.4 Forfeiture

The landlord may be able to forfeit the lease for breach of the tenant's covenant to repair; forfeiture is dealt with at **30.5**.

29.1.3 Breaches of other covenants by the tenant: an outline

29.1.3.1 Damages

Damages for breach of covenant are assessed on a contractual basis, the aim being to put the landlord in the same position as if the covenant had been performed. The general principle is that the landlord may recover as damages all loss which may be fairly and reasonably considered as arising in the natural course of things from the breach, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time of entering into the lease, as the probable result of that breach (*Hadley v Baxendale* (1854) 9 Exch 341). In the majority of cases the damages will be equal to the diminution in the value of the reversion.

The breach of some particular covenants will now be considered.

Covenant to insure

The landlord usually assumes responsibility for insurance. If, however, the tenant has covenanted to insure, there will be a breach of covenant if the premises are uninsured or underinsured at any time during the term. If the premises are damaged during the period of default, the measure of damages will be the cost of rebuilding (*Burt v British Transport Commission* (1955) 166 EG 4).

Covenant against dealings

There is little authority on the measure of damages obtainable by a landlord where, for example, the tenant has assigned the lease without consent. However, the landlord will probably be entitled to compensation for the fact that his new tenant is less financially sound than the assignor and the value of his reversion is thus reduced.

User covenant

Damages may be awarded for breach by the tenant of a positive covenant to keep the premises open. For example, if the anchor tenant, in breach of covenant, closes its shop premises in a shopping centre, it may have such an adverse effect on the profitability of the other shops in the centre that the landlord may be forced to offer rental concessions to the other tenants. The landlord should be compensated for this loss by an award of damages; but there may be difficult problems in quantifying the amount of the damages. If the landlord can prove that his financial loss arises wholly from the tenant's breach, there should be no difficulty for the landlord. However, it may be the case that the centre was already in decline long before the tenant ceased trading, so that the defaulting tenant's breach merely contributed to the already falling profitability of the centre (see, generally, *Transworld Land Co Ltd v J Sainsbury plc* [1990] 2 EGLR 255).

29.1.3.2 Injunction

In certain circumstances, the landlord may be able to obtain an injunction against the tenant. An injunction is an equitable remedy and thus at the discretion of the court, which may award damages instead. In an appropriate case the landlord may be able to obtain an interim injunction pending the full hearing. There are two types of injunction:

(a) *Injunctions prohibiting a breach of covenant.* The landlord may consider the use of such an injunction to prevent, for example:
   (i) an assignment in breach of covenant;
   (ii) the carrying out of unauthorised alterations;
   (iii) an unauthorised use.

(b) *Mandatory injunctions.* These injunctions compel the tenant to do something to ensure the performance of a covenant. The court is cautious in its grant of mandatory injunctions.

Standard works on landlord and tenant law contain a more detailed consideration of the subject of injunctions.

29.1.3.3 Specific performance

Like the injunction, this is an equitable remedy and is therefore discretionary. The House of Lords has confirmed that specific performance is not available against a tenant who is in breach of his 'keep open' covenant (*Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 23 EG 137).

29.1.3.4 Forfeiture

Often the landlord's most effective remedy will be to commence (or threaten to commence) forfeiture proceedings against the tenant with a view to ending the lease. This remedy is dealt with at **30.5**.

29.1.4 Right of former tenant or his guarantor to an overriding lease

If a former tenant, or guarantor, is served with a notice by the landlord requiring payment of a fixed charge (see **29.1**), the LT(C)A 1995 allows him to call for an overriding lease within 12 months of payment. For example, L granted a lease to T in 1980. The lease is now owned by A who fell into arrears with his rent. L served notice on T requiring T to pay this sum. T duly made full payment and now claims an overriding lease from L. This will be a head-lease 'slotted in' above the lease of the defaulting tenant. The lease of the defaulting tenant moves one step down the reversionary line and becomes a sub-lease. Thus, T will become the immediate landlord of A and in the event of continued default by A can decide what action to take against him, eg forfeiture of the occupational lease (sub-lease). Under the overriding lease, T now has some control over the premises for which he is being held liable. The same situation would arise in leases granted on or after 1 January 1996 where the former tenant had been required under an authorised guarantee agreement to guarantee the performance of his immediate assignee, and that assignee is now in default (see **20.2.4.3**).

The terms of the overriding lease will be on the terms of the defaulting tenant's lease (with consequential adjustments to add a small reversionary period).

Before deciding to call for an overriding lease, a former tenant (or guarantor) should be made aware that he may become liable for landlord's covenants (eg repairing obligations).

29.2 Tenant's remedies

29.2.1 Breach of an express covenant

In general, a breach by the landlord of one of his covenants in the lease will entitle the tenant to bring a claim for damages. The measure of damages will usually be the difference between the value of the tenant's interest in the premises with the covenant performed and the value with the covenant broken. In certain circumstances, the tenant may seek a more appropriate remedy, such as specific performance or an injunction.

Particular attention should be paid to the landlord's repairing covenant.

29.2.1.1 Breach of landlord's repairing covenant

Unless the lease is of part of a building, it is unusual for the landlord to enter into a covenant to repair. Even where the landlord has assumed the responsibility for repairs, he will generally be liable only if he has notice of disrepair. If the landlord fails to carry out the repairs for which he is liable, the tenant has various remedies available to him. These include the following.

Claim for damages

The tenant's normal remedy will be to bring a claim against his landlord for damages for breach of covenant. Section 18 of the LTA 1927, which restricts a landlord's claim for damages (see **29.1.2.1**), is not relevant to a tenant's claim. Here, damages will be assessed by comparing the value of the premises to the tenant at the date of assessment with their value if the landlord had complied with his obligation. The tenant will also be entitled to damages for consequential loss such as damage caused to the tenant's goods. If the disrepair was such that the tenant was forced to move into temporary accommodation, the cost of this should also be recoverable, provided the tenant had acted reasonably to mitigate his loss.

Self-help

Subject to notifying the landlord and giving him a reasonable opportunity to perform his covenant, the tenant is entitled to carry out the repair himself and deduct the reasonable cost of so doing from future payments of rent (*Lee-Parker v Izzet* [1971] 1 WLR 1688). If the landlord sues the tenant for non-payment of rent, the tenant will have a defence (see **17.1**).

Specific performance

The tenant, unlike the landlord, may be able to obtain an order of specific performance. The granting of the order is entirely at the discretion of the court, and being an equitable remedy it will not be granted if damages are an adequate remedy. Further, there must be a clear breach of covenant and must be no doubt over what is required to be done to remedy the breach.

Appointment of receiver

In the tenant's claim against the landlord for breach of covenant, the tenant may seek the appointment of a receiver to collect the rents and manage the property in accordance with the terms of the lease (including the performance of the landlord's covenants). The court has this power whenever it appears just and convenient to make such an appointment (Senior Courts Act 1981, s 37). The power has been exercised not only where the landlord had abandoned the property, but also where he has failed to carry out urgently needed repairs in accordance with his covenant (see *Daiches v Bluelake Investments Ltd* [1985] 2 EGLR 67).

The tenant must nominate a suitably qualified person to act as receiver, for example a surveyor; and before agreeing to act, the potential appointee should ensure that the assets of which he will have control will be sufficient to meet his fees, or that he obtains an indemnity in respect of them from the applicant.

A receiver may also be appointed where the landlord collects a service charge from the tenants but fails to provide the services he has promised.

29.2.2 Breach of an implied covenant

29.2.2.1 Covenant for quiet enjoyment

Most leases will contain an express covenant by the landlord for quiet enjoyment (see **Chapter 23**). In the absence of an express covenant, one will be implied arising out of the relationship of landlord and tenant. The implied covenant extends only to interruption of or interference with the tenant's enjoyment of the demised premises by the landlord or any person lawfully claiming under him; it does not extend to acts done by anyone with a title superior to that of

the landlord. Express covenants are often similarly restricted, in which case the only significant difference between the express and the implied covenant is that under an express covenant the landlord will remain liable throughout the term granted, whereas under an implied covenant the landlord's liability operates only during the currency of his ownership of the reversion.

The covenant will provide the tenant with a remedy in the case of unlawful eviction, or where there is any substantial interference with the tenant's use and enjoyment of the premises either by the landlord or by the lawful (rightful) acts of anyone claiming under him. The acts likely to amount to a breach of the covenant are discussed at **23.2**. The normal remedy will be damages, assessed on a contractual basis, to compensate the tenant for the loss resulting from the breach.

29.2.2.2 Derogation from grant

A landlord is under an implied obligation not to derogate from his grant. This covenant complements the covenant for quiet enjoyment, and sometimes the two overlap. The landlord will be in breach of his obligation if he does anything which substantially interferes with the use of the demised premises for the purpose for which they were let. Having given something with one hand, the landlord cannot take away its enjoyment with the other. The principle is often used to prevent the landlord from using his retained land in a way which frustrates the purpose of the lease. Thus, it has been held to be a derogation from grant for a landlord to grant a lease for the purpose of storing explosives and then to use his retained land in such a way as to render the storage of explosives on the demised premises illegal (*Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200; see also *Petra Investments Ltd v Jeffrey Rogers plc* [2000] 3 EGLR 120, a case concerning the landlord's ability to alter the original concept of a shopping centre). Similarly, if the landlord uses machinery on his retained land which by reason of vibration affects the stability of the demised premises, there will be a breach of the implied covenant. However, there will be no derogation from grant where the landlord's use of the adjoining land merely makes the user of the demised premises more expensive, for example by letting the adjoining premises to a business competitor of the tenant (*Port v Griffith* [1938] 1 All ER 295 and *Romulus Trading Co Ltd v Comet Properties Ltd* [1996] 2 EGLR 70; but see also *Oceanic Village Ltd v Shirayama Shokusan Co Ltd* [2001] All ER (D) 62 (Feb), in which the High Court was prepared, exceptionally, to find the landlord in breach of the obligation in such circumstances).

Until the decision in *Chartered Trust plc v Davies* [1997] 49 EG 135, it was generally believed that it was insufficient to amount to derogation from grant for a landlord to stand back while tenant A, in breach of covenant, committed acts of nuisance against tenant B thus driving tenant B out of business. Just because the landlord failed to take action against tenant A to prevent the nuisance did not, so it was thought, amount to a repudiation of B's lease. However, the Court of Appeal held that inaction by the landlord in these circumstances may amount to derogation from grant. The implications of this decision will be felt most where, as in the instant case, the landlord has retained management control of a shopping centre and is responsible for the common parts. If, in breach of covenant, one of the tenants does something in the common parts which adversely affects another tenant, the landlord will have to consider acting to enforce the lease obligations or else run the risk of being found to have derogated from grant (see also *Nynehead Developments Ltd v RH Fibreboard Containers Ltd and Others* [1999] 9 EG 174).

Chapter 30
Methods of Termination

30.1	Introduction	261
30.2	Expiry	261
30.3	Notice to quit	261
30.4	Operation of break clause	262
30.5	Forfeiture	262
30.6	Surrender	266
30.7	Merger	266

30.1 Introduction

There are a number of ways at common law in which a lease may be ended. Before looking at these in detail, it is important to appreciate that if the tenant enjoys the protection of the security of tenure provisions under Pt II of the LTA 1954, the lease may be ended only in one of the ways specified by that Act. For example, a protected fixed term will not come to an end on the expiry of that term; a protected periodic tenancy will not come to an end by the service of a landlord's common law notice to quit. Such tenancies can only be terminated in one of the ways specified in the Act. These restrictions on termination are dealt with in **Chapter 31**. The methods of termination to be considered here are:

(a) expiry;
(b) notice to quit;
(c) operation of break clause;
(d) forfeiture;
(e) surrender;
(f) merger.

30.2 Expiry

A fixed-term tenancy will terminate at the end of that term; there is no need for either party to take any steps at all. If the tenant remains in possession beyond the expiry date with his landlord's consent, he holds over as a tenant at will, ie, on terms that either party may end the tenancy at any time. A tenancy at will may be converted into an implied periodic tenancy by the payment and acceptance of rent.

30.3 Notice to quit

A periodic tenancy may be determined by service of a notice to quit by either party. There are many technical rules surrounding the drafting and service of such notices and reference should be made to one of the standard works on landlord and tenant law for a consideration of these. What follows is only intended as a reminder of some of the more important rules.

In the absence of contrary agreement, the minimum length of notice required is as follows:

(a) yearly tenancy: half a year's notice (or two quarters if the tenancy expires on a quarter day);
(b) monthly tenancy: one month's notice;
(c) weekly tenancy: one week's notice.

Not only must the length of notice be correct, it must also expire at the end of a completed period of the tenancy. In the case of a yearly tenancy, this means that the notice must expire on the anniversary of the commencement of the tenancy or on the day before the anniversary. For example, with a yearly tenancy beginning on 1 January in one year, the notice should expire on 1 January or 31 December in any subsequent year. A similar rule applies to other periodic tenancies.

At common law, no particular form of notice is required but it must be unambiguous and, for the avoidance of doubt, in writing.

As a general rule, unless the lease provides to the contrary, a notice to quit must relate to all of the land in the lease and not just part.

30.4 Operation of break clause

The lease may contain an option by which one or both parties may determine the lease, at a particular time or on the happening of a specified event, before it has run its full term. This is known as a break clause. If there are any conditions precedent to the exercise of the option, these must be strictly observed (*Bairstow Eves (Securities) Ltd v Ripley* [1992] 2 EGLR 47). If, for example, the option is only exercisable provided the tenant has performed all of his obligations, he will not be able to exercise it while in arrears or in breach of his repairing covenant. However, the exact wording of the option should be examined to see whether such conditions have to be satisfied at the date the notice exercising the option is served, or at the date when it expires. While great care should always be taken in drafting the break notice, minor errors which would not mislead a reasonable recipient may not render the notice invalid (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 and **16.2.2**).

The exercise of a break clause in a head-lease may operate to terminate any sub-lease which has been created (this is certainly the case in the event of exercise by the superior landlord; see *Barrett v Morgan* [2000] 2 AC 264). However, the sub-tenant may have the right to remain in possession if he is protected under Pt II of the LTA 1954.

30.5 Forfeiture

Forfeiture is the landlord's right to re-enter the premises and determine the lease on breach by the tenant of any of his covenants, or upon the happening of certain specified events. However, the right to forfeit is not automatic; it exists only where the lease expressly includes such a right (or if the lease is made conditional upon the performance of the covenants). The drafting of an appropriate provision is dealt with in **Chapter 23**.

Before the landlord proceeds to forfeit the lease, he should consider carefully the consequences of so doing. In a rising market the landlord should have no difficulty in subsequently re-letting the premises, possibly at a higher rent. If, however, the landlord is faced with a falling market, re-letting the premises may not be so easy. As a result of forfeiture the landlord may be left with an empty property on his hands for a long time. This will lead to a loss of income and may have a detrimental effect on any adjoining property of the landlord, for example, other shops in a parade.

The right of forfeiture is enforced by the landlord in one of two ways. First, the landlord may issue and serve proceedings for recovery of possession or, secondly, the landlord may peaceably re-enter the premises. Landlords are sometimes reluctant to adopt the second alternative because an offence will be committed if any violence is used or threatened and the landlord knew that there was someone on the premises opposed to the entry (Criminal Law Act 1977, s 6). Furthermore, there is a feeling that peaceable re-entry may be open to significant challenge under the Human Rights Act 1998. There are further statutory

restrictions on the right of peaceable re-entry where the premises are let as a dwelling (Protection from Eviction Act 1977 (PEA 1977)).

30.5.1 Waiver of the right to forfeit

A landlord will be prevented from forfeiting a lease if he has expressly or impliedly waived the right to forfeit. The landlord will still be able to pursue his other remedies but will have lost his right to forfeit. Waiver will be implied where the landlord, knowing of the breach, does some unequivocal act which recognises the continued existence of the lease. It is not, however, a question of intention. So long as the act is inconsistent with an intention to determine the lease, the motive for the act is irrelevant. Thus, a demand for rent, or receipt of rent falling due *after* the right to forfeit has arisen, will amount to waiver notwithstanding a clerical error by the landlord's agent, receipt of rent paid under a standing order, or that the rent is demanded or received 'without prejudice to the landlord's right to forfeit'.

Waiver operates only in respect of past breaches of covenant. Where the landlord waives a 'once and for all' breach (eg, breach of a covenant against sub-letting) his right to forfeit is lost for ever. If, however, the breach is of a continuing nature (eg, breach of a repairing covenant) the right to forfeit, though waived on one occasion, will arise again, as the property continues to be in disrepair (see *Greenwich London Borough Council v Discreet Selling Estates Ltd* [1990] 48 EG 113; as to the need for a fresh s 146 notice).

30.5.2 Forfeiture for non-payment of rent

That the tenant owes rent to his landlord may seem a necessary pre-condition of the landlord's right to forfeit. Yet, exceptionally, this may not be the case. If, on an assignment of the reversion, the tenant is in arrears with payment of the rent, the 'old' and 'new' landlords often come to some arrangement as to who has the right to sue for the outstanding arrears. Such was the situation in *Kataria v Safeland plc* [1998] 05 EG 155, where it was agreed that, on completion, the right to receive the arrears of rent and all rights of action relating thereto were vested in the 'old' landlord. Notwithstanding this, it was held that the 'new' landlord, following completion, was entitled to forfeit the lease for non-payment of rent (even though the arrears were owed to the 'old' landlord). Hence it becomes important to distinguish the right to forfeit from the right of action in respect of the arrears.

The landlord must make a formal demand for the rent before forfeiting unless the lease exempts him from this obligation. To avoid the technicalities of a formal demand, most leases will provide for forfeiture if the tenant is, for example, 21 days or more in arrears 'whether the rent is formally demanded or not' (see also s 210 of the Common Law Procedure Act 1852). If the rent falls into arrears, the landlord may proceed to forfeit either by court proceedings, or by peaceable re-entry.

However, the tenant may have the right to apply to court for relief from forfeiture which, if granted, will mean that the tenant continues to hold under the existing lease. Where the landlord is proceeding by way of court action, those proceedings will be stayed if the tenant pays all the arrears plus the landlord's costs before the hearing. In certain cases, the tenant may also apply for relief within six months from the landlord's recovery of possession, although the rules differ between the High Court and county court. Where the landlord is proceeding by way of peaceable re-entry, the tenant may still apply to the court for relief. Again, the tenant will have to pay the arrears and must, as a general rule, apply within six months of re-entry by the landlord (although in exceptional circumstances the court may be prepared to grant relief outside this period: *Thatcher v CH Pearce & Sons (Contractors) Ltd* [1968] 1 WLR 748).

30.5.3 Forfeiture for breach of other covenants

Before a landlord is able to forfeit for a breach of covenant, other than for the payment of rent, the landlord must normally serve a notice on the tenant under s 146 of the LPA 1925. Where there has been an unlawful assignment, the notice should be served on the unlawful assignee.

A s 146 notice must:

(a) specify the breach;
(b) require it to be remedied within a reasonable time, if it is capable of being remedied; and
(c) require the tenant to pay compensation for the breach, if the landlord so requires.

As far as the second requirement is concerned, the notice will be invalid if the landlord wrongly takes the view that the breach is irremediable and, therefore, does not require the tenant to remedy it within a reasonable time. Whether a breach is remediable is a question of fact in each case. As a general rule, breach of a positive covenant is usually remediable by the tenant doing that which he has left undone. Thus, for example, it has been held that breach of a covenant requiring the tenant to reconstruct the premises by a stated date, was capable of being remedied by the tenant carrying out the work within a reasonable time (*Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340). With negative covenants the issue is less clear. Views have been expressed in the past that breaches of negative covenants can never be remedied; once the forbidden act has been done it cannot be undone. However, current thinking is that the breach of some negative covenants can be remedied. Where, for example, the tenant has erected advertisement hoardings in breach of covenant, the removal of them would, it is submitted, remedy the breach. On the other hand, it has been held that certain breaches of negative covenants cannot be remedied. Thus, the breach of an alienation covenant, a covenant against immoral user and a covenant against trading without the appropriate licences have all been held to be irremediable (see, generally, *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* above, and *Scala House & District Property Co Ltd v Forbes* [1974] QB 575). If the landlord is in any doubt about whether a particular breach can be remedied, the notice should require the tenant to remedy the breach 'if it is capable of remedy'.

What is a 'reasonable' period for compliance has always been a grey area. Guidance on this is now provided by *Albany Holdings Ltd v Crown Estate Commissioners* [2003] EWHC 1480. Here the court held that a period of one month would normally be sufficient. However, where the work required to remedy a breach would take longer than one month to carry out, then a longer period may be necessary.

If the tenant does not comply with the requirements of a valid s 146 notice, the landlord may proceed to forfeit the lease by court proceedings or peaceable re-entry. In either case the tenant may be able to seek relief from forfeiture but there is a vital difference between the two methods. If the landlord takes court proceedings, the tenant can seek relief at any time before the landlord actually re-enters the premises: no relief can be granted afterwards. However, if the landlord re-enters peaceably, the tenant can seek relief even after the landlord has re-entered, though the court will take into account all the circumstances including any delay by the tenant in seeking relief (*Billson v Residential Apartments Ltd* [1992] 1 AC 494).

In deciding whether or not to grant relief, the court will have regard to the conduct of the parties and all other relevant circumstances. If relief is granted, it will be granted on such terms as the court thinks fit (LPA 1925, s 146(2)). This gives the court a very wide discretion and the House of Lords has refused to lay down any rigid rules on its exercise. Relief is usually granted where the breach has been remedied and is unlikely to re-occur.

Where the s 146 notice relates to internal decorative repairs, the tenant has a special right to apply to the court for relief under s 147 of the LPA 1925. This is separate from the general right to apply for relief under s 146. Under s 147, the court may wholly or partially relieve the tenant from liability for internal decorative repairs if, having regard to all the circumstances of the

case and in particular the length of the tenant's term still unexpired, it thinks the notice is unreasonable. However, s 147 does not apply:

(a) where the liability is under an express covenant to put the property in a decorative state of repair which has never been performed; or

(b) to any matter necessary or proper for keeping the property in a sanitary condition, or for the maintenance or preservation of the structure; or

(c) to any statutory liability to keep a house fit for human habitation; or

(d) to any covenant to yield up the premises in a specified state of repair at the end of the term.

30.5.3.1 Three special cases

(a) Where the breach by the tenant is of a repairing covenant, a special procedure may apply. If the lease was granted for seven or more years and still has three or more to run, the s 146 notice must also contain a notice of the tenant's right to serve a counter-notice within 28 days. If this is served, the landlord cannot proceed to forfeit without leave of the court. Such leave is only granted on specified grounds (Leasehold Property (Repairs) Act 1938, see **29.1.2.1**).

(b) A lease will usually give the landlord the right to forfeit upon the tenant's bankruptcy (or liquidation) or having the lease taken in execution. If the landlord wishes to forfeit, he need only serve a s 146 notice and the tenant may only apply for relief during the first year following the bankruptcy or taking in execution. However, there is an important exception to this rule. If, during that first year, the trustee or liquidator sells the lease, the s 146 protection lasts indefinitely. Without such an exception, it would be difficult for the trustee or liquidator to find a buyer for the lease because of the risk of forfeiture taking place after the expiration of the first year without the service of a s 146 notice and with no right to seek relief.

(c) Exceptionally, there is no need for the landlord to serve a s 146 notice following bankruptcy, liquidation or taking in execution, and the tenant has no right to apply for relief if the lease is of:

  (i) agricultural land;

  (ii) mines or minerals;

  (iii) a public house;

  (iv) a furnished house;

  (v) any premises where the personal qualifications of the tenant are important for the preservation of the nature or character of the premises or on the ground of neighbourhood to the landlord or anyone holding under him (as to the meaning of 'neighbourhood to the landlord', see *Hockley Engineering Ltd v V & P Midlands Ltd* [1993] 1 EGLR 76).

30.5.4 Position of sub-tenants and mortgagees on forfeiture

If the head-lease is forfeited, this will automatically end any sub-lease. This is unfair to sub-tenants who stand to lose their interest through no fault of their own. In order to protect sub-tenants in this situation, s 146(4) enables them to apply for relief against forfeiture of the head-lease even in those cases where the head tenant is unable to do so. The granting of relief is entirely at the discretion of the court which can impose such conditions as it thinks fit and may, for example, require the sub-tenant to comply with the terms of the head-lease. If the court grants relief, the sub-tenant will become the immediate tenant of the landlord but cannot be granted a longer term than that remaining under the sub-lease. Difficult problems can arise where the sub-lease is of part only of the premises comprised in the head-lease. The view has sometimes been expressed that the sub-tenant may, as a condition of granting relief,

have to take a new lease of all the property comprised in the head-lease or pay the arrears of rent relating to the whole.

An important example of the operation of s 146(4) arises in the case of a mortgagee of a lease. Lenders (whether by sub-demise or legal charge) are sub-tenants for the purposes of the subsection and can thus apply for relief from forfeiture of the lease (see *United Dominion Trust Ltd v Shellpoint Trustees* [1993] EGCS 57, as to the time within which relief must be sought by lenders).

30.6 Surrender

Surrender occurs where a tenant relinquishes his lease to his immediate landlord, with his landlord's consent. The lease will merge in the reversion and be extinguished. Surrender can be express or by operation of law. An express surrender must generally be made by deed. Surrender by operation of law occurs where the parties act in a way which is inconsistent with the continuance of the lease. For example, a surrender will occur if the parties agree a new lease to commence during the currency of the existing lease. A similar situation occurs if the tenant gives up possession and returns the key to the landlord and the landlord accepts this as surrender. However, surrender requires the agreement of both parties. If the key is merely left with the landlord, this in itself will not amount to surrender unless the landlord accepts it as surrender, for example, by re-letting the premises (see *Arundel Corporation v The Financial Training Co Ltd* [2000] 3 All ER 456).

If a lease protected under Pt II of the LTA 1954 requires the tenant to offer to surrender the lease before seeking consent to assign, the landlord's acceptance of that offer may be void under s 38 of the LTA 1954 (*Allnatt London Properties Ltd v Newton* [1984] 1 All ER 423, and see **31.1.5**).

30.6.1 Effect of surrender

A surrender will release the tenant from any future liability under the lease but not in respect of past breaches. A well-advised tenant should, therefore, seek a release from all breaches.

The surrender of a head-lease will not affect any sub-lease. The sub-tenant will become the immediate tenant of the head landlord on the terms of the sub-lease. Sometimes, a head tenant will agree to surrender his head-lease with a view to taking a new fixed term from his landlord; this may happen where the head-lease is coming to the end of its fixed term. In this situation, any new head-lease granted following the surrender will be subject to the sub-lease (LPA 1925, s 150).

30.7 Merger

Merger occurs where a tenant acquires his immediate landlord's reversion or a third party acquires both the lease and the immediate reversion. In such a case the lease will end. However, merger will only take place where the person acquiring both the lease and immediate reversion holds both estates in the same capacity and intends merger to take place.

As with surrender, merger of a lease will not affect the position of any sub-tenant.

Chapter 31
The Landlord and Tenant Act 1954, Part II

31.1	Introductory matters	267
31.2	Termination under the Act	273
31.3	The application to court	277
31.4	Interim rents	278
31.5	Grounds of opposition	279
31.6	Compensation for failure to obtain a new tenancy	283
31.7	The renewal lease	285
31.8	The order for the new lease	287

31.1 Introductory matters

31.1.1 The protection of the Act

The principal Act conferring security of tenure on business tenants and regulating the manner in which business tenancies can be terminated is Pt II of the LTA 1954 (statutory references in this chapter are to this Act, unless otherwise stated). The protection given to tenants covered by the Act is twofold. First, a business tenancy will not come to an end at the expiration of a fixed term, nor can a periodic tenancy be terminated by the landlord serving an ordinary notice to quit. Instead, notwithstanding the ending of the contractual term, the tenancy will be automatically continued under s 24 until such time as it is terminated in one of the ways specified in the Act. Secondly, upon the expiration of a business tenancy in accordance with the Act, business tenants normally have a statutory right to apply to court for a new tenancy and the landlord may only oppose that application on certain statutory grounds. Any new tenancy granted will also enjoy the protection of the Act.

Major changes to the provisions of the Act were brought into force on 1 June 2004 by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096). This book reflects the amended provisions.

Selected extracts from the Act are set out in **Appendix 6**.

31.1.2 The application of the Act

Section 23(1) provides that:

> this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.

This involves a number of elements.

31.1.2.1 There must be a 'tenancy'

Tenancy includes an agreement for a lease and an underlease (even an unauthorised one). However, licences are not protected. The lease/licence distinction is further considered at **11.4**. In view of the danger for landlords in inadvertently creating a protected tenancy, the use of licences as a means of avoiding the Act needs very careful consideration. Certain tenancies are specifically excluded from the protection of the Act and these are dealt with at **31.1.3**.

31.1.2.2 The premises must be occupied by the tenant

Occupation need not be by the tenant personally. It has been held that occupation may be sufficient where it is conducted through the medium of a manager or agent provided that such

representative occupation is genuine and not a sham arrangement. Similarly, s 23(1A) and (1B) provides that the Act will apply where an individual is the tenant but the premises are then occupied by a company in which the tenant has a controlling interest. 'Controlling interest' is defined by s 46(2). There are also special rules as to occupation in ss 41, 41A and 46 where a tenancy is held on trust, vested in partners as trustees, or held by one member of a group of companies but occupied by another member of the same group. Occupation need not be continuous provided that the 'thread of continuity' of business user is not broken (*Hancock & Willis v GMS Syndicate Ltd* (1982) 265 EG 473 and *Flairline Properties Ltd v Hassan* [1997] 1 EGLR 138). In *Pointon York Group plc v Poulton* [2006] EWCA Civ 1001, it was held that parking a car in a car parking space during normal business hours could amount to occupation for the purposes of the LTA 1954.

Problems may arise where a business tenant sub-lets part of the property to a business sub-tenant. In such a situation, they cannot both qualify for protection in respect of the sub-let part; there can be no dual occupation for the purposes of the Act. In normal circumstances, it will be the sub-tenant who enjoys the protection of the Act although in an exceptional case the head tenant may reserve sufficiently extensive rights over the sub-let part that he remains the occupier (see *Graysim Holdings Ltd v P&O Property Holdings Ltd* [1995] 3 WLR 854). The case of *Pointon York Group plc v Poulton* [2006] EWCA Civ 1001 shows the problems landlords can face due to the rule that any sub-lease must of necessity be shorter than the head lease out of which it is granted. In this case, the head tenant moved back into occupation in the short period between the end of the sub-lease and the later ending of the head lease and was thus enabled to claim the protection of the Act. It is arguable that a landlord cannot serve a s 25 notice at a time when the tenant is not in business occupation, and so in situations like the *Poulton* case the landlord would not be able to serve the s 25 notice until the tenant actually took up occupation. This would seriously delay the landlord's ability to obtain possession or grant a renewal lease at an increased rent.

31.1.2.3 The premises must be occupied for the purposes of a business carried on by the tenant

'Business' is widely defined in s 23 to include a 'trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate'. Where the business is carried on by an individual, it must amount to a trade, profession or employment; but where it is carried on by a body of persons (corporate or unincorporate) 'any activity' may suffice. Thus, it has been held that the organising of a tennis club and the activities of the governors in running a hospital, both amounted to a business use (*Addiscombe Garden Estates v Crabbe* [1958] 1 QB 513 and *Hills (Patents) Ltd v University College Hospital Board of Governors* [1956] 1 QB 90). This does not mean however that the Act will apply whenever the tenant is a body of persons; the 'activity' must be correlative to the conceptions involved in the words 'trade, profession or employment'.

Two problem areas may arise with this requirement.

(a) The demised premises will sometimes be used for two purposes, only one of which is a business user. For example, the letting may consist of a shop on the ground floor with living accommodation above. Does the Act still apply? In cases of mixed user the Act will apply provided the business activity is a significant purpose of the occupation and not merely incidental to the occupation of the premises as a residence (*Cheryl Investments Ltd v Saldhana* [1978] 1 WLR 1329 and *Gurton v Parrot* [1991] 1 EGLR 98). In the example mentioned, the Act is likely to apply. If, however, a residential tenant occasionally brought work home with him this would not result in his tenancy being protected under the Act.

(b) The business user may be in breach of a covenant of the lease. How does that affect the tenant's rights? If the lease merely forbids a specific business use (eg, not to use the shop as a newsagents), or any use except the business use specified (eg, not to use the premises for any purpose other than as a newsagents), a business use in breach of such a

provision will not deprive the tenant of the protection of the Act. However, s 24(3) does exclude from protection any tenancy where the use of the premises for business purposes is in breach of a general prohibition preventing all business use (eg, not to carry on any business, trade, profession or employment) although if the landlord had consented to or acquiesced in the breach, the Act would still apply.

31.1.3 Exclusions from the Act

Apart from those tenancies which fail to satisfy the requirements of s 23, there are other tenancies which are not protected by the Act. These include:

(a) Tenancies at will. In *Javad v Aqil* [1991] 1 WLR 1007, a prospective tenant who was allowed into possession while negotiations proceeded for the grant of a new business lease was held, on the facts, to be a tenant at will, and thus excluded from protection. A similar decision was reached in *London Baggage Co (Charing Cross) Ltd v Railtrack plc* [2000] EGCS 57, where a tenant holding over after the expiry of its lease, pending the negotiation of a new lease, was held to be a tenant at will.

(b) Tenancies of agricultural holdings: these have their own form of protection under the Agricultural Holdings Act 1986.

(c) A farm business tenancy.

(d) Mining leases.

(e) Service tenancies. These are tenancies granted to the holder of an office, appointment or employment from the landlord and which continue only so long as the tenant holds such office, etc. For the exclusion to apply the tenancy must be in writing and express the purpose for which it was granted.

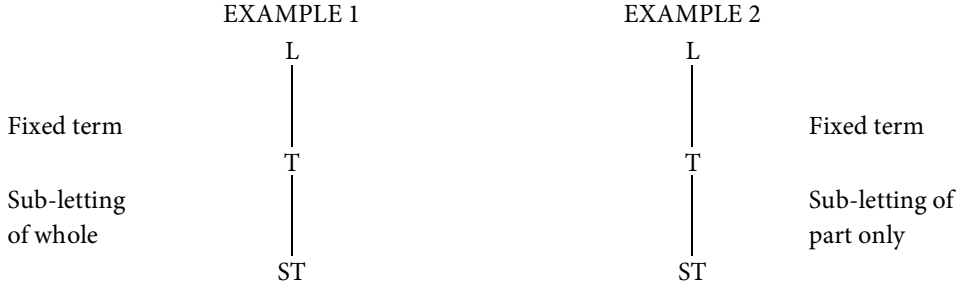
(f) Fixed-term tenancies not exceeding six months. These tenancies are excluded unless the tenancy contains provisions for renewing the term or extending it beyond six months, or the tenant (including any predecessor in the same business) has already been in occupation for a period exceeding 12 months (see *Cricket Ltd v Shaftesbury plc* [1999] 3 All ER 283).

(g) 'Contracted out' tenancies (see **31.1.5**).

31.1.4 Two important definitions

31.1.4.1 The competent landlord

It is between the tenant and the competent landlord that the procedure under the Act must be conducted. It is important, therefore, that the tenant identifies his competent landlord and deals with him. Where a freeholder grants a lease, there is no cause for concern as the tenant's competent landlord can be no other than the freeholder. However, where the tenant is a sub-tenant, the statutory definition of competent landlord means that the sub-tenant's immediate landlord may not be his competent landlord. Using s 44 of the Act, the sub-tenant must look up the chain of superior tenancies for the first person who either owns the freehold or who has a superior tenancy which will not come to an end within 14 months. The following examples may assist:



As the first example involves a sub-letting of the whole of the premises, T will not be in occupation, and will not, therefore, enjoy the protection of the Act. This means that the head-lease will come to an end on its contractual expiry date, with the result that as soon as the head-lease has entered the last 14 months of its contractual term, ST's competent landlord will be the freeholder. However, in the second example, because it is a sub-letting of part only, then provided T occupies the remaining part for business purposes, the head-lease will be protected. Therefore, it will not expire by effluxion of time. So even if the head-lease has entered the last 14 months of its contractual term, the sub-tenant's competent landlord will still be T (unless, eg, the freeholder has served an appropriate notice terminating the head-lease within 14 months, see **31.2.1**).

It is, therefore, very important for sub-tenants to identify their competent landlord and this can be done by serving a notice on their immediate landlord under s 40 of the Act seeking information about the landlord's interest. A s 40 notice should always be served by a sub-tenant before taking any other steps under the Act. The prescribed form is set out in **Appendix 2**.

31.1.4.2 The 'holding'

The definition of the holding is important because the tenant's right to a new lease normally extends to only that part of the premises known as the 'holding'. Further, many of the landlord's grounds of opposition refer to the holding. This term is defined in s 23(3) of the Act as being the property comprised in the current tenancy excluding any part which is not occupied by the tenant or a person employed by the tenant for the purposes of the tenant's business. In practice, in the majority of cases, it is correct to describe the holding as comprising all the premises originally let except those parts which the tenant is currently sub-letting.

31.1.5 Contracting out – before 1 June 2004

As a general rule, s 38(1) forbids any contracting out of the Act. This means that any agreement purporting to exclude or modify the tenant's security of tenure is void. However, under s 38(4) of the Act the court was empowered to make an order excluding the security of tenure provisions, provided certain conditions were satisfied:

(a) The proposed letting must have been for a term of years certain. Care must be taken not to fall foul of this requirement. In *Nicholas v Kinsey* [1994] 16 EG 145, a tenancy for 12 months and thereafter from year to year was held to be outside it. More controversially, in *Newham London Borough Council v Thomas-Van Staden* [2008] EWCA Civ 1414, the landlord had granted its tenant a lease for a term beginning on 1 January 2003 and ending on 28 September 2004. The lease defined this period as 'the Term, which expression shall include any period of holding over or extension of it whether by statute or at common law or by agreement'. The Court of Appeal decided that was not for a 'term of years certain', as required by the legislation, because the term had been defined to include a subsequent indefinite period. This again rendered the contracting out void.

(b) There must have been a joint application to court by both parties.

(c) The lease entered into must have been substantially the same as the draft lease attached to the court order (*Receiver for Metropolitan Police District v Palacegate Properties Ltd* [2001] 2 Ch 131).

Further, and most importantly, the court's approval must have been obtained before the tenancy was granted (*Essexcrest Ltd v Evenlex Ltd* [1988] 1 EGLR 69).

These provisions have now been changed with regard to leases entered into on or after 1 June 2004. However, the old rules will still be relevant in the case of a dispute between the parties to a contracted out lease if the tenant were to claim that the contracting out procedures were not correctly followed and that the lease does have security of tenure. Equally, any potential purchaser of the landlord's reversion to a contracted out lease will need to check carefully that

the correct procedures were followed in order to avoid as far as possible any such claim by a tenant.

31.1.6 Contracting out – on or after 1 June 2004

The new rules no longer require the need to obtain a court order, but still require the proposed letting to be for a term of years certain. Instead the landlord must serve a notice on the tenant in the prescribed form and the tenant (or someone duly authorised by the tenant) must sign a declaration that he has received the notice and accepts the consequences of the agreement to contract out. If the notice is served within the 14 days prior to the grant of the tenancy, the tenant must make a statutory declaration as to this before an independent solicitor. The prescribed form of notice contains a 'health warning' advising the tenant that he is giving up the right to security of tenure and advising him to seek advice not only from a solicitor or surveyor but also from his accountant. The 'instrument creating the tenancy', ie, normally the lease, must then contain reference to the exclusion agreement, the notice and the declaration. The prescribed form of notice is set out overleaf:

IMPORTANT NOTICE

You are being offered a lease without security of tenure. Do not commit yourself to the lease unless you have read this message carefully and have discussed it with a professional adviser.

Business tenants normally have security of tenure – the right to stay in their business premises when the lease ends.

If you commit yourself to the lease you will be giving up these important legal rights.

- You will have **no right** to stay in the premises when the lease ends.
- Unless the landlord chooses to offer you another lease, you will need to leave the premises.
- You will be unable to claim compensation for the loss of your business premises, unless the lease specifically gives you this right.
- If the landlord offers you another lease, you will have no right to ask the court to fix the rent.

It is therefore important to get professional advice – from a qualified surveyor, lawyer or accountant – before agreeing to give up these rights.

If you want to ensure that you can stay in the same business premises when the lease ends, you should consult your adviser about another form of lease that does not exclude the protection of the Landlord and Tenant Act 1954.

If you receive this notice at least 14 days before committing yourself to the lease, you will need to sign a simple declaration that you have received this notice and have accepted its consequences, before signing the lease.

But if you do not receive at least 14 days' notice, you will need to sign a 'statutory' declaration. To do so, you will need to visit an independent solicitor (or someone else empowered to administer oaths).

Unless there is a special reason for committing yourself to the lease sooner, you may want to ask the landlord to let you have at least 14 days to consider whether you wish to give up your statutory rights. If you then decided to go ahead with the agreement to exclude the protection of the Landlord and Tenant Act 1954, you would only need to make a simple declaration, and so you would not need to make a separate visit to an independent solicitor.

It is clear that the Government anticipated that the 14 day 'ordinary' notice would be the one most used (see, for example, the guidance note, 'Business Tenancies: new procedures under

the Landlord & Tenant Act 1954, Part 2', published by the then Office of the Deputy Prime Minister in April 2004). However, in practice, the statutory declaration procedure is the one most used. This is largely because solicitors are reluctant to serve the notice until the form of the lease has been finalised – and once it has been finalised, parties do not want to have to wait 14 days before the tenant can take up occupation and start paying rent.

The reason for the reluctance stems from a lack of clarity in the new procedure. Under the old law, it had been held (see **31.1.5**) that the lease entered into must be in substantially the same form as the one approved by the court for contracting out. It was not made clear under the new provisions whether a similar rule might apply. What if the contracting out notice was signed and then the terms of the lease were substantially renegotiated. Would that original notice still be valid? In order to avoid any possible problems, it is usual practice for the notice not to be signed until the terms of the lease have been substantially agreed.

Other problems have been identified. What if the identity of the landlord or the tenant were to change during negotiations, but after the service of the notice? This is not unknown where businesses operate through a web of inter-related companies, each of which is, however, a separate legal entity.

Another problem to bear in mind with the procedure is the position of any guarantors. It is not unusual in a guarantee agreement to find a covenant by the guarantor that it will enter into a new lease of the premises if the tenant should become insolvent and the liquidator should then disclaim the lease. If it is intended that such lease is also to be contracted out of the Act, notice must be served on and signed by the guarantor before he is legally obliged to take that lease, ie before he signs the guarantee agreement, *not* before the lease itself is granted. Similar principles must be applied where an outgoing tenant is entering into an Authorised Guarantee Agreement (see **20.2.4.3**). It is likely that this will require the tenant to take a new lease on disclaimer.

In *The Chiltern Railway Co Ltd v Patel* [2008] EWCA Civ 178, another potential problem with the procedure was identified by a tenant. A statutory declaration had been used, even though the notice was served more than 14 days before the commencement of the lease and so a simple signature would have been sufficient. The tenant's claim that the lease was fully protected as the correct procedure for contracting out had not been used was rejected by the Court of Appeal.

31.1.7 Continuation tenancies

A business tenancy protected by the Act will not come to an end on the expiry of the contractual term. Instead, s 24 continues the tenancy on exactly the same terms (except those relating to termination) and at exactly the same rent until it is terminated in accordance with the Act. However, the landlord may be able to obtain an increased rent by asking the court to fix an interim rent under s 24A (see **31.4**).

Section 24 continues the tenancy, but does it also continue the liability of the original tenant (or any previous assignees who have given direct covenants) for breaches committed by an assignee during the continuation tenancy? This was the question which arose in *City of London Corporation v Fell* [1993] 49 EG 113 and *Herbert Duncan Ltd v Cluttons* [1992] 1 EGLR 101. In both these cases the original tenant was sued by the landlord for arrears of rent that had accrued during the continuation tenancy due to non-payment by an assignee. The court decided that if the original tenant had covenanted to pay rent during the contractual term only, the landlord was unable to recover from him any rent accruing after that date. However, had the covenant been worded so that the original tenant was liable to pay rent during any statutory extension of the contractual term, the landlord would have been able to recover accordingly. Further, even if the lease had been drafted so that the tenant was bound to

pay rent during the statutory continuation, this did not extend to any interim rent ordered by the court. Landlords must bear these points in mind when defining the term of the lease.

If the tenant ceases occupation of the premises on or before the contractual termination date then one of the qualifying conditions for the Act to apply is no longer fulfilled (see **31.1.2**). In these circumstances a fixed-term tenancy will come to an end by effluxion of time and no continuation tenancy will arise (see the new s 27(1A) inserted by art 25 of the 2003 Order, confirming the decision in *Esselte AB v Pearl Assurance plc* [1997] 1 WLR 891; see also *Surrey County Council v Single Horse Properties Ltd* [2002] EWCA Civ 367, [2002] 1 WLR 2106). In this situation the tenant will not incur any further liability for rent (the tenant may also choose to serve a s 27 notice in these circumstances, see **31.2**).

31.2 Termination under the Act

A tenancy protected under the Act will not end automatically at the expiration of a lease for a fixed term nor, if it is a periodic tenancy, can it be ended by an ordinary notice to quit given by the landlord. Instead, such a tenancy can only be terminated in one of the ways prescribed by the Act:

(a) By the service of a landlord's statutory notice (a 's 25 notice').

(b) By the tenant's request in statutory form (a 's 26 request').

(c) Forfeiture (or forfeiture of a superior tenancy).

(d) Surrender. To be valid the surrender must take immediate effect.

(e) By the tenant giving the landlord a notice to quit, unless this was given before the tenant has been in occupation for a period of one month.

(f) Where the lease is for a fixed term, by written notice under s 27 of the Act, served by the tenant upon the landlord at least three months before the contractual expiry date. However, as noted above, the new s 27(1A), confirming the case of *Esselte AB v Pearl Assurance plc* [1997] 1 WLR 891, provides that if a tenant ceases to occupy the premises for business purposes on or before the contractual expiry date, the lease will come to an end by effluxion of time and a s 27 notice is not needed. *Esselte* (and s 27(1A)) must now be read in the light of subsequent cases (*Bacchiocci v Academic Agency Ltd* [1998] 1 WLR 1313 and *Sight and Sound Education Ltd v Books etc Ltd* [1999] 43 EG 61) which have created uncertainty over the period of absence required before it can be established that the tenant has ceased occupation for the purposes of the Act. In light of these cases it may be safer for a tenant to proceed by service of a s 27 notice (see also *Arundel Corporation v The Financial Training Co Ltd* [2000] 3 All ER 456 which, again, emphasises the desirability of a s 27 notice).

It is the first two of the above methods, the s 25 notice and s 26 request, which are the usual methods of terminating a protected business tenancy.

31.2.1 Section 25 notices

31.2.1.1 Form

If such a notice is to be effective, it must be in the prescribed form and be given to the tenant by the competent landlord not less than six months, nor more than 12 months, before the date of termination specified in it. The prescribed forms are contained in the Landlord and Tenant Act 1954, Part II (Notices) (England and Wales) Regulations 2004 (SI 2004/1005), although a form 'substantially to the like effect' can be used instead. Two slightly different forms are prescribed: one for use where the landlord does not oppose the grant of a new tenancy; and one for use where he does. The forms are set out in **Appendix 2**.

A tenant will often seek to attack the validity of his landlord's notice on the ground that it is not in the correct form. The task of the court in these circumstances is to ascertain whether

the notice served is substantially the same as the prescribed form. In doing this, any omission from the notice of matters irrelevant to the tenant's rights or obligations may not affect the validity of the notice. However, if the court decides that the notice is not the same as, or substantially to the same effect as, the prescribed form, it is irrelevant that the recipient did not suffer any prejudice: the notice will be invalid (*Sabella Ltd v Montgomery* [1998] 09 EG 153).

In *Smith v Draper* [1990] 2 EGLR 69, it was held that a landlord who had served what turned out to be an invalid notice, could withdraw it and serve a second valid notice.

31.2.1.2 Content

The notice must comply with the following requirements:

(a) The notice must state the date upon which the landlord wants the tenancy to end. The specified termination date must not be earlier than the date on which the tenancy could have been terminated at common law (and, as mentioned above, the notice must be given not less than six months, nor more than 12 months, before this specified termination date).

For a periodic tenancy or a fixed term with a break clause, the specified termination date cannot be earlier than the date upon which the landlord could have ended the tenancy with an ordinary common law notice. If there is a break clause, it would appear that a separate contractual notice is unnecessary provided the s 25 notice states a date for termination no earlier than the date the break clause would operate (*Scholl Manufacturing Ltd v Clifton (Slim-Line) Ltd* [1967] Ch 41). If the tenancy is for a fixed term without a break clause, the specified termination date cannot be earlier than the last day of the contractual term. If, however, the contractual tenancy has already expired and the tenancy is being continued under the Act, the s 25 notice need only comply with the six–12-month rule mentioned above.

(b) The notice must state whether or not the landlord will oppose an application to court by the tenant for the grant of a new tenancy and, if so, on which statutory ground(s). The tenant has the right to apply to court for a new tenancy but the landlord can oppose that application on one or more of the seven grounds of opposition set out in s 30 of the Act (see **31.5**). If this is the landlord's intention, he must state in his s 25 notice the ground(s) upon which he intends to rely. As there is no provision in the Act allowing the landlord to amend his notice, the choice of ground(s) is a matter which must be given very careful consideration.

It will not be in every case that the landlord states a ground of opposition. Often the landlord will be quite happy with the tenant's presence and is seeking to end the current tenancy simply with a view to negotiating a new tenancy upon different terms, for example, at an increased rent. In this type of situation the landlord should consult a valuer and obtain expert advice before proceeding further. Where the landlord is not opposing the grant of a new tenancy, the landlord's notice must set out his proposals for the new tenancy, including the property to be comprised in it (ie, all or part of the property contained in the existing tenancy), the rent to be payable and the other terms proposed.

(c) The notice must relate to the whole of the premises contained in the lease. A s 25 notice cannot relate to part only of the demised premises (*Southport Old Links Ltd v Naylor* [1985] 1 EGLR 66 and see also *M&P Enterprises (London) Ltd v Norfolk Square Hotels Ltd* [1994] 1 EGLR 129).

(d) The notice must be given and signed by, or on behalf of, the landlord. If there are joint landlords, all their names must be given (*Pearson v Alyo* [1990] 1 EGLR 114).

31.2.2 Section 26 requests

Rather than wait for the landlord to serve a s 25 notice, the tenant can sometimes take the initiative and request a new tenancy from his landlord under s 26 of the Act. However, the tenant must remember that the sooner there is a new tenancy, the sooner the new rent will be payable, which may be higher than the rent payable under the old tenancy. Nevertheless, there are situations where the service of a request by the tenant has tactical advantages for him.

Not all tenants can request a new tenancy. A request cannot be served if the landlord has already served a s 25 notice. Further, a request is only possible where the tenant's current lease was granted for a term of years exceeding one year (or during its continuance under s 24). This will exclude both periodic tenants and those with fixed terms of one year or less; although these tenants still enjoy security of tenure.

31.2.2.1 Form

To be valid, the request must be in the prescribed form as laid down in the Landlord and Tenant Act 1954, Part II (Notices) (England and Wales) Regulations 2004 (SI 2004/1005) and served on the competent landlord. As with the s 25 notice, a form 'substantially to the like effect' can be used instead. The prescribed form is set out in **Appendix 2**.

31.2.2.2 Content

The request must comply with the following requirements:

(a) It must state the date on which the new tenancy is to begin. The current tenancy will terminate on that date. This date must not be more than 12 months nor less than six months after the making of the request, and cannot be earlier than the date on which the tenancy could have been terminated at common law.

(b) It must give the tenant's proposals as to:
  (i) the property to be comprised in the new tenancy, which must be either the whole or part of the property comprised in the current tenancy;
  (ii) the proposed new rent (this issue requires the advice of a valuer);
  (iii) the other terms of the tenancy (eg, as to duration).

(c) The request must be signed by or on behalf of all the tenants.

A landlord who is unwilling to grant a new tenancy must, within two months of receipt of the request, give notice to the tenant that he will oppose any application to court for a new lease stating on which statutory ground(s) of opposition he intends to rely. This is effected by means of a landlord's counter-notice (see **31.2.3**).

As with a s 25 notice, the landlord must choose his ground(s) of opposition with care because he will be confined to those stated in his counter-notice.

If the tenant serves a valid s 26 request and then fails to apply to court for a new tenancy within time (see **31.3**), he will not be allowed to withdraw it and serve a new one with a view to complying with the time limit the second time since the effect of the s 26 request was to fix the date of termination of the tenancy (*Stile Hall Properties Ltd v Gooch* [1979] 3 All ER 848).

31.2.2.3 Reasons for making a request

Usually a tenant is best advised not to make a request because it is not always in a tenant's interest to bring his current tenancy to an end. However, there are some situations in which it might be advisable. For example:

(a) If the rent payable under the current tenancy is more than that presently achievable in the open market. In a falling market like this the landlord is unlikely to serve a s 25 notice, as it is in his interests to let the existing tenancy continue under the Act.

Therefore, the tenant should give careful consideration to ending the current tenancy and obtaining a new one at a reduced rent.

(b) If, as is more often the case, the current rent is less than the present market rent, it is in the tenant's interest to prolong the tenancy for as long as possible. In this case the tenant may be able to make what is sometimes called a pre-emptive strike. Say the lease is contractually due to expire on 30 September. In the previous March the landlord is considering serving a s 25 notice with a view to bringing the tenancy to an end on 30 September and negotiating a new tenancy at an increased rent. If the tenant knows or suspects the landlord's plans, he can, before the landlord has acted, serve a request specifying sometime in the following March as the date for the new tenancy. The tenant has thus achieved an extra six months at the old rent.

(c) If the tenant has plans to improve the premises, he may prefer the certainty of a new fixed term as opposed to the uncertainty of a statutory continuation.

(d) If the tenant has plans to sell the lease, a buyer would prefer the security of a new fixed term rather than the uncertainty of a statutory continuation.

31.2.3 Counter-notices

31.2.3.1 The tenant's counter-notice

Under the procedure applicable prior to 1 June 2004 both landlord and tenant had to serve a counter-notice following receipt of a s 26 request or a s 25 notice respectively. However, the requirement for a tenant to serve a counter-notice on receipt of a s 25 notice has now been abolished. The requirement for a landlord to serve a counter-notice remains, however.

31.2.3.2 The landlord's counter-notice

The service of a s 26 request by the tenant will require a counter-notice by the landlord if he wishes to oppose the tenant's application to court for a new tenancy. This must state any ground(s) of opposition that the landlord intends to rely on to oppose the tenant's application (see **31.5**). If the landlord fails to serve a counter-notice within two months of receipt of the tenant's request, he will lose his right to raise any ground of opposition to the tenant's application to court for a new tenancy although he will be allowed to raise issues relating to the terms of the new tenancy.

A landlord who has served a counter-notice stating that he will not oppose the tenant's application for a new tenancy will be bound by that decision. Similarly, the landlord cannot later amend his stated grounds of opposition.

There is no prescribed form of counter-notice but it should be unequivocal and in writing.

31.2.4 Service of notices and requests

Notices and requests given under the Act require service. Section 23(1) of the LTA 1927 provides for personal service or by leaving the notice at the last known place of abode (which includes the place of business of the person to be served; *Price v West London Investment Building Society* [1964] 2 All ER 318), or by sending it through the post by registered or (as now applies) recorded delivery. Service on a company may be effected at its registered office (s 1139 of the Companies Act 2006). The effect of complying with one of the methods of service laid down in the LTA 1927 is that there is a presumption of service so that it does not matter that the recorded delivery letter may not have been received by the intended recipient because it went astray in the post. Other methods of service may be effective (eg, the ordinary post) if in fact the notice is received by the person to whom it has been given. But the risk is that the letter may be lost in the post, in which case, notice will not have been given. The question also arises as to the date on which the notice is treated as having been served. In *Railtrack plc v Gojra* [1998] 08 EG 158, it was held that if the registered or recorded delivery method is used (both being methods laid down in the LTA 1927), the notice (or request) is served on the date

on which it is posted. This decision was confirmed by the Court of Appeal in *CA Webber Transport Ltd v Railtrack plc* [2004] 1 WLR 320. When, however, notice is sent through the ordinary post, it is served on the date it would have been delivered in the ordinary course of post.

31.3 The application to court

31.3.1 The need for an application

It will become apparent after service of a s 25 notice or counter-notice to a s 26 request, whether or not the landlord is willing to grant a new tenancy. Where a s 25 notice has been served, the contents will have told the tenant whether or not the landlord intends to oppose his application. If the tenant initiated the termination procedure with a s 26 request, the landlord will have responded with a counter-notice if he is not prepared to grant a new tenancy.

The 2003 Order makes provision for either the landlord or the tenant to apply to the court (although, of course, one cannot make an application if the other has already done so). It will usually be the tenant who will apply to the court. Even if the landlord has stated that he is prepared to grant a new tenancy, the tenant will lose his entitlement unless an application is made to the court within the prescribed time limits (see **31.3.2**), or the parties have entered into a legally binding contract for a new lease. Where the landlord is opposing the grant, there is obviously little possibility of such an agreement and so an application must be made.

The landlord will normally only apply to the court where he is opposing the grant and wants an order determining the tenancy on one of the s 30 grounds to be made as quickly as possible. He could wait for the tenant to apply for a new tenancy, but making his own application would mean the matter could be brought before the court as soon as possible. A tenant who fears he will lose in court may delay making his own application for as long as possible in order to gain an extra few weeks or months in the premises. The landlord can only make such application if he has served a s 25 notice opposing renewal or served a counter-notice to a tenant's s 26 notice to that effect.

Where a landlord is not opposing the grant, he can again apply to the court for the grant of that new lease, again in order to have the matter determined as soon as possible. Otherwise, a tenant may delay his own application for as long as possible in order to enjoy the benefit of the more favourable terms of the old lease for as long as possible.

Unless the parties have already entered into a binding lease, the tenant must always apply to court at the appropriate time otherwise he will lose the right to a new tenancy.

31.3.2 The application

Applications may be commenced in either the High Court or, as is more usual, in the county court.

The application must be made within the 'statutory period'. This is defined in s 29A(2) to mean a period ending, where the landlord served a s 25 notice, on the date specified in his notice; and, where the tenant made a s 26 request, a period ending immediately before the date specified in his request.

However, where the tenant has made a s 26 request, the court cannot entertain an application which is made before the end of the period of two months beginning with the date of the making of the request, unless the application is made after the landlord has served his counter-notice.

31.3.3 Agreements extending time limits

By s 29B the parties can by written agreement extend the time limit for applications and they may do so any number of times. The only provisos are that the first agreement to extend must be made prior to the end of the statutory period and any subsequent agreement must be made before the expiry of the period of extension agreed in the previous agreement.

Following the tenant's application to court it is advisable to protect the application by registration of a pending land action under the Land Charges Act 1972. This will make the tenant's application binding on a buyer of the reversion. Where the landlord's title is registered, the application may be an overriding interest under the Land Registration Act 2002, Sch 3, but it would nevertheless be prudent to register a unilateral notice against the reversionary title.

31.4 Interim rents

31.4.1 The need for an interim rent

Where the tenant validly applied to court for a new tenancy, his current tenancy did not terminate on the date specified in the s 25 notice or s 26 request. Instead, s 64 of the Act provided that the current tenancy would be continued at the old contractual rent until three months after the proceedings were concluded. As the Act was originally drafted there was thus an incentive for tenants to delay proceedings as much as possible, because the longer the current tenancy lasted the longer the old rent (which was usually below current market rents) remained payable. This was unfair to landlords particularly in those cases where, due to the effects of inflation, there was a substantial difference between the old contractual rent and the rent achievable in the open market. As a result of this unfairness, s 24A was inserted into the Act by the Law of Property Act 1969. This gave the court a discretion, on the application of the competent landlord, to determine an 'interim rent' to be substituted for the old contractual rent until such time as the current tenancy ceased.

These provisions have now been entirely replaced by a new s 29A inserted by art 18 of the 2003 Order. The interim rent will be payable from the earliest date for the termination of the existing tenancy that could have been specified in the s 25 notice or s 26 request that was served to bring the tenancy to an end. So a tenant who serves a s 26 request but states a commencement date for the new tenancy 12 months after service when the contractual termination date is only six months away (and so he could have served six months' notice) will find that the interim rent will be payable from that earlier date. Either landlord or tenant can apply for an interim rent. Normally, it will be the landlord who will apply as the interim rent is likely to be higher than the existing rent which may have been fixed several years previously. However, in times on falling property values, it might be advantageous for the tenant to apply if the current market rent will be below that being paid under the lease.

31.4.2 Amount

The interim rent will normally be the same as the rent payable under the new tenancy, ie, an open market rent assessed as set out at **31.7.3**. However, this will not be the case where there is a significant movement in the market (upwards or downwards) in the intervening period or where the terms of the new tenancy are so different from the terms of the old one to make a substantial difference in the rent. (Bear in mind here that normally the new lease will be on very similar terms to the old lease; see **31.7.4**.) Nor will this be the case where the landlord opposes the grant of a new tenancy. In both cases, the following provisions apply:

(a) Section 24A requires the court to assess the interim rent on the basis of a yearly tenancy, while the rent payable under the new lease is usually assessed on the basis of a term of years. And market rents under yearly tenancies are usually less than under fixed terms, since the latter guarantee tenants a more substantial period of occupation.

(b) The court is obliged to have regard to the rent payable under the current tenancy. This is so that the court can exercise a discretion to 'cushion' the tenant from too harsh a blow in moving from the old out-of-date contractual rent to the new rent (see *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415). However, a 'cushion' does not have to be provided in every case. The court has a discretion which it may use to specify the full market rent, especially in those cases where the tenant has already benefited from a low contractual rent for a long time (see, eg, *Department of the Environment v Allied Freehold Property Trust Ltd* [1992] 45 EG 156).

31.4.3 Avoiding s 24A

While the introduction of interim rents has been a step in the right direction for landlords, many still feel that the application of the 'cushion' can produce unfairness. Accordingly, the landlord may wish to avoid s 24A altogether by including a penultimate day rent review in the lease. This would revise the contractual rent just before the contractual term expired. In such a case the harshness of changing from the old rent to the new rent would be suffered during the contractual term without the imposition of any 'cushion'. Tenants, on the other hand, will wish to resist such a clause.

Another way of avoiding s 24A would be for the landlord, at the lease-drafting stage, to make it clear that the contractual rent review provisions are to continue to apply notwithstanding the ending of the contractual term. Careful drafting would be required to achieve this but the case of *Willison v Cheverell Estates Ltd* [1996] 26 EG 133 indicates that this is another possibility for the landlord.

31.5 Grounds of opposition

When the landlord serves his s 25 notice or counter-notice in response to the tenant's s 26 request, he must, if he is intending to oppose the grant of a new tenancy, set out one or more of the seven grounds of opposition in s 30 of the Act. The landlord can rely only on the stated ground(s); no later amendment is allowed.

If the landlord has stated a ground of opposition and the tenant's application proceeds to a hearing, a 'split trial' will usually be ordered with the question of opposition being dealt with first as a preliminary issue. Only if the ground is not made out will the terms of the new tenancy be dealt with.

The statutory grounds of opposition are all contained in s 30(1) of the Act and, as will be seen, some of the grounds ((a), (b), (c) and (e)), confer a discretion on the court whether or not to order a new tenancy even if the ground is made out.

31.5.1 Ground (a): tenant's failure to repair

The landlord can oppose the tenant's application for a new tenancy on the ground of the tenant's failure to repair the holding. To succeed, the landlord will have to show that the tenant was under an obligation to repair or maintain the holding and that the tenant is in breach of that obligation. Problems can arise where the repairing obligation is divided between the landlord and tenant, for example, where the landlord is responsible for the exterior and the tenant for the interior of the premises. In such cases, an inspection will be necessary to determine the party in breach. The ground only applies to failure to repair the holding, and not to the disrepair of another part of the demised premises not forming part of the tenant's holding (eg, where the tenant has sub-let part and it is that part which is in disrepair).

This is one of the discretionary grounds and the landlord is only likely to succeed if the tenant's breaches are both serious and unremedied at the date of the hearing.

As an alternative, the landlord may be able to commence forfeiture proceedings to terminate the tenancy; this being one of the permitted methods of termination under the Act. This

remedy may be available throughout the term and while the tenant may apply for relief, this will usually only be granted if the tenant rectifies the breach.

31.5.2 Ground (b): persistent delay in paying rent

The requirement of 'persistent delay' suggests that the tenant must have fallen into arrears on more than one occasion. However, the rent need not be substantially in arrears nor need the arrears last a long time. Indeed, there need not be any arrears at the date of the hearing; the court will look at the whole history of payment (see *Hazel v Akhtar* [2002] EWCA Civ 1883, [2002] 07 EG 124). Again, this is one of the discretionary grounds and the court is entitled to take into account the likelihood of future arrears arising should a new tenancy be ordered. The tenant should, therefore, consider offering to provide a surety for any new lease ordered.

31.5.3 Ground (c): substantial breaches of other obligations

Discretionary ground (c) requires other substantial breaches by the tenant of his obligations in the lease, or some other reason connected with the tenant's use or management of the holding. Any breach of an obligation may be relied upon by the landlord (eg, breach of the user covenant) but the breach must be substantial and this will be a question of fact and degree. The ground also extends to reasons connected with the tenant's use or management of the holding and this has been held to include carrying on a use in breach of planning control.

31.5.4 Ground (d): alternative accommodation

The landlord must have offered and be willing to provide or secure alternative accommodation for the tenant. The accommodation must be offered on reasonable terms having regard to the terms of the current tenancy and all other relevant circumstances. Further, the accommodation must be suitable for the tenant's requirements, (including the requirement to preserve goodwill) bearing in mind the nature and type of his business and the location and size of his existing premises. It seems that offering the tenant part only of his existing premises may qualify as alternative accommodation.

This ground, unlike the three previously mentioned, is not discretionary. If the landlord proves the requirements of the ground, the court must refuse the tenant's application.

31.5.5 Ground (e): current tenancy created by sub-letting of part only of property in a superior tenancy

Ground (e) is the least used ground because the necessary requirements are seldom fulfilled. It only applies where the current tenancy was created by a sub-letting of part of the property in a superior tenancy, and the sub-tenant's competent landlord is the landlord under the superior tenancy. The competent landlord will succeed if he can show that the combined rents from the sub-divided parts of a building are substantially less than the rent to be obtained on a single letting of the whole building, and that he requires possession to let or dispose of the whole.

This is the last of the discretionary grounds.

31.5.6 Ground (f): demolition or reconstruction

Ground (f) is the most frequently used ground. The landlord must show that on termination of the tenancy:

(a) he has a firm intention;

(b) to demolish or reconstruct the premises in the holding (or a substantial part of them), or to carry out substantial work of construction on the holding (or part of it); and

(c) that he could not reasonably do so without obtaining possession of the holding.

Each of these elements is considered in turn.

31.5.6.1 The landlord's intention

The landlord must prove a firm and settled intention to carry out relevant work. It has been said that the project must have 'moved out of the zone of contemplation … into the valley of decision' (per Asquith LJ in *Cunliffe v Goodman* [1950] 2 KB 237, approved in *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20). Not only must the landlord have made a genuine decision to carry out relevant work, he must also show that it is practicable for him to carry out his intention. This will be a question of fact in each case but the landlord's position will be strengthened if he has:

(a) obtained (or shown a reasonable prospect of obtaining) planning permission and building regulation approval (if necessary);
(b) instructed professional advisers;
(c) prepared the necessary drawings and contracts;
(d) obtained quotations and secured finance; and
(e) obtained the consent of any superior landlord (if necessary).

Where the landlord is a company, intention is normally evidenced by a resolution of the board of directors. Similarly, local authority landlords should pass an appropriate resolution and have it recorded in their minutes.

The landlord's intention must be established at the date of the hearing (*Betty's Cafes Ltd v Phillips Furnishing Stores Ltd,* above). It is thus irrelevant that the s 25 notice (or s 26 counter-notice) was served by the landlord's predecessor who did not have the necessary intention. See also *Zarvos v Pradhan* [2003] 2 P & CR 9 where a landlord failed at the hearing because the judge was not satisfied that it would be able to finance the project. The landlord appealed and by the time of the appeal has received assurances from its bank that finance would be available. The Court of Appeal refused to allow the landlord to adduce this evidence at the appeal as this would be unfair to the tenant.

If the court is not satisfied that the landlord's intention is sufficiently firm and settled at the date of the hearing, a new tenancy will be ordered. In such cases, however, the court, in settling the terms of the new tenancy, may take into account the landlord's future intentions, and limit the duration of the new tenancy so as not to impede development later when the landlord is able to fully establish intention and the ability to carry it out (see **31.7.2**).

31.5.6.2 The nature of the works

The landlord must prove an intention to do one of six things:

(a) Demolish the premises comprised in the holding (see *Coppin v Bruce-Smith* [1998] EGCS 45).
(b) Reconstruct the premises comprised in the holding. For the works to qualify as works of reconstruction it has been held that they must entail rebuilding and involve a substantial interference with the structure of the building but need not necessarily be confined to the outside or loadbearing walls (*Romulus Trading Co Ltd v Henry Smith's Charity Trustees* [1990] 2 EGLR 75).
(c) Demolish a substantial part of the premises comprised in the holding.
(d) Reconstruct a substantial part of the premises comprised in the holding.
(e) Carry out substantial work of construction on the holding. It has been held that such works must directly affect the structure of the building and must go beyond what could be more properly classified as works of refurbishment or improvement (*Barth v Pritchard* [1990] 1 EGLR 109).
(f) Carry out substantial work of construction on part of the holding.

31.5.6.3 The need to obtain possession

The landlord must show that he could not reasonably execute the relevant work without obtaining possession of the holding. This means the landlord must show that he needs 'legal' (not just 'physical') possession of the holding. He has to show that it is necessary to put an end to the tenant's interest, and this may not always be the case. Accordingly, if the lease contains a right of entry for the landlord which is sufficiently wide to enable him to carry out the relevant work, his ground of opposition will fail. In such a situation, the tenant will be able to argue that the work can be carried out under the terms of the lease and there is thus no need to end it.

Even if the lease does not include a right of entry, the landlord may still fail in his opposition if the tenant is able to rely on s 31A of the Act. This provides that the court shall not find ground (f) to be established if the tenant will either:

(a) agree to a new lease which includes access and other rights for the landlord, which enable the landlord to reasonably carry out the relevant work without obtaining possession and without substantially interfering with the use of the holding for the tenant's business; or

(b) accept a new lease of an economically separable part of the holding with, if necessary, access rights for the landlord.

31.5.7 Ground (g): landlord's intention to occupy the holding

Ground (g) is another frequently used ground. The landlord must prove that on the termination of the current tenancy he intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him, or as his residence. There are a number of elements to this ground which will be considered in turn.

31.5.7.1 The landlord's intention

As with ground (f), the landlord's intention must be firm and settled, and many of the matters discussed at **31.5.6** will be equally relevant here. Therefore, not only must the landlord be able to show a genuine intention to occupy the holding, he must also show that he has a reasonable prospect of being able to do so. It is, therefore, necessary for the court to take into account, for example, whether planning permission would be required to use the premises for the landlord's business and, if so, whether it would be likely to be granted. In some cases, the court has accepted as evidence of intention to occupy, an undertaking to do so given by the landlord. Such an undertaking is not conclusive but it is a relevant consideration when the court is determining the issue (see, eg, *London Hilton Jewellers Ltd v Hilton International Hotels Ltd* [1990] 1 EGLR 112). As with ground (f), the landlord's intention must be shown to exist at the date of the hearing.

The court will not assess the viability of the landlord's proposed business venture provided his intention to occupy is genuine. Thus, the court has held the ground to be established even where they thought the landlord's business plans to be ill thought out and likely to fail; his intention was nevertheless genuine. See, for example, *Dolgellau Golf Club v Hett* [1998] 2 EGLR 75, CA, but also the contrasting case of *Zarvos* v *Pradhan* [2003] EWCA Civ 208, where possession was refused as the landlord could not establish a reasonable prospect of being able to raise finance.

31.5.7.2 The purpose of occupation

Occupation must be for the purpose of the landlord's business or as his residence. The landlord need not intend to occupy all the holding immediately, provided that within a reasonable time of termination he intends to occupy a substantial part of the holding for one of these purposes.

The wording of this ground refers to a business to be carried on by the landlord. However, the landlord need not physically occupy the premises and it will be sufficient if occupation is through a manager or agent provided that the arrangement is genuine. Further, the ground is still available where the landlord intends to carry on the business in partnership with others. Where the landlord has a controlling interest in a company, any business to be carried on by the company, is treated as a business carried on by the landlord. The landlord has a controlling interest for this purpose, either if he beneficially holds more than half of the company's equity share capital, or if he is a member and able, without consent, to appoint or remove at least half of the directors (s 30(3)). Where the landlord is a company in a group of companies, it may rely on ground (g) where another member of the group is to occupy the premises (s 42). If the landlord is a trustee, he may be able to rely on an intention to occupy by a beneficiary (s 41).

31.5.7.3 The five-year rule

The most important limitation on the availability of this ground of opposition is the 'five-year rule' in s 30(2) of the Act. A landlord cannot rely on ground (g) if his interest was purchased or created within five years before the end of the current tenancy, ie, the termination date specified in the s 25 notice or s 26 request. However, the restriction only applies if, throughout those five years, the premises have been subject to a tenancy or series of tenancies within the protection of the Act.

The idea behind the provision is to stop a landlord buying a reversion within five years of the end of the lease, and then using this ground to obtain possession for himself at the end of the term. Thus, a landlord will not be able to rely on this ground if he purchased the premises subject to the tenancy within the last five years. However, the restriction does not apply where a landlord buys premises with vacant possession, grants a lease, and then seeks to end the lease within five years relying on this ground.

The wording of the provision refers to the landlord's interest being 'purchased' and this is used in its popular sense of buying for money (*Bolton (HL) Engineering Co Ltd v Graham & Sons Ltd* [1957] 1 QB 159). Thus, it will not cover a freeholder who has accepted the surrender of a head-lease without payment, and then seeks to use this ground against the sub-tenant.

Finally, a landlord who is unable to rely on ground (g) because of this restriction, may be able to rely on ground (f) if he intends to demolish or reconstruct the premises. This remains so even if the landlord then intends to use the reconstructed premises for his own occupation.

31.6 Compensation for failure to obtain a new tenancy

On termination, a tenant may be entitled to compensation for any improvements he has made. Additionally, if the tenant is forced to leave the premises he may lose the goodwill which he has built up and he will be faced with all the costs of relocation. This is particularly unfair to those tenants who are forced to leave the premises through no fault of their own, ie, if the landlord establishes one of the grounds of opposition (e), (f) or (g). In certain circumstances, therefore, the tenant may be entitled to compensation for failing to obtain a new tenancy where the landlord establishes one of these 'no fault' grounds.

31.6.1 Availability

Compensation is only available on quitting the premises in one of the following situations:

(a) Where the landlord serves a s 25 notice or counter-notice to a s 26 request stating one or more of the grounds of opposition (e), (f) or (g) but no others, and the tenant either:
   (i) does not apply to court for a new tenancy or does so but withdraws his application; or
   (ii) does apply to court for a new tenancy, but his application is refused because the landlord is able to establish his stated ground.

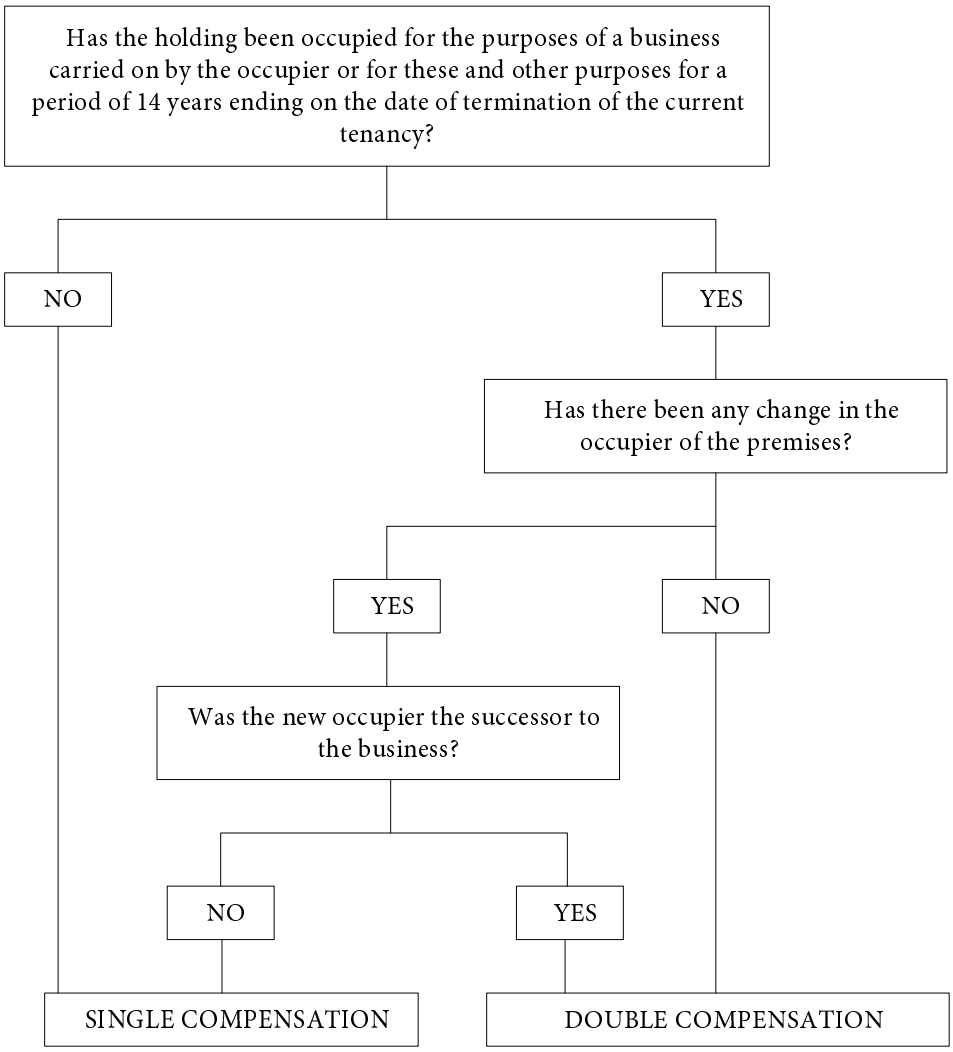
(b) Where the landlord serves a s 25 notice or counter-notice to a s 26 request specifying one or more of the grounds (e), (f) or (g) and others; the tenant applies to court for a new tenancy but the court refuses to grant a new tenancy solely on one or more of the grounds (e), (f) or (g). Here the tenant must apply to court for a new tenancy and ask the court to certify that a new tenancy was not ordered solely because one of these three 'no fault' grounds has been made out.

31.6.2 Amount

The amount of compensation is the rateable value of the holding multiplied by the 'appropriate multiplier' which is a figure prescribed from time to time by the Secretary of State, and is currently 1. In some cases, the tenant will be entitled to double compensation.

31.6.3 Double compensation

Sometimes the appropriate multiplier is doubled. This happens when the tenant or his predecessors in the same business have been in occupation for at least 14 years prior to the termination of the current tenancy. These provisions are summarised in the illustration below.



31.6.4 Contracting out

In some situations the tenant's right to compensation can be excluded by agreement between the parties. This agreement is often in the lease itself. However, s 38(2) of the Act provides that where the tenant or his predecessors in the same business have been in occupation for five

years or more prior to the date of quitting, any agreement to exclude or reduce the tenant's right to compensation is void.

31.7 The renewal lease

If the tenant follows all the correct procedures and properly applies to court for a new tenancy, the court will make an order for a new lease in two situations:

(a) if the landlord fails to make out his s 30 ground of opposition; or
(b) if the landlord did not oppose the tenant's application for a new tenancy.

The terms of this new lease are usually settled by agreement between the parties and it is only in default of such agreement that the court will be called upon to decide the terms. In either event, any new lease will also enjoy the protection of the Act.

The court has jurisdiction over the premises, duration, rent and the other terms.

31.7.1 The premises

The tenant is entitled to a new tenancy of the holding only as at the date of the order. This term was defined in **31.1.4.4**, and excludes any part of the premises which have been sub-let. However, the landlord (but not the tenant), has the right to insist that any new tenancy to be granted shall be a new tenancy of the whole of the demised premises including those parts sub-let.

The court may grant a new lease of less than the holding under s 31A, where the landlord establishes ground (f), the redevelopment ground, but the tenant takes a new lease of an 'economically separable part' of the holding (see **31.5.6**).

The new lease may also include appurtenant rights enjoyed by the tenant under the current tenancy.

31.7.2 The duration

The length of any new lease ordered by the court will be such as is reasonable in all the circumstances but cannot exceed 15 years (often it is much less than this). In deciding this issue the court has a very wide discretion and will take into account matters such as:

(a) the length of the current tenancy;
(b) the length requested by the tenant;
(c) the hardship caused to either party;
(d) current open market practice;
(e) the landlord's future proposals.

It may be that the landlord was unable to rely on ground (f) because he could not prove that his intention to demolish or reconstruct was sufficiently firm and settled at the date of the hearing (see **31.5.6**). If, however, the court is satisfied that he will be able to do so in the near future, it may order a short tenancy so as not to impede development later. Similarly, if the premises are shown to be ripe for development, the new lease may be granted subject to a break clause (*National Car Parks Ltd v The Paternoster Consortium Ltd* [1990] 15 EG 53). In the same way, where the landlord has narrowly missed being able to rely on ground (g) because of the five-year rule, the court may be prepared to grant a short tenancy.

31.7.3 The rent

The amount of rent to be paid is the greatest source of disagreement between the parties and specialist valuation advice will be essential. If the question of rent comes before the courts, they will assess an open market rent having regard to the other terms of the tenancy. However,

in assessing the rent the court is obliged to disregard certain factors which may otherwise work to the detriment of the tenant, ie:

(a) Any effect on rent of the fact that the tenant or his predecessors have been in occupation. The classic landlord's argument would be that the tenant, being a sitting tenant, would pay more in the open market for these premises simply to avoid relocation. This would inflate an open market rent and is thus to be disregarded.

(b) Any goodwill attached to the holding due to the carrying on of the tenant's business. The tenant should not have to pay a rent assessed partly on the basis of goodwill he generated.

(c) Any effect on the rent of improvements voluntarily made by the tenant (certain conditions must also be satisfied).

(d) Where the holding comprises licensed premises, any addition in value due to the tenant's licence.

Where the premises are in disrepair due to the tenant's failure to perform his repairing obligation, conflicting views have been expressed on whether the court should disregard this in setting the rent of the new tenancy. One view is that the premises should be valued in their actual condition. This will probably produce a lower rent but the landlord may be able to sue the tenant for breach of his repairing obligation.

The other view is that the premises should be valued on the basis that the tenant has complied with his obligation, thus preventing the tenant benefiting from his own breach. This view is supported by cases such as *Crown Estate Commissioners v Town Investments Ltd* [1992] 08 EG 111.

In *Fawke v Viscount Chelsea* [1980] QB 441, the premises were in disrepair because the landlord was in breach of his repairing obligation. The court decided that the premises should be valued in their actual condition and, therefore, fixed a new rent which was below open market value but which increased once the landlord had complied with his obligation.

Under s 34(3), the court has power to insert a rent review clause in the new lease whether or not the previous lease contained such a provision. The frequency and type of review is at the discretion of the court which may be persuaded by the tenant to make provision for downward revisions as well as upward (see *Forbuoys plc v Newport Borough Council* [1994] 24 EG 156).

As to the effect of the LT(C)A 1995, see **31.7.4**.

Finally, the court does have power to require the tenant to provide guarantors.

31.7.4 Other terms

It will only fall to the court to decide other terms in the absence of agreement between the parties. In fixing the other terms the court must have regard to the terms of the current tenancy and all other relevant circumstances. For that reason, the terms will be much the same as before. The leading case in this area is *O'May v City of London Real Property Co Ltd* [1983] AC 726 which held that if one of the parties seeks a change in the terms, it is for that party to justify the change. Further, the change must be fair and reasonable and 'take into account, amongst other things, the comparatively weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity' (per Lord Hailsham in *O'May).* Therefore, the tenant should be on his guard against any attempt by the landlord to introduce more onerous obligations into the new lease (eg, a more restrictive user covenant). In the *O'May* case the landlord was, in effect, trying to transfer the responsibility for the repair and maintenance of office premises to the tenant. This would have increased the value of the reversion by more than £1 million but the House of Lords held that the landlord was not entitled to do this. Notwithstanding the effect of the *O'May* case, variations may be made in the renewal lease to reflect the changes introduced by the LT(C)A 1995. The renewal lease will,

of course, be subject to the provisions of that Act. This will often mean that under the current lease (granted before 1 January 1996) the original tenant was liable for the entire duration of the term through privity of contract; whereas for the renewal lease, privity of contract will not apply. This change is one of the circumstances to which the court must have regard in fixing the rent and other terms of the new lease. For example, the landlord may wish to alter the terms of the alienation covenant to balance the effect of the loss of privity of contract (see *Wallis Fashion Group Ltd v General Accident Life Assurance Ltd* [2000] EGCS 45; and **20.2.4.2**).

31.8 The order for the new lease

Any new lease ordered by the court will not commence until three months after the proceedings are 'finally disposed of'. This is when the time for appeal has elapsed, and for appeals to the Court of Appeal the time limit is four weeks from the date of the order. The tenant continues to occupy under his old tenancy during this period. Either party may appeal.

If the court makes an order for a new tenancy upon terms which the tenant finds unacceptable (eg, as to rent), the tenant may apply for revocation of the order within 14 days. In such a case, the existing tenancy will continue for such period as the parties agree or the court determines as necessary to enable the landlord to re-let the premises.

Part III
PROPERTY AND INSOLVENCY

Chapter 32
Insolvency and its Effect on Commercial Property

32.1	Why insolvency matters	291
32.2	Measures to reduce the perceived risk of insolvency	291
32.3	Always establish the type of insolvency regime	292
32.4	Identify the type of contract	293
32.5	Different types of insolvency regime	294
32.6	Setting aside transactions which have already been completed	299
32.7	The effect of a tenant becoming insolvent	301
32.8	Requiring the insolvency official to pay rent	308
32.9	Disclaimer and its effects	309

32.1 Why insolvency matters

If one party (X) to an existing contract becomes insolvent, this will cause the other party (Y) significant problems. X is likely to breach its obligations, and may pull out of the contract altogether. Completed transactions to which X is a party may be reversed by the court. Y's normal remedies for breach will be restricted either as to what Y can do, or how quickly it can act. All this may put Y in breach of its own obligations to others (for example, an insolvent tenant's failure to pay rent will reduce the landlord's income stream, which may mean it defaults on its mortgage payments; similarly, in a chain of related sales, if one buyer becomes insolvent and fails to complete, buyers higher up the chain may well not have sufficient funds to complete their own purchases). This is why, before entering into the contract, Y should always check X's financial track record and resources (by taking references, establishing its credit rating and looking at its accounts).

Also, when X becomes insolvent, it usually loses the ability to deal with its assets. Even if it retains legal ownership, any purported disposition by X (without the involvement of its insolvency official or the court) may well be void. This is why Y should always check that a party with whom it proposes to enter into a contract is not insolvent. Ways to do this are discussed at **32.3**. If entering into a contract with an insolvency official, Y will usually find that the contractual terms will need to be modified.

The Insolvency Act 1986 (as amended) is the primary source of insolvency legislation. In this chapter, it is referred to as the 'IA 1986'.

32.2 Measures to reduce the perceived risk of insolvency

If X's financial strength is in doubt, Y may still be willing to contract with X if additional financial reassurance is provided. If X subsequently becomes insolvent, Y should then have meaningful ways to ensure performance of the contract (or at very least, payment of damages for breach) without becoming embroiled in the insolvency process. These could include:

(a) requiring another person (with a better financial track record) to enter into the contract at the outset, either as joint covenantor with X or as guarantor for X. This could include requiring the existing tenant (who wishes to assign to X) to act as guarantor by way of an authorised guarantee agreement (AGA);

(b) requiring X to obtain a bank bond or guarantee. Here the bank agrees to perform the obligations, or pay damages, if X is in breach. Usually, the bank's liability is capped at a specified amount;

(c) (where the contract is the grant of a new lease, or the assignment of an existing lease to X) requiring X to deposit cash in a rent deposit, held either by a neutral party or (more likely) by the landlord (see **14.5**);

(d) drafting the contract to include a right for Y to rescind if X becomes insolvent or is likely to do so. At least Y is then free to do a different deal with someone else. A forfeiture clause in a lease, which is triggered by an insolvency event, is very similar to this. For more details on forfeiture, see **30.5**;

(e) keeping a close eye on X's financial and trading performance, so that Y picks up very quickly any signs of impending insolvency. This might include watching for press announcements of the loss of a major contract, reacting quickly to late payments of rent by the tenant or investigating the background to a request from an occupation tenant to pay rent monthly rather than quarterly.

If X becomes insolvent, Y should always check whether it can take advantage of any of these measures (as they may be quicker or more productive than pursuing X for performance or damages).

32.3 Always establish the type of insolvency regime

When Y first becomes aware of X's insolvency or likely insolvency, it is critical to establish precisely which type of insolvency regime is involved. Y's range of remedies will vary considerably from one regime to another, and the terminology can be misleading. For example, being told 'the receivers have gone in' might refer to a receiver under the LPA 1925 (a 'LOPA receiver'), an administrative receiver or the Official Receiver, acting either as liquidator or as interim trustee in bankruptcy. The range of insolvency regimes is set out in **Table 32.1** below, and a more detailed explanation of the types of regime and their consequences is given in the appropriate part of **32.5**.

Table 32.1 The alternative insolvency regimes

Where X is an individual	**Where X is a company**
Law of Property Act Receiver	Law of Property Act Receiver
Individual Voluntary Arrangement (IVA)	Company Voluntary Arrangement (CVA)
–	Administrative Receivership
–	Administration
Bankruptcy (either on X's own petition or that of a creditor)	Liquidation • Compulsory • Voluntary (triggered by creditors) • Voluntary (triggered by members) (Liquidation is also known as winding up)

32.3.1 How to check which insolvency regime applies

Y can check which insolvency regime applies by following these guidelines:

(a) *Voluntary arrangements (CVA or IVA)*. Once a CVA has been agreed, it should be registered at Companies House and thus be discoverable by a company search. An IVA that has been agreed should be registered on the Insolvency Service register, and this can be searched on-line. Also the supervisor of the voluntary arrangement must give notice to all X's known creditors, so Y (if he is X's landlord) may find out that way. An interim order (for an IVA) can be discovered only by asking the local court.

(b) *Appointment of a receiver where X is a company*. This will be registered at Companies House (regardless of whether this is a LOPA receiver, or an administrative receiver). All

business correspondence has to state that a receiver has been appointed, and an administrative receiver also has to notify all known creditors promptly after his appointment.

The appointment of either receiver cannot be noted on the title to any registered property belonging to X which is affected by the receivership, but this will not matter, as the debenture or charge under which the receiver is appointed will have been noted on the title already. However, the receiver may wish to ensure that any notices which are served by Land Registry will reach him. He may therefore wish to register his own address as an additional address for service.

(c) *Administration order*. This should show up as an entry in the Companies House file, but to find out about any recent administration order that has not yet been registered at Companies House, Y should telephone the Central Registry of Winding Up Petitions and the county court for the area where X's registered office is situated. A notice of the administrator's appointment may be entered on the registers of title of any property that is affected by the administration, but absence of such a notice is not conclusive as no application for this entry may have been made.

(d) *Voluntary liquidation*. The winding-up resolution must be registered at Companies House within 15 days, so will be revealed by a company search. A notice of the liquidator's appointment may be entered on the registers of title of any property that is affected by the liquidation, but absence of such a notice is not conclusive as no application for this entry may have been made.

(e) *Compulsory liquidation*. The winding-up order will be registered at Companies House 'forthwith', so will be revealed by a company search. To be sure that there are no more recent applications/orders for compulsory liquidation, Y should telephone the Central Registry of Winding Up Petitions (which covers petitions for compulsory liquidation, whether submitted in the High Court or the county court). A notice of the liquidator's appointment may be entered on the registers of title of any property that is affected by the liquidation, but absence of such a notice is not conclusive as no application for this may have been made.

(f) *Bankruptcy*. The register of bankruptcy orders can be searched on-line at the Insolvency Service. Both bankruptcy petitions and orders are recorded at the Land Charges Department. Details may also have been entered on the register of title for X's properties as the court is supposed to notify the Land Registry when a bankruptcy petition is issued (Insolvency Rules 1986, r 6.13).

32.3.2 The insolvency official

Each of the insolvency regimes listed at **32.3.1** is implemented by a different person (the supervisor (nominee) of a voluntary arrangement, a LOPA receiver, an administrative receiver, an administrator, a liquidator, or a trustee in bankruptcy). For convenience, in this chapter, all of these individuals are called 'insolvency officials'.

32.4 Identify the type of contract

It is equally important to know what type of contract exists between X and Y, as this can also affect the remedies available to Y when X becomes insolvent. For example, it may be:

(a) an existing lease;

(b) an agreement for lease (lease not yet granted);

(c) a recently completed transfer;

(d) an exchanged contract for sale which has yet to complete;

(e) an existing freehold restrictive covenant;

(f) a pure contract, with no property interest at all – such as a contractual licence to occupy;

(g) a new sale contract or lease into which the insolvency official is proposing to enter with Y as part of the process of realising X's assets.

32.5 Different types of insolvency regime

32.5.1 Voluntary arrangements (CVAs and IVAs)

Voluntary arrangements can arise under ss 1 to 7 of the IA 1986 (for companies) or ss 252 to 263 of the Act (for individuals). They are a statutory compromise agreement between X (who is insolvent) and the majority of its creditors. Where X is a company, the arrangement is known as a CVA; where X is an individual, it is known as an IVA.

The aims of a voluntary arrangement are for the general creditors to agree to proposals which secure them better payments than would be the case under a formal insolvency distribution, but which reduce the overall burden on X by giving it longer to pay its debts or by reducing the amount it has to pay. A voluntary arrangement can compromise both existing and future debts (such as rent that will become due under a lease). A voluntary arrangement rarely lasts for more than five years. The distribution of assets in accordance with the agreed arrangement is supervised by a licensed insolvency practitioner (called 'the nominee').

A voluntary arrangement cannot include proposals which would adversely affect the rights of secured creditors or preferential debtors, unless they consent. Interestingly, a voluntary arrangement can propose changes to third-party liabilities (usually the release from liability of guarantors or former tenants who have given an AGA). Such proposals have been challenged successfully on grounds of unfair prejudice (see **32.5.1.1**) in recent cases.

The advantage of a CVA/IVA is that it avoids the more formal insolvency regime. This is particularly important where X would be prohibited (by the rules of his professional organisation) from practising, or would have to give up his other directorships, if he was declared bankrupt. It may be less expensive than the alternative insolvency regimes and can be more flexible.

32.5.1.1 Approval of the voluntary arrangement

A voluntary arrangement requires the consent of over 75% in value (not numbers) of the creditors who attend the initial meeting to discuss the proposals. A CVA also has to be approved by at least 50% of X's members (or more if the constitution of X so prescribes). Creditors who oppose the arrangement can challenge its terms on grounds that they cause them unfair prejudice. They must do so quickly (within 28 days). The IA 1986 does not define unfair prejudice, but recent case law has upheld claims by landlords that a CVA should be revised on this ground. (See *Prudential Assurance Company Ltd & Others v PRG Powerhouse Ltd & Others* [2007] EWHC 1002 and *Mourant & Co Trustees Ltd v Sixty UK Ltd (in administration)* [2010] EWHC 1890, where the CVA proposed stripping some landlords of their rights to pursue the guarantor of the leases for rent arrears. In both *Powerhouse* and *Mourant*, the original terms of the CVA were held to offer the landlord inadequate compensation for being deprived of its rights against the guarantors.)

32.5.1.2 Moratorium

Unless X is a 'small company' and particularly requests this, there is no moratorium to prevent Y seeking to enforce its remedies during the period leading up to formal approval of the CVA. A small company is one which satisfies two of three criteria (these relate to turnover, balance sheet assets and number of employees) and is not one of the types of company which are disqualified (by the IA 1986) from being 'small companies'. For more detail on how the small company moratorium works, see **Flowchart 3** at **32.7.2**.

There are very complex moratorium arrangements in an IVA (IA 1986, ss 252 and 254). More details are given in **Flowchart 1** at **32.7.2**.

The moratorium provisions apply only up to the point that the CVA/IVA is approved. After that, X may dispose of property only in accordance with the terms of the approved voluntary arrangement.

32.5.2 Receivership

Receivership occurs where a person is appointed (by the holder of a mortgage or charge) to realise the charged assets (either taking income from them, or selling them) in order to secure repayment of the debt due from the borrower. Thus receivership is only available to lenders who hold security. In a property context, the most likely varieties of receiver will be a LOPA receiver or an administrative receiver (less frequently encountered now). The rules which govern what such a receiver can do (and thus how these operate to affect other parties such as Y) differ significantly from those applicable to other types of insolvency official (administrators, liquidators or trustees in bankruptcy).

Table 32.2 below indicates how these two types of receiver differ.

Table 32.2 The differences between a LOPA receiver and an administrative receiver

Law of Property Act Receiver	**Administrative Receiver**
Can be appointed if X is an individual or a company.	Can be appointed only if X is a company
Appointed by a lender with a fixed charge over the property as security. It is unusual for a rack rent lease to be used as security (since it often has no capital value), so a LOPA receiver is more likely to be appointed in respect of freehold land or long leases granted for a premium.	Appointed by a lender who has a floating charge over the whole or substantially the whole of X's undertaking and • that floating charge was executed on or before 15 September 2003; *or* • that floating charge was executed after that date but falls into one of the limited categories which continue to qualify for administrative receivership (such as PPI and other projects loans).
Appointed either under the terms of the mortgage, or under the default power in s 101 of the LPA 1925, in circumstances where the mortgagee's power of sale has arisen.	Appointed under the terms of the floating charge, as expanded by s 28 of the IA 1986 and following.
Receiver acts only in relation to the charged asset (the particular property).	Receiver acts in relation to the class of assets covered by the floating charge.
Need not be a licensed insolvency practitioner.	Must be a licensed insolvency practitioner.

<table>
<tr><th>Law of Property Act Receiver</th><th>Administrative Receiver</th></tr>
<tr><td>The LOPA receiver can always collect the income of the property. Usually the mortgage expands these powers to include sale and letting of the property. The aim is for the LOPA receiver to realise enough from the asset to allow repayment of the debt, though he must use reasonable endeavours to secure the market value of the asset. He is not interested in maximising the amount which other classes of creditor will recover.</td><td>The administrative receiver's powers depend on the mortgage, but these are expanded by statutory powers of sale, granting and surrendering leases, and carrying on X's business (because the floating charge is over all of X's undertaking). The aim is for the administrative receiver to realise enough from the assets to allow repayment of the debt, though he must use reasonable endeavours to secure the market value of the asset. He is not interested in maximising the amount which other classes of creditor will recover.</td></tr>
<tr><td colspan="2">Legal title to the assets remains in X</td></tr>
<tr><td>The LOPA receiver cannot
disclaim the charged property (whether onerous or not);
ignore any obligations that bind the charged property, eg restrictive covenants, leases or easements. He must observe these, or negotiate to escape from them or modify them.</td><td>The administrative receiver cannot
disclaim any assets (whether they are onerous or not);
ignore any obligations that bind the property asset, eg restrictive covenants, leases or easements. He must observe these, or negotiate to escape from them or modify them.</td></tr>
<tr><td colspan="2">The LOPA/administrative receiver acts as agent of X</td></tr>
<tr><td colspan="2">If the LOPA/administrative receiver enters into a new contract, he will be personally liable on that contract (unless the terms of the contract state otherwise, as they usually will).</td></tr>
<tr><td colspan="2">The appointment of a LOPA/administrative receiver does not impose a moratorium on actions against X by other creditors or contracting parties. Thus Y can seek to enforce any contract that it has with X.</td></tr>
</table>

32.5.3 Bankruptcy

Bankruptcy is applicable only to an insolvent individual (X). A licensed insolvency practitioner (generally one selected by the creditors) is appointed to act as the trustee in bankruptcy, to collect in the realisable assets belonging to X, convert them to cash and distribute this to the creditors. Once this process is complete, X is released from any of the debts he incurred up to the date of bankruptcy if they have not been fully settled in the bankruptcy.

A bankruptcy order is made by the court following presentation of a bankruptcy petition. The rules are complex, but in essence, a petition can be lodged by X (on grounds that he is unable to pay his debts), or by a unsecured creditor of X who is owed more than £750 and can demonstrate that X cannot pay this debt or has no reasonable prospect of doing so.

32.5.3.1 Effect of bankruptcy

Once the trustee in bankruptcy is appointed, X's assets vest in him automatically. Where this includes leasehold property, this operates as an excluded, automatic assignment and does not need the consent of the landlord. Once the assets have vested in the trustee in bankruptcy, X loses the ability to dispose of them, so Y should not enter into new contracts with X in relation to his property. Y should deal only with the trustee in bankruptcy.

32.5.3.2 Powers of trustee in bankruptcy

The trustee in bankruptcy has a wide range of powers (detailed in the IA 1986), enabling him to manage the assets and eventually sell them. The trustee in bankruptcy must observe any existing restrictions and covenants which affect existing properties vested in him in this way (eg registered restrictive covenants affecting the property). This includes paying rent on existing leases (see **32.8.2.3**). However, the trustee is not obliged to implement any outstanding contracts (such as sale or purchase contracts), though he may choose to do so if this is consistent with proper realisation of X's assets. If the trustee considers the properties or contracts to be onerous, he can disclaim them (in the same way as a liquidator, but not other insolvency officials). For more details about disclaimer and its effect, see **32.9**.

32.5.3.3 Restrictions placed on the bankrupt

During the bankruptcy process there are restrictions both on what X can do and on the action its creditors may take against X to recover sums due to them or secure performance of obligations. These restrictions include the following:

(a) Between presentation of the bankruptcy petition and the vesting of the property in the trustee in bankruptcy, any purported disposition of that property by X is void (IA 1986, s 284(1)) unless it is:
  (i) made with the court's permission or subsequent ratification; or
  (ii) a disposition to a purchaser acting in good faith, for value and without notice of the presentation of the petition.

(b) Between presentation of the bankruptcy petition and making the bankruptcy order the court can, if asked, stay any action or legal process brought against X or its property (IA 1986, s 285(1)).

(c) Once the bankruptcy order has been made, unsecured creditors may not enforce a remedy against X or its property, or bring any action or legal proceedings against X, unless they have the leave of the court to do so. Secured creditors are not affected by this restriction (IA 1986, s 285(3)).

32.5.4 Administration

Administration is applicable only to an insolvent company (X). It is intended to provide an opportunity to rescue X from insolvency (perhaps selling it as a going concern). If this is impossible, the administration will focus instead on realising X's assets in a manner that produces a better result for the creditors as a whole than they would achieve in a liquidation. The administrator will seek to ensure that secured and preferential debts are cleared in full.

32.5.4.1 Appointment of the administrator

The administrator may be appointed by the court (on the request either of a director of X or of a creditor) or directly (without court involvement) by resolution of X in general meeting, or by resolution of its directors or by the holder of a floating charge (dated on or after 15 September 2003) over the whole or substantially the whole of X's assets. The administrator must be a licensed insolvency practitioner.

32.5.4.2 Powers and duties of the administrator

The administrator has powers and duties as set out in the IA 1986. These are designed to equip the administrator to manage X's business and property, with a view to rescuing X from insolvency. The administrator will put forward proposals as to which assets should be sold and which retained, which debts should be compromised and at what level, which contracts (to which X is a party) will be performed by X and which it proposes should be terminated, and whether and how X should continue to trade. The administrator is an officer of the court, so must act fairly.

An administrator cannot disclaim any property of X, neither can he simply repudiate contracts into which X has entered. He must negotiate their termination, or allow X to be in breach of them and let the other party pursue what remedies it may have for that breach.

The administrator acts as X's agent and has no personal liability on the contracts into which X has already entered, or new ones into which it enters during the course of the administration. X's property does not vest in the administrator, so if the administrator wishes to dispose of properties, he does so in X's name. Once X is in administration, the directors lose their ability to determine the disposal of the properties.

Administration usually lasts for no more than one year. If the company is still insolvent at that point, the administration will generally change either to a CVA or to liquidation.

32.5.4.3 Moratorium

Whilst X is in administration, a statutory moratorium applies (IA 1986, Sch B1, para 43). This prevents both forfeiture by peaceable re-entry and any 'legal process' against X without the consent of the administrator or the court. This restricts X's creditors from seeking specific performance by X of its contracts with them (perhaps a contract to purchase land), suing for damages in lieu of performance, or seeking repayment of debts owed to them by X (such as a landlord trying to recover rent arrears). Similarly, those creditors cannot issue a petition to put X into liquidation, and the restriction on legal process means that a tenant will need consent before it can apply for a new lease under Pt II of the LTA 1954 where its landlord is in administration (*Somerfield Stores Ltd v Spring (Sutton Coldfield) Ltd* [2009] EWHC 2384). While consent will sometimes be given, the delay and uncertainly means that the moratorium can be very frustrating for creditors.

32.5.5 Liquidation

Liquidation is also applicable only to insolvent companies. It is appropriate where X cannot be rescued and its assets must be realised (converted into cash) for distribution to its creditors (or shareholders if there is a surplus). In such circumstances, the unsecured creditors may receive very little towards the debt or damages for breach of contract owed to them by X.

32.5.5.1 Types of liquidation

A voluntary liquidation is started by a resolution of X's shareholders (members). Usually they pass such a resolution because X is insolvent, and in this case X's creditors must approve the resolution and choice of liquidator. This is a creditors' voluntary liquidation. Sometimes, the shareholders wish to wind up the company even though it is solvent (a members' voluntary liquidation). No court order is needed to confirm a voluntary liquidation.

Alternatively, compulsory liquidation occurs where the court makes an order following presentation of a winding-up petition against X because it cannot pay its debts. Such a petition is often lodged by a creditor (who must be owed at least £750, though it would seem that, unlike a bankruptcy petition, this need not be on an unsecured basis).

32.5.5.2 Powers and duties of the liquidator

The liquidator deals with realisation of X's assets and distribution of the proceeds, but X's assets do not vest in him. The liquidator must be a licensed insolvency practitioner. He has wide-ranging powers and duties as set out in the IA 1986, but may need approval for some actions, depending on whether the liquidation is voluntary or compulsory.

Unlike other insolvency officials, a liquidator (and a trustee in bankruptcy) has the ability to disclaim any property or other assets belonging to X that are considered to be onerous. Contracts which impose obligations on X, either to do things or to pay money, would generally be onerous. This would include contracts in which X agrees to take a lease or purchase property, or leases where X is the tenant. It might also include a sale agreement

where X is the seller. Disclaimer terminates X's rights and obligations under the contract and is possible regardless of whether there is a termination clause in the contract. It is very rare for freehold property to be considered onerous, as it usually has a positive value. However, if the obligations associated with its ownership are extensive and costly, it could be disclaimed as onerous. For more on disclaimer see **32.9**.

32.5.5.3 Moratorium

Unlike administration, no moratorium applies in a voluntary liquidation. Thus creditors, and other parties (such as Y) to contracts into which X entered (but of which it is now in breach) can take enforcement action, unless the liquidator obtains a court order (under s 112 of the IA 1986) to prevent this.

In a compulsory liquidation, once the winding-up order is made by the court, Y cannot take any action or proceedings against X or its property without the consent of the court. Also, from the earlier point when the winding-up petition is presented, any purported disposition by X of its property is void, unless made with the court's permission or subsequent ratification.

32.6 Setting aside transactions which have already been completed

One of the surprising implications of insolvency is that certain kinds of insolvency official (liquidators, administrators and trustees in bankruptcy) can ask the court to set aside completed transactions (potentially resulting in the return of the property or an award of damages against Y as the current owner). This power is designed to prevent some creditors 'getting in first', to the detriment of the remainder.

The two most important categories of completed transaction which can be set aside are transactions at an undervalue and preferences. **Table 32.3** below shows the essential features of both.

Table 32.3 Transactions at an undervalue and preferences

Transactions at an undervalue	**Preferences**
IA 1986, s 238 (insolvent companies). IA 1986 s 339 (insolvent individuals).	IA 1986, s 239 (insolvent companies). IA 1986 s 340 (insolvent individuals).
X was a party to a completed transaction (either direct with Y, or with a predecessor in title of Y).	Y is one of X's creditors or a guarantor of X's debts.
X received substantially less than the value of the property disposed of in the transaction (perhaps it was a gift, or only nominal consideration was paid).	X does something which has the effect of putting Y in a better position than it would have been if X were subject to a formal insolvency process (gave a 'preference' to Y)
X's intention in entering into the undervalue transaction is irrelevant.	X must do this with the *desire* to produce the effect of putting Y in a better position. Where Y is connected to X in some way, this desire is presumed to exist.
X subsequently goes into administration or liquidation (companies), or becomes bankrupt (individuals). Other forms of insolvency process cannot take advantage of this process.	

Transactions at an undervalue	Preferences
The completed transaction took place within: • the 2-year period leading up to the administration or liquidation (where X is a company); • the 5-year period leading up to the bankruptcy (where X is an individual).	The preference was given within: • the 2-year period leading up to the administration, liquidation or bankruptcy, where Y is connected to X; *or* • the 6 months leading up to that point, where Y is not connected to X.
At the time of the transaction, or immediately after and in consequence of the transaction, X is in practice insolvent (ie cannot pay its debts, even if it is not yet subject to any formal insolvency process). Where X is an individual, this requirement does not apply in the 2 years immediately before the bankruptcy – it applies only during the earlier part of the 5-year period	At the time of the giving the preference, or immediately after and in consequence of giving it, X is in practice insolvent (ie cannot pay its debts, even if it is not yet subject to any formal insolvency process).
Where X is a company, the transaction, even if at an undervalue and completed during the 2-year period, will not be at risk of being reversed if X can show that it entered into the transaction in good faith, for the purposes of carrying on its business, and at the time of the transaction there were reasonable grounds for believing that the transaction would benefit the company. There is no equivalent escape clause if X is an individual.	No equivalent.
The administrator, liquidator (with various consents from creditors and shareholders) and the trustee in bankruptcy (as appropriate) can ask the court to set the transaction aside. The court can make such order as it sees fit, including ordering the return of the property or payment of damages.	
If Y was the other party to the undervalue transaction with X, Y cannot argue (as a defence to any such court order) that it did not know: • X was insolvent or in danger of becoming so; or • the value Y was giving was significantly less than market value.	If Y was the party given the preference, it cannot argue (as a defence to any such court order) that it did not know: • X was insolvent or in danger of becoming so; or • X had the desire to give Y a preference.

Transactions at an undervalue	Preferences
If Y is not the other party to the undervalue transaction/preference, but is a successor in title to the party that was, then Y may be protected from any such court order to return the property or pay damages (IA 1986, ss 241/342). Protection is available where Y: • acted in good faith when it entered into its own transaction; and • gave value for its own transaction. Y will be presumed *not* to act in good faith if, at the time of its own transaction, either: • Y was connected to the party to whom X transferred at an undervalue or to whom X gave the preference; *or* • Y had notice of both the previous undervalue transaction/preference *and* the fact that X had since entered into administration, liquidation or bankruptcy. If Y can prove otherwise then the protection will once more apply. If Y gave no value for its own transaction then it cannot benefit from this protection.	

This is why, when investigating title, if there is evidence of an undervalue transaction it is necessary to carry out either a company search or a land charges (bankruptcy) search against the company or individual that was the 'donor' under that transaction (X), to see if they subsequently went into administration, liquidation or became bankrupt.

32.7 The effect of a tenant becoming insolvent

32.7.1 The range of remedies available to a landlord

Where an insolvent tenant (X) fails to pay its rent or perform its obligations, the landlord may want to pursue all or any of the following remedies:

(a) sue for unpaid rent (proceedings);
(b) levy distress for unpaid rent (the rules on this are due to change);
(c) divert to itself the rent due from a sub-tenant to X (under s 6 of the Law of Distress Amendment Act 1908) (a 's 6 LODAA notice');
(d) sue for specific performance (proceedings);
(e) sue for damages for breach of covenant (proceedings);
(f) forfeit the lease on grounds either of insolvency or breach (for more details see **30.5**);
(g) start insolvency proceedings (perhaps a petition for bankruptcy or compulsory liquidation) in order to bring pressure to bear;
(h) force a trustee in bankruptcy or liquidator, acting for X, to decide whether to disclaim the lease or not, so that (if they do disclaim) at least Y is free to re-let.
(i) persuade the insolvency official to surrender the lease

In some cases the insolvency official may be personally liable to pay the rent, or the rent may qualify as an expense of the insolvency (see **32.9.5**). This gives the landlord an extra remedy.

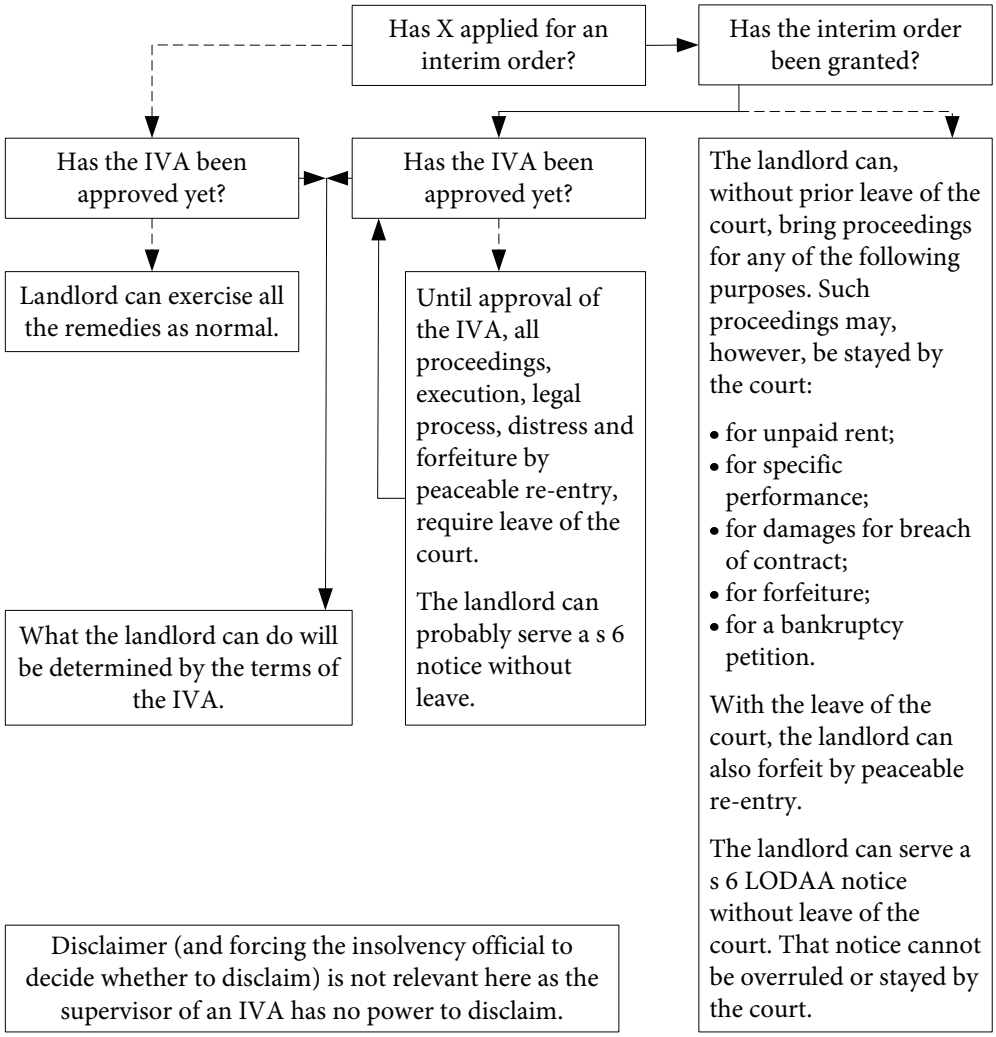
As indicated in **32.2**, the landlord should also consider whether it has meaningful remedies against third parties (for example, guarantors, or through a rent deposit or a performance bond from a bank). Bear in mind, if X is subject to a voluntary arrangement, the obligations of those third parties may have been amended (see **32.5.1**).

32.7.2 The restrictions on exercise of these various remedies

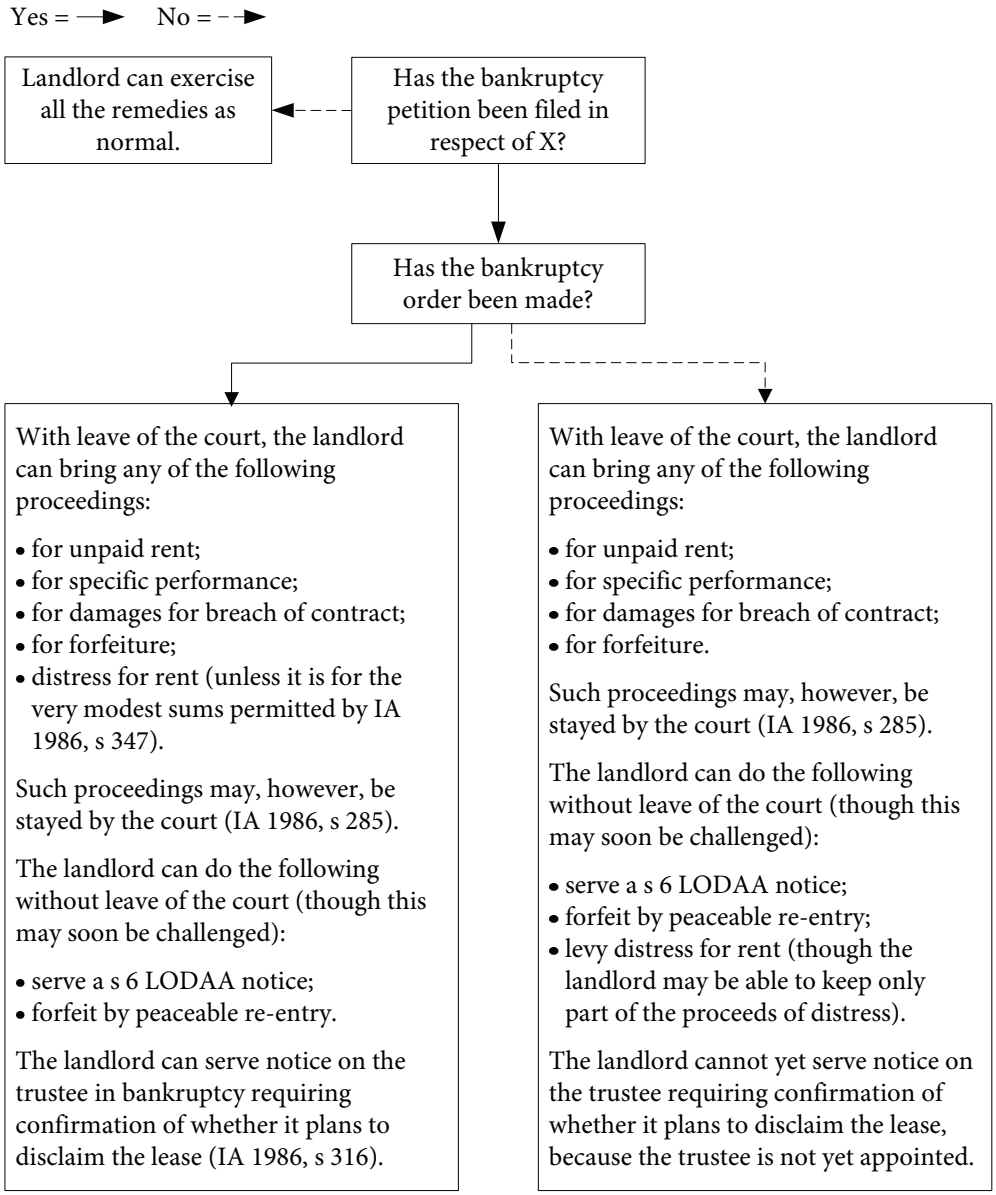
To illustrate how the various principles outlined in **32.5** impact on the landlord's remedies against the tenant, see **Flowcharts 1 to 6** below. Consult the correct flowchart for the insolvency regime that affects X.

Flowchart 1 Where an individual tenant (X) is subject to an IVA

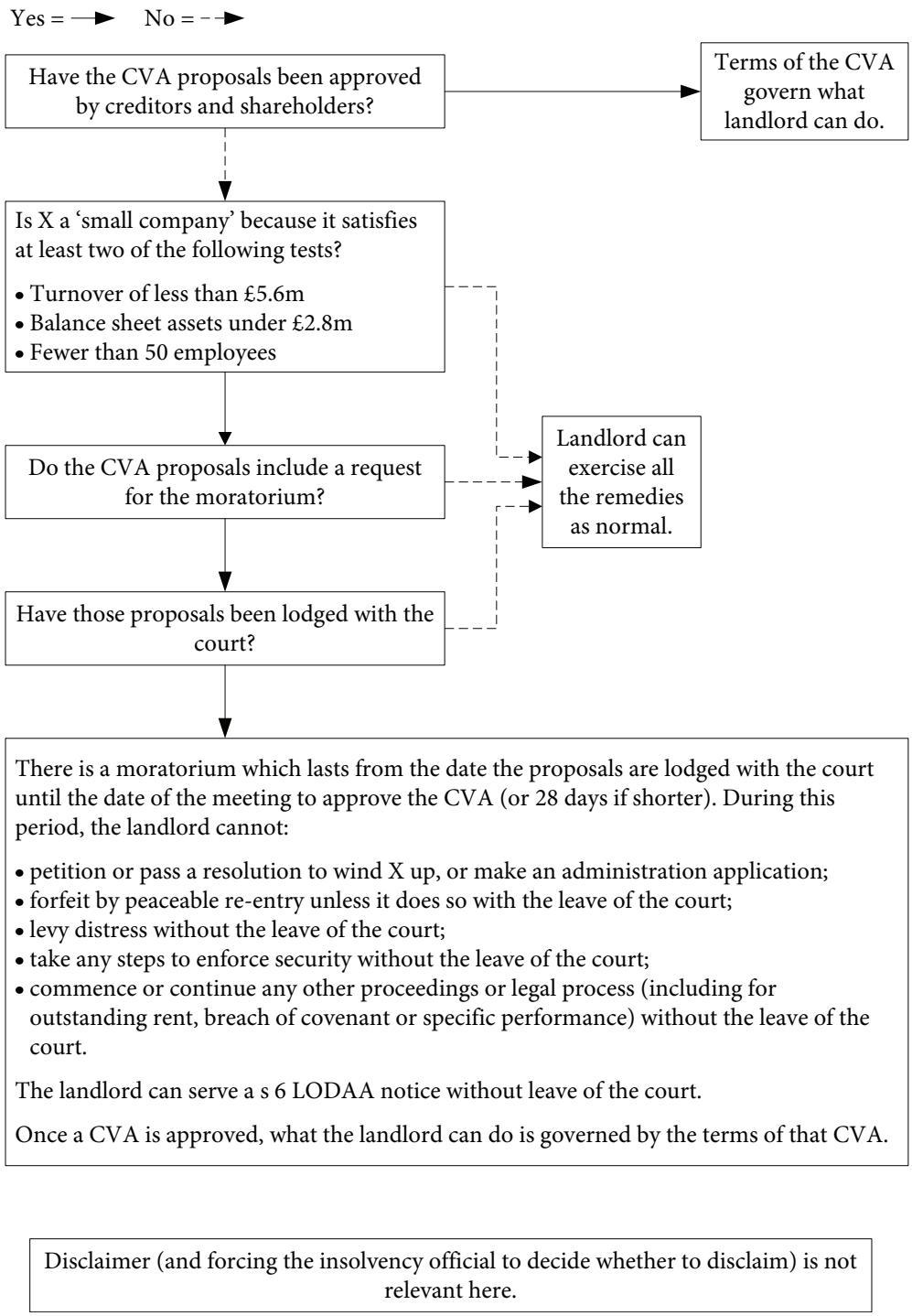
Yes = → No = - -►



Flowchart 2 Where an individual tenant (X) is bankrupt

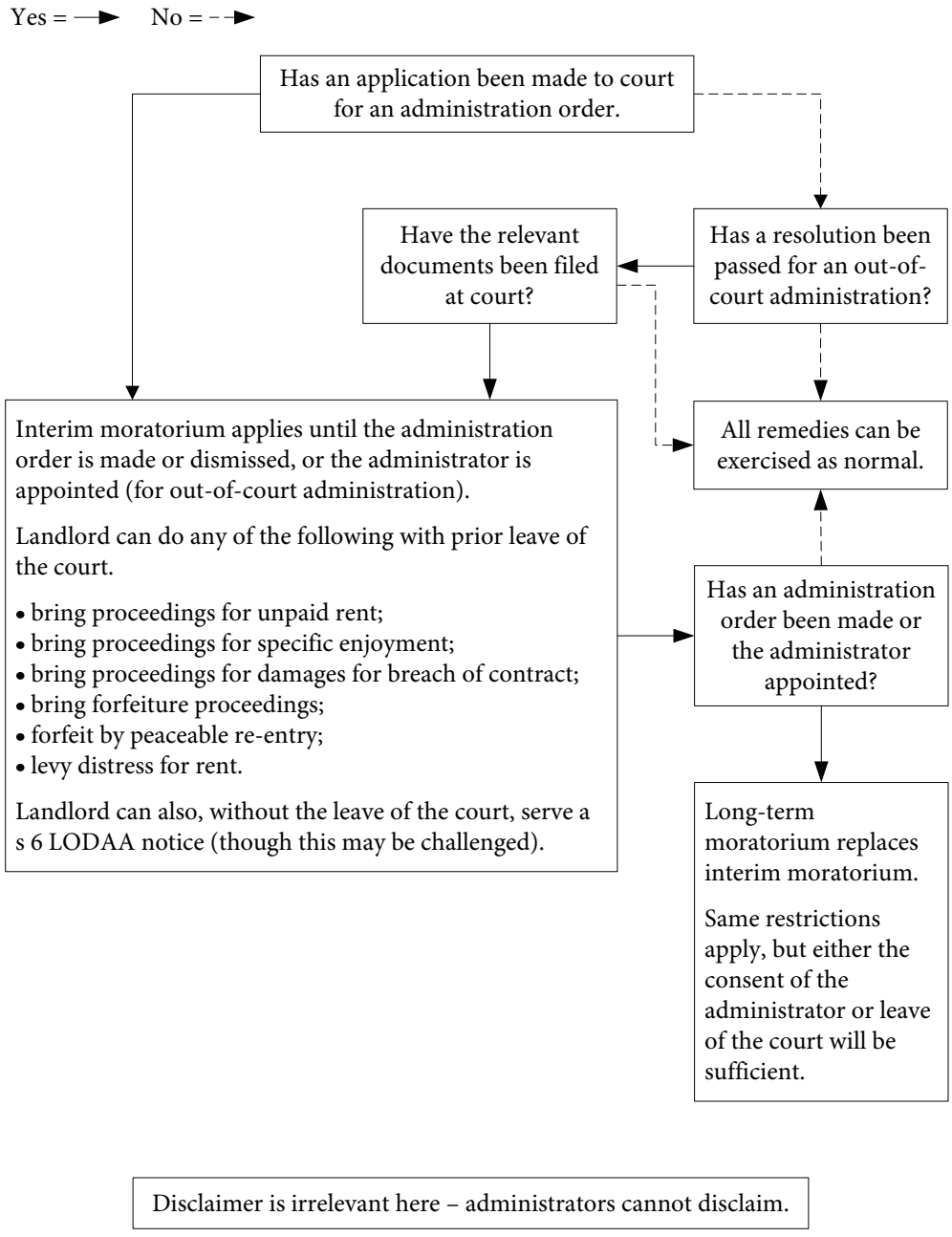


Flowchart 3 Where a corporate tenant (X) is subject to a CVA



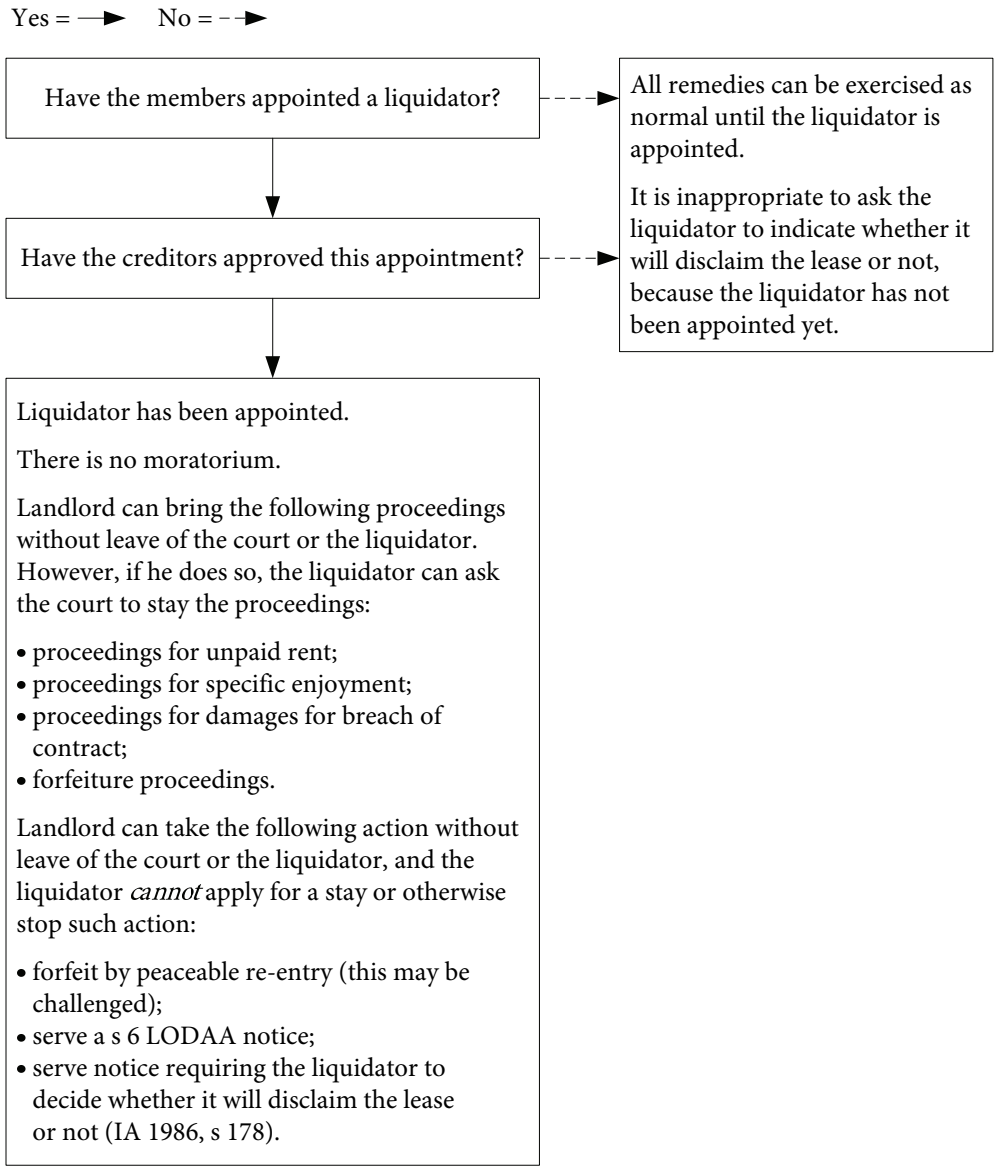
Disclaimer (and forcing the insolvency official to decide whether to disclaim) is not relevant here.

Flowchart 4 Where a corporate tenant (X) is in administration

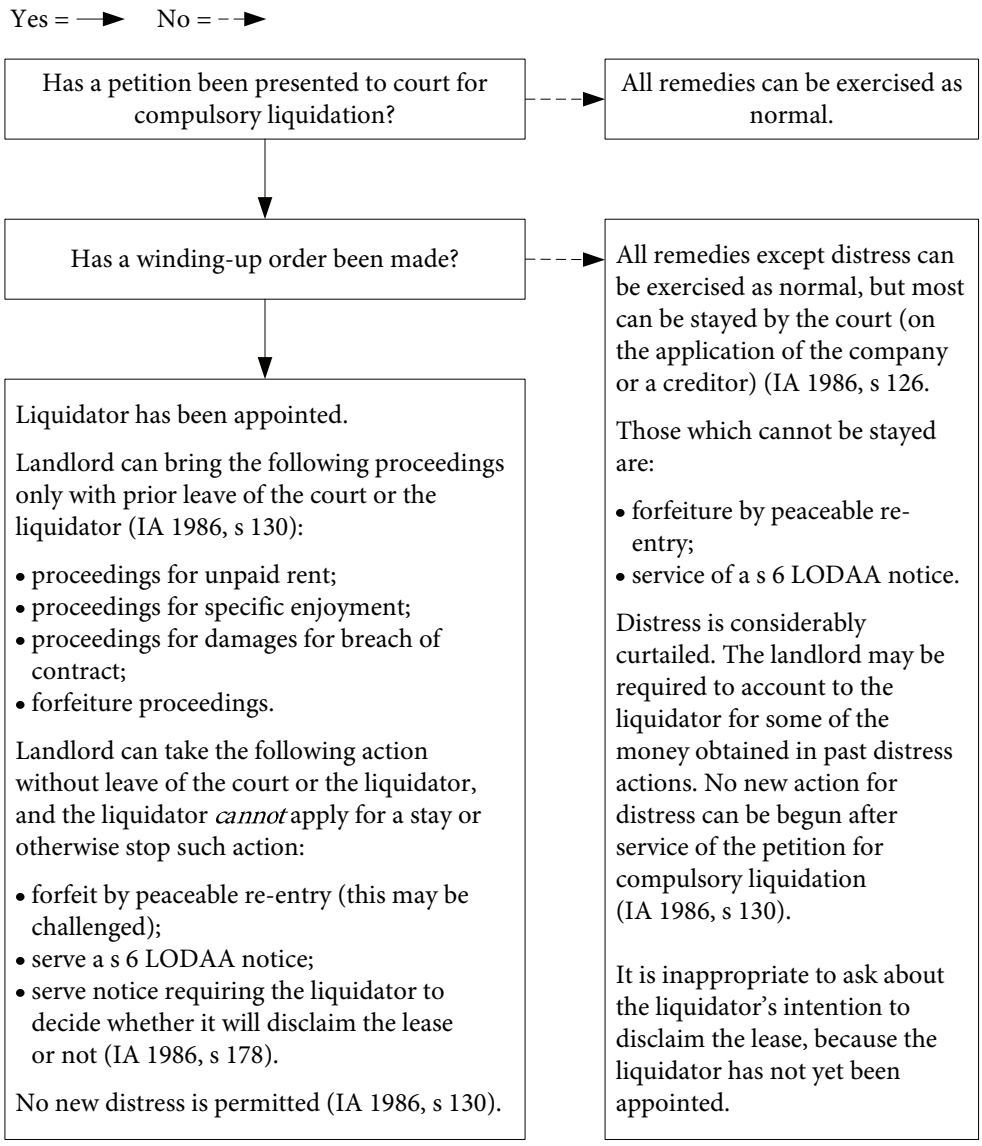


Disclaimer is irrelevant here – administrators cannot disclaim.

Flowchart 5 Where a corporate tenant (X) is in voluntary liquidation



Flowchart 6 Where a corporate tenant (X) is in compulsory liquidation



32.7.3 Recovering the premises – forfeiture and its drawbacks

The forfeiture clause in most leases includes insolvency events as a trigger for possible forfeiture. These usually include the appointment of an administrator, a liquidator or a trustee in bankruptcy, but can extend to voluntary arrangements or the appointment of a receiver. Usually the preliminary steps in those insolvency processes (such as lodging a petition for winding up, rather than just the making of the winding-up order) are enough to give the landlord the right to forfeit.

Where the landlord can insist that a third party/source pays the rent and performs the covenants (perhaps a guarantor or a rent deposit), he may prefer to keep the lease alive, for once it has been forfeited these remedies will generally cease with it. One exception may be if the guarantee states that the guarantor will take a replacement lease if the original is forfeited. The landlord may also be reluctant to forfeit if it will be difficult to find a replacement tenant quickly, or if the cost of the necessary incentives to achieve a re-letting will be prohibitive or if the bill for rates whilst the property stands empty is unaffordable.

If the landlord decides to forfeit on an insolvency ground, it must serve a notice on the tenant under s 146 of the LPA 1925. However, the insolvency ground is irremediable, so the tenant

need not be given a reasonable time to remedy the breach. The greatest source of delay in forfeiture is likely to be the need for consent from the court or the insolvency official to allow forfeiture (either by proceedings or by peaceable re-entry). Consult **Flowcharts 1 to 6** for further details of what consent is required and when. The main case to consider whether such consent should be given for forfeiture proceedings is *Re Atlantic Computer Systems plc* [1990] EWCA Civ 20.

Even if forfeiture is permitted and achieved, X or its insolvency official can apply for relief from forfeiture. The court has a wide discretion to permit this, and can set terms for doing so (eg requiring X to pay off the arrears or remedy the breach of covenant).

For more details on forfeiture, see **30.5**.

32.8 Requiring the insolvency official to pay rent

32.8.1 Rent arrears for the period leading up to the insolvency event

These must be claimed for by the landlord in the insolvency.

32.8.2 Rent/service charge arising after the start of the insolvency

Whether these are payable in full depends on the type of insolvency.

32.8.2.1 Voluntary arrangements

The terms of the CVA/IVA will determine whether X is liable for the ongoing rent in full or in part, or not at all. The supervisor of the CVA/IVA is not liable personally to pay these sums.

32.8.2.2 Receiver

The tenant company remains liable for the rent and service charge, and the receiver may choose to require the tenant company to pay those sums or it may not. The receiver is not personally liable to pay these sums (even if it chooses to direct the tenant company to pay them). Moreover, the receiver can collect in sub-lease rents and account for these to the mortgagee even if the main lease rent is not being paid.

If the ongoing rent is not paid, the tenant company will be in breach and the landlord will have its normal remedies, which may include forfeiture, diverting any sub-lease rents under s 6 of the LODAA 1908, or commencing more formal insolvency proceedings (such as bankruptcy or liquidation). The unpaid rent will usually rank as an unsecured claim in such an insolvency. For more details on remedies, see **32.7.1** and **Chapter 29**.

32.8.2.3 Bankruptcy

The lease becomes vested in the trustee in bankruptcy, who will be personally liable on the covenants in the lease. The trustee should therefore pay the rent and other sums that fall due whilst the lease is vested in him. Generally the trustee will try to bring his liability for rent and other payments to an end by assigning, surrendering or disclaiming the lease.

If the trustee disclaims the lease, the landlord cannot sue the trustee for rent arrears accruing for the period prior to the disclaimer. Instead the landlord will have to submit a claim in the bankruptcy for that sum, as an unsecured creditor, and may well recover only part of the debt. It is possible (but not yet established by case law) that where the trustee has been using the let premises for the purpose of realising the assets (perhaps continuing to trade X's business from them pending sale of that business as a going concern), the landlord's claim for rent arrears (for the period from the making of the bankruptcy order to the date of disclaimer) might be treated as an expense of the bankruptcy and therefore more likely to be paid in full.

32.8.2.4 Administrator or liquidator

Rent and other sums need not be paid by an administrator or a liquidator as they are not personally responsible for the contracts into which X has entered. However, if they choose to occupy the property (or part of it) for the purposes of the administration or winding up, then they will be liable to pay both rent and service charge that fall due during that period (even if these are due in advance for periods which may last longer than the time the administrator or liquidator is using the property). What qualifies as use for such purposes was considered in *Sunberry Properties Limited v Innovate Logistics Ltd (in administration)* [2008] EWCA Civ 1261 and *Goldacre (Offices) Ltd v Nortel Networks (UK) Ltd (in administration)* [2009] EWHC 3389. These sums will count as administration expenses, so should be settled as a priority debt in the insolvency (ahead of the liquidator's remuneration), and therefore should be paid in full.

32.9 Disclaimer and its effects

32.9.1 Who can disclaim?

Only trustees in bankruptcy (IA 2006, s 315) and liquidators (IA 2006, s 178) can disclaim property.

32.9.2 What is disclaimer?

The insolvency official, by notice filed in court, renounces future involvement by X in the contract, or future ownership by X of the property (as appropriate). Copies of that notice have to be served on the other people who may be interested in the disclaimed property, or who will remain under an obligation in relation to it despite the disclaimer. This gives them the chance to decide whether they want to apply for an order vesting the disclaimed property in them. For more on vesting orders see **32.9.7**.

Where X is a tenant, and the insolvency official wishes to bring liability under the lease to an end, it may prefer to do so by methods other than disclaimer. It may be possible to terminate the lease by notice to quit (a periodic tenancy), or by exercising a break right. The landlord may be willing to take a surrender of the lease (particularly if there are sub-leases, as this will be a more reliable way for the landlord to take over those sub-leases). Alternatively, the insolvency official may choose to do nothing, fail to pay the rent or observe the provisions of the lease, and hope that the landlord takes the initiative and chooses to forfeit the lease.

32.9.3 What can be disclaimed?

Any property which the insolvency official considers to be onerous can be disclaimed. Onerous property is defined (IA 1986, s 178(3)) as property which is either unsaleable or not readily saleable, or which might give rise to a liability to pay money or perform any onerous act. This will include:

(a) a lease where X is the tenant (because a tenant has a range of obligations which involve paying money or doing things);

(b) a lease where X is the landlord, if the obligations which the landlord must discharge (perhaps carrying out repairs) may cost more than it can recover from the tenants;

(c) a sale contract where X is the buyer;

(d) a sale contract where X is the seller but has obligations beyond the mere transfer of the property for the agreed price (perhaps carrying out extensive repair works). In these circumstances, case law says that disclaimer of the sale contract is possible only if the property to which it relates is also disclaimed. Freehold property is rarely encumbered with such extensive obligations that it will be onerous, so disclaimer of freehold property is very unusual.

32.9.4 Is consent needed for disclaimer?

In most cases consent is not needed to disclaim (there are a few situations where a trustee in bankruptcy will need the consent of the court to disclaim, but these are beyond the scope of this book).

32.9.5 When can the onerous property be disclaimed?

The insolvency official can disclaim whenever he wishes, as long as he does so before the insolvent party is discharged from bankruptcy (where X is an individual) or finally dissolved (where X is a company).

If the insolvency official delays, the other party to the contract is left in limbo, not knowing whether the contract will be observed. That other party can force the pace, by serving on the insolvency official a notice to elect whether or not to disclaim (IA 1986, s 316(1) or s 178(5)). The insolvency official then has 28 days to serve notice of disclaimer. If no notice is served in time:

(a) the trustee in bankruptcy is deemed to have adopted the contract and will be personally liable to perform it;

(b) the liquidator is still not personally liable to perform the contract, but (at least in the case of a lease) may be taken to have retained the premises for the benefit of the liquidation, in which case rent and other payments due under the lease will rank as expenses of the liquidation and be payable as a priority debt (*ABC Coupler and Engineering C Ltd* (No 3) [1970] 1 All ER 650).

32.9.6 Effect of disclaimer

32.9.6.1 On the insolvent party (X) and the insolvency official

The disclaimer releases X from its obligations (and rights) under the contract from the date of the disclaimer. It also releases the insolvency official from any such liability.

32.9.6.2 On the other party to the contract

The other party to the disclaimed contract will be left with a claim in the insolvency for the damages or losses it suffers as a result of the contract not being performed by X. In some circumstances it may be able to secure performance by a third party and will not, therefore, suffer any loss (see **32.9.6.3**).

Where it is a lease that is disclaimed, the landlord will be entitled to retake possession. However, it should not do so if it wishes to require a third party to take on the responsibility for the lease (see **32.9.6.3**).

32.9.6.3 On third parties

Disclaimer does not (unless this is necessary in order to release X from its obligations) affect the liabilities and rights of any third party. For example, if X has agreed, jointly with Z, to purchase a property from Y, X's insolvency official can disclaim the purchase contract but Y may still seek specific performance against Z. This comes up most often in the context of a lease where there is a guarantor for X, or possibly previous tenants who are still liable to perform the lease (either as original tenant under a pre-1996 lease, or under an AGA for a more recent lease). All will remain liable to the landlord under the guarantee arrangements, despite the disclaimer (*Hindcastle v Barbara Attenborough Associates* [1997] AC 70 and *Doleman v Shaw* [2009] EWCA Civ 283).

In such circumstances, the landlord can, despite disclaimer, still sue the guarantor or former tenant for the rent or performance of the lease covenants. If (as is usual) the guarantee clause

provides for this, the landlord can, alternatively, require the guarantor or former tenant to take up a replacement lease.

The landlord must be careful not to retake possession of the premises following disclaimer, if it wishes to be able to pursue such remedies against third parties. If the landlord does retake possession, it will be treated rather as if it had successfully forfeited the lease, which brings the lease to an end, and with it the liability of the guarantors and former tenants.

32.9.6.4 On sub-tenancies

Sub-tenants are a special variety of third party where a lease is disclaimed. The disclaimer of the headlease brings to an end the obligations which X had as landlord of the sub-leases. However, it does not:

(a) terminate the sub-leases (so disclaimer differs from forfeiture in this respect);
(b) substitute the superior landlord as landlord of the sub-leases (as would occur if X's lease had been surrendered).

There is privity neither of contract nor estate between the superior landlord and the sub-tenant. In effect, the disclaimed headlease is treated as still being in existence, unless and until the superior landlord chooses to forfeit it (for default in rent payments or performance of other conditions). If that forfeiture is successful then the sub-lease will be forfeit too (assuming the sub-tenant does not obtain relief from forfeiture). Until that point, the sub-tenant has a continued right to occupy, under the sub-lease.

This means that if the sub-tenant continues to pay the rent and observe the covenants of the disclaimed headlease, the superior landlord may have no grounds for forfeiture. If the sub-tenant pays more rent (under the headlease) than it was obliged to do under the sub-lease, it can claim in the insolvency for the difference.

32.9.7 Vesting orders

Where a third party (perhaps a guarantor, former tenant or sub-tenant) ends up paying the rent under X's disclaimed lease, it may want to apply for a vesting order. Likewise, a mortgagee of X's disclaimed property may want to apply for a vesting order. If successful, the lease or property will be transferred to the third party. This gives that party control over the property, and thus the ability to ensure performance of relevant covenants and to sell or assign the property, in order to bring their liability to a close.

The court has discretion over whether to make a vesting order and on what terms. Generally it will require the person in whom the property is vested to be subject to the same obligations (in relation to that property) as X was before the disclaimer. If more than one person applies for a vesting order, the court applies an established pecking order in deciding who should succeed (sub-tenants come higher up this order than guarantors, former tenants or the landlord itself). If the landlord applies for a vesting order (so as to be sure that the lease is under his control), the court will give people higher up the pecking order (such as sub-tenants) the chance to take the vesting order instead. If they do not take up this opportunity reasonably quickly, they will lose the right to apply for a vesting order at a later date.

If the vesting order is granted, ownership of the lease or other property transfers automatically. There is no need for a conveyance, an assignment or a transfer.

A party seeking a vesting order must apply for it within three months of becoming aware of or being notified of the disclaimer. This period can be extended by the court.

Appendix 1
Review Activity Answers

Chapter 1

1. The three main types of commercial property are offices, retail and industrial.
2. Renting avoids the need to find or borrow the purchase money at the outset and means that capital is not tied up in the building.
3. Investors hope to make an income by letting the property to tenants and a capital gain as the property rises in value.
4. Developers hope to make a profit by selling the completed development for more than it cost to purchase and develop the original site.
5. An investor may join with another investor to spread the financial risk and/or make it easier to obtain funding for the development. It may join with a developer to gain specialist expertise in areas such as project management, planning, environmental remediation and construction. It may join with a prospective buyer of the completed development to give the buyer some input into design and construction, and thereby strengthen the buyer's commitment to the purchase.
6. Contractual joint ventures and joint venture partnerships have no separate legal personality so they are 'tax transparent' and pay no tax in their own right. Tax is paid only once the profits and gains have reached the joint venture parties. An SPV, being a separate legal entity, pays tax in its own right, and tax is charged again when the SPV dividends are paid to the joint venture parties, hence the term 'double taxation'.
7. Both an SPV and an LLP, as legal entities separate from the joint venture parties, offer limited liability for losses incurred in the development. Traditional partnerships and contractual joint ventures have unlimited liability, and a traditional partner is also liable for the defaults of its partners.
8. Which joint venture structure is most efficient in terms of SDLT depends on the stage of the development. At the outset, a contractual joint venture is the more efficient, as the necessary transfer of the property into the joint venture partnership or SPV gives rise to a charge to SDLT. On the eventual sale of the developed property, an SPV offers the possibility of selling the shares with 0.5% stamp duty instead of the property with 4% SDLT.

Chapter 2

There are potential risks to Western if the issues raised are not addressed prior to the release of the loan. The issues raised are best dealt with in the loan agreement in conditions precedent. Conditions precedent must be satisfied prior to the release of the loan and, accordingly, unless Western is satisfied with the position, the loan will not proceed.

(a) *Subsidence*

Unit 3 may be suffering from subsidence. If so, the building may require significant and expensive remedial works, which are not included in the development budget. Ross may need to borrow further monies from Western. This may impact on the loan-to-value ratio, and Ross may struggle to meet the interest obligations under an increased loan. Any remedial works may delay the development which may affect the period of the loan. If the development is delayed, the institutional investor may no longer be interested in buying the property and Ross would need to find another buyer for the completed development. This may delay the repayment of the loan.

Condition precedent – Western is in receipt of a satisfactory structural engineer's report in respect of Unit 3 confirming that the movement to the property is long-established settlement and there is no subsidence.

(b) *Right of way*

If the dispute with the owner of Unit 4 cannot be resolved, the extension cannot be built. Resolving the dispute may require litigation, which would be expensive and time-consuming. This drain on Ross' resources and management time may affect Ross' ability to pay the capital and interest due under the loan. The alternative would be to proceed without the extension, but the project may be viable only with the extension. The institutional investor may no longer be interested in purchasing Unit 3 if it cannot be extended.

Condition precedent – The dispute relating to the right of way with the owner of Unit 4 is resolved to Western's satisfaction.

(c) *Flooding*

The recent flooding may make it difficult to insure Unit 3 against the risk of flooding. If this risk is not covered, Ross may find it difficult to let the property. Tenants may be unwilling to accept the risk that they may be faced with expensive remedial works and clean-up costs if the flooding recurs, unless the lease provides that the landlord will be responsible for uninsured risks. The institutional investor would object to any such term in the lease, as it would expect there to be no circumstances in which it would be required to make any expenditure. If the property cannot be let/sold, this will affect Ross' ability to repay the loan.

Condition precedent – Western is satisfied with details of the fully comprehensive insurance policy, which includes the risk of flooding, and which will be put in place on completion of the acquisition of Unit 3.

Chapter 3

1. A call option combined with a non-returnable fee and/or overage.

   Both a put option and a right of pre-emption would give all the decision-making power to the seller, who would presumably trigger the relevant provisions immediately as there is an alternative buyer already in the wings. ABC must offer the seller an immediate incentive not to sell to the rival developer whilst not committing itself to buy the land. The incentive could take the form of a non-returnable fee and/or the offer of an overage payment if and when the barn conversion takes place. Either (or both) of these could be incorporated into a conditional contract or a call option. However, although it would be possible to draft a contract conditional upon the obtaining of funding on acceptable terms, it would be very difficult to agree a test of acceptability. A call option would avoid these drafting difficulties and is obviously preferable for ABC as there would be no commitment to buy. It should be borne in mind, however, that the seller is likely to demand a high option fee/overage payment for the grant of a call option, to reflect the fact that it is passing up the chance to sell to the rival developer with no certainty that ABC will ever buy the land.

2. A right of pre-emption.

   A call option would not serve any useful purpose as the housing association might never be in a position to exercise it, and in the meantime MBC will be prevented from selling to anyone else. Similarly, the housing association is presumably not in a position to enter into a put option; and even if it does, it may not be able to comply with the obligation to complete if and when MBC exercises the put option. It will be difficult to draft a contract conditional upon the housing association getting sufficient funding to allow it to proceed, as the sources and amount of its funding will be variable from year to year. A right of pre-emption might be suitable here as it does not commit the housing

association to a purchase it may not be able to afford but gives MBC a way of imposing a timetable on the decision-making process.

Chapter 4

1. The statement is incorrect. The basis on which LPAs are required to make decisions on whether to grant planning permission (and on what terms) is set out in s 38(6) of the Act. In simple terms, decisions should be made in line with the terms of the development plan unless material considerations indicate to the contrary. (See **4.1.3**.)
2. The statement is incorrect.

   First, permitted development rights under the GPDO amount to the grant of planning permission in any event (albeit that such permission is granted 'automatically' by the order rather than as a result of an express application). Secondly, the conversion of a building into more than one dwelling house is a material change of use and so will require planning permission. (See **4.2.2.1**.)
3. Subject to there being a condition preventing this within any planning permission allowing the current use, change of use from one A1 shop use to another A1 shop use would not amount to development. (See **4.2.2.1** and **4.2.2.2**.)
4. An Article 4 Direction removes permitted development rights given under the GPDO (to the extent stated in the relevant Direction). This will mean that an individual will have to make an express application for planning permission should it wish to carry out an activity amounting to development that is the subject of such a Direction. (See **4.2.3.3**.)
5. When seeking to rely on the permitted development rights granted by the GPDO it should be remembered that the rights are not unqualified. In the case of a change of use from a use within use class A2 to a use within use class A1, the change is only permitted if there is a display window at ground level. (See **4.2.3.2**.)
6. The statement is not correct. An outline planning permission will typically require that approval of reserved matters be obtained within three years of the grant of the permission. Implementation must take place within two years of approval of the last of such reserved matters. In this way, an outline planning permission potentially has a life span of up to five years before implementation. (See **4.3.1** and **4.3.4.3**.)
7. In the case of a full planning permission, implementation of the permission must usually be commenced within three years of grant. The meaning of 'commenced' is set out in s 56 of the Act and includes such steps as digging a trench for foundations and any work of demolition in connection with the development. The erection of the building does not have to be completed within the three year period. (See **4.3.4.3**.)
8. An appeal against an adverse planning decision by an LPA is a total rehearing of the matter and so an Inspector must put himself in the position he would be in if he were the LPA making the decision in the first instance. This is different to many appeals (such as from the High Court to the Court of Appeal) where the appeal is made on a point of law and points of evidence cannot generally be considered. (See **4.4.1**.)
9. In most cases, the time limit is six months from the date of the LPA's notice of decision or its failure to determine. (See **4.5**.)
10. The danger for the farmer is that if he appeals against the decision, it is possible that an Inspector would refuse the application altogether (see Question 8) and so the farmer would be worse off than is the case currently.

    A way round this is for the farmer to submit a fresh application for planning permission under s 73 of the Act. If refused, he can appeal against the refusal in respect of that application. This will leave the original planning permission intact. (See **4.4.3.1**.)

Chapter 5

1. It is not possible to require the payment of money as a condition attached to planning permission. Such a requirement could be imposed by way of a planning obligation. (See **4.3.3** and **5.1**.)
2. Planning obligations can require the payment of money. The general land law principle that only the burden of restrictive covenants can bind successors in title does not apply to planning obligations. The burden of both positive and restrictive covenants contained in a planning obligation can be enforced against successors in title. (See **5.2**.)
3. Circular 05/05 sets out government policy on planning obligations. Paragraph B9 makes it clear that it is not appropriate to impose requirements that merely resolve existing deficiencies. If the LPA did seek to impose such a requirement, it might give the developer grounds to appeal. (See **5.3**.)
4. A planning obligation can only be entered into by a 'person interested in land'. It is not thought that this would extend to the holder of an option to purchase. In light of this, the current freehold owner of the land in question will need to be made a party to the planning obligation. (See **5.2**.)
5. The owner of the land will be keen to ensure that it does not take on any unnecessary liability. It would, in particular, be keen to ensure there was no obligation to pay until the development linked to the planning obligation has been commenced. It would also wish to have its liability limited to its period of ownership. (See **5.4**.)

Chapter 6

1. First, it does not follow from the question that there is a breach of planning control at all. The works could be permitted by an express application or under permitted development rights under the GPDO. Even if there is a breach of planning control, it is not an offence in itself to be in breach. It is only if the LPA takes enforcement action that this can occur (such as failing to comply with a planning contravention notice). (See **Chapter 4** generally and **6.1**.)
2. The LPA does not have an automatic right to issue an enforcement notice. There must be an apparent breach of planning control and the service of the notice must be expedient having regard to the provisions of the development plan and other material considerations. (See **6.7.1**.)
3. Once served with a planning contravention notice, it is an offence to reply to it within 21 days without reasonable excuse (See **6.5.2**.)
4. Enforcement action must be taken within four years in the case of building and other operational development (and change of use to a dwelling house). Once this time limit has passed, the LPA is unable to take enforcement action. On the facts of Question 4, therefore, the extension would be immune from being the subject of enforcement action.
5. A Certificate of Lawful Use or Development could be obtained in the circumstances envisaged in Question 4. This would act as proof that the development is lawful. (See **6.3**.)
6. There are various information gathering tools available to an LPA in respect of possible breaches of planning control. In particular, LPAs have a right of entry to ascertain whether there has been a breach of planning control and a planning contravention notice could be served requiring information about the use to which a relevant property is being put. (See **6.4** and **6.5**.)
7. The LPA could serve a breach of condition notice (given the nature of the breach in question). It could also consider serving an enforcement notice (and associated stop notice: see Question 8). One major advantage of the service of a breach of condition

notice is that, unlike an enforcement notice, it cannot be appealed against. There are defences to being prosecuted for being in contravention of a breach of condition notice, but they are more limited than the grounds of appeal in respect of the service of an enforcement notice. Further, if an enforcement notice is appealed, its effect is suspended until the appeal has been heard. (See **6.6** and **6.7**.)

The LPA could always choose not to enforce at all. (See **6.1**.)

8. A stop notice cannot be served in isolation and instead depends upon an enforcement notice having first been issued. A stop notice cannot be served once the enforcement notice has taken effect. (See **6.8.2**.)
9. Notice of appeal against the service of an enforcement notice must be given to the DCLG before the date on which the relevant enforcement notice takes effect. (See **6.10.2**.)
10. There are seven grounds of appeal. (See **6.10.1**.)

    On the facts, ground (c) (no breach of planning control) might be relevant. The firm's use of the property could be within use class A2 in any event and so there would be no breach of planning control at all. (See **4.2.2.2**.)

    If the firm's use of the property does amount to a breach of development control, ground (a) (planning permission should be granted) might be relevant. The facts indicate that under the plan-led principle which governs when planning permission should be granted, the use stands a good chance of being granted. (See **4.1.3.1**.)

    Ground (g) might also be relevant as six weeks is a very short time limit within which to cease to operate.

    Note that other grounds might also be relevant would but the above are particularly relevant from the facts.

Chapter 7

Scenario 1

As always, you would need to ascertain the size of the operation and its environment. In particular, what equipment or chemicals does it use, and are there other shops or even residences nearby? However, a 'typical' dry-cleaner may need to consider:

- use of harsh chemicals – hazardous substances regulation applies;
- smell and noise – potential nuisance claims from neighbours;
- emissions and waste – environmental permit or exemption may be required.

Scenario 2

You would need to consider the following:

- Building constructed in 1950s – asbestos removal probably required.
- Petrol station previously on site – contaminated land regime/PPS 23 planning condition for assessment and remediation of, say, any leaks from underground storage tanks.
- Roman wall on site – protection of archaeological sites; special building consent and preservation requirements.
- Limited information on previous use – transactional risk management (enquiries and warranties from seller) and possibly insurance needed for contingent risks.
- Mixed use commercial/residential planned – requirement to provide affordable housing under planning regime.

Scenario 3

This would raise the following environmental issues:

- Buildings on site since 1900 – asbestos management plan required.
- Long site history of industrial use and a nearby river – contaminated land and water pollution liability.
- Industrial chemicals and solvents used – hazardous substances and Control of Major Accidents Hazards Regulations, and potentially any *Rylands v Fletcher* claim.
- Produces substantial waste – waste management regulations.
- Strong burning smells and smoke – nuisance and statutory nuisance issues.
- Heavy industry activity – requires environmental permit(s).
- Depending on activity use – caught by the EU ETS, so needs requisite allowance (could trade on the carbon market).
- Substantial fire risks – higher duties of assessment, training and monitoring under the Fire Safety Order.
- Heavy energy use – Climate Change Levy Agreement still in force, and now also caught by the Carbon Reduction Commitment Energy Scheme.
- Purchase from another plc – transactional risk management, complex indemnities and agreement on liabilities, consideration of s 172 of the Companies Act 2006.
- Environmental Damage Regulations applicable due to questionable standard of machinery and hazardous substances containment – need to take precautionary measures.

Chapter 8

1. Searches made in every conveyancing transaction:
   (a) A search of the local land charges register on form LLC1.
   (b) Enquiries of the local authority on form CON29R, paying particular attention to the replies to enquiries 1 (planning consents and refusals), 2 (are the access roads maintainable at public expense) and 3.12 (notices in relation to the remediation of contaminated land).
   (c) Optional enquiries of the local authority on form CON29O, all enquiries to be raised except those relating to parks and countryside, houses in multiple occupation, food safety notices and hedgerow notices. Particular attention should be paid to the replies to enquiries 5 (public rights of way) and 19 (environmental and pollution notices).
   (d) Water and drainage enquiries.
   (e) Enquiries of the seller, paying particular attention as to by what right access is gained to the site and whether any maintenance contributions are required.
   (f) Chancelcheck search.
   (g) Survey (ground conditions only as site has no buildings).
2. Additional searches:
   (a) Inspection of the property.
   (b) Full environmental survey as the land is clearly in an industrial area.
   (c) Flooding search (may be incorporated into the environmental survey).
   (d) Highways search, particularly as it is clear that parts of the site do not immediately abut the road.
   (e) Public index map search, to try to find out who owns the land between the site and the access road.
   (f) Note that a coal mining search is not indicated as Canvey Island is not listed in the *Coal Authority Gazette for England and Wales* as a place where a mining search is required.

Chapter 9

There is no simple right or wrong answer in these circumstances. However, suggested points you should consider are as follows:

- In considering the most appropriate form of procurement, you ought to consider the type of building and nature of the project, ie 'landmark', 'iconic' and the relevant importance of each of the different factors of time/cost/quality. The facts suggest that design is going to be an important consideration as 'an international architect' is being engaged.
- You should also consider the pros and cons of different forms of procurement, eg traditional, design and build, and even construction management. While the importance of design is usually associated with using traditional procurement, you could also consider the possibility of design and build with novation, which would allow the client to employ the architect and control the conceptual design for the building, prior to the architect (and other consultants) being novated to the contractor, to ensure single point responsibility for the client.
- You should also set out the consultancy appointments to be entered into, which should include the CDM coordinator (as the building must comply with health and safety legislation). In addition, a project manager is almost certainly required for a large development of this nature.
- You should set out details of those parties requiring collateral warranties/third party rights, ie the client (if design and build), R, G and H. Details of the warrantors providing the collateral warranties/third party rights, ie the different consultants and key sub-contractors (especially the specialist acoustic engineering sub-contractor) should also be set out. Note that warranties/third party rights may be given to G in respect of each floor it is letting (to enable G to assign the benefit of that warranty to H whilst retaining warranties for its other floors), rather than for the whole of its letting.
- Other forms of protection in the event of a defect arising may also be considered, eg defects liability insurance.

Chapter 10

1. (c)

   Value added tax is charged on any supply of goods or services made in the United Kingdom where it is a taxable supply made by a taxable person in the course or furtherance of a business carried on by him.

   In general terms, SDLT is levied on land transactions, CGT on the gain resulting from a disposal of an interest in land, and capital allowances are a form of tax relief that a buyer of commercial property may be entitled to claim on any fixed plant and machinery.

2. (a) and (d)

   Input tax is not paid when the supply is zero-rated or exempt.

3. (a), (b) and (d)

   In order to recover input tax, the business must make 'taxable' supplies, ie supplies that are standard or zero-rated, or where the option to tax has been exercised. A zero-rated supply is a taxable supply, albeit with VAT chargeable at the zero rate.

   When it makes a taxable supply, the business will charge output tax from which it will deduct input tax paid by it, so that it pays only the balance to HMRC.

4. The sale of the green field site to the developer and the grant of the retail lease are both exempt, subject to the option to tax. The payment to the building contractor and the freehold sale of the superstore (being a 'new' building) are both standard-rated.

5. True. The input tax can be recovered if the developer makes a taxable supply by opting to tax the rent due under the retail lease. Alternatively, the developer will be making a taxable supply when it sells the 'new' freehold superstore.
6. The grant and assignment of the lease are both exempt subject to the option to tax, the legal fees and fitting out costs are both standard-rated.
7. False. The insurance company tenant will *not* be able to recover the input tax as it makes only exempt supplies in the course of its business. The irrecoverable VAT will have to be borne as an overhead of the business.

Chapter 19

1. If the premises are in disrepair at the beginning of the lease, a tenant may be concerned not to be obliged to repair the premises to a higher standard, so would include the provision for a schedule of condition (see **19.5**).

   A tenant might resist the inclusion of the words 'good' and 'condition', as potentially imposing a more onerous obligation on the tenant (see **19.4**).
2. The tenant may be alarmed by the prospect of having to repair inherent defects, and so an exclusion of liability for defects caused by design or construction faults should be included, at least for a specified period (see **9.5.2.4**).

   A tenant might resist the inclusion of the words 'good' and 'condition', as potentially imposing a more onerous obligation on the tenant (see **19.4**).

   A tenant might seek to exclude liability for historic contamination (see **19.3**).

Chapter 22

1. The approach to be taken would be to analyse and categorise the nature of the works, and then read and apply the relevant lease clause to the facts:
   (a) Affixing the aerial to the exterior of the building would involve external structural works. The tenant is not entitled to carry these works out as they are works outside the demised premises (clause 1.1 definition of 'Property').
   (b) The erection of internal partitioning is likely to be non-structural work (although any plans or specifications would need to be checked to ensure this). As non-structural alterations, under clause 28.2 the tenant would be able to carry out the works without the consent of the landlord, provided that the tenant makes good any damage caused and provides plans and specifications immediately following completion of the alterations.
   (c) This is a structural alteration. If the interior structural walls were demised (clause 1.1 definition of 'Property') then, under clause 28.1, the tenant is not entitled to make the alteration without the landlord's consent (not to be unreasonably withheld). The tenant will be entitled to make the alteration unless the landlord can show that it is reasonable for it to refuse consent. The landlord under clause 28.5 must determine the application within 15 working days of receiving all information as specified. If the tenant is able to carry out these works, it will have to reinstate the Property under clause 29.2 if reasonably required by the landlord and having been given six months' notice of that requirement.

   If the interior structural walls were not demised then the comments in (a) above would apply.
2. Yes it is compliant with the Code for Leasing Business Premises in that no consent is required for internal non-structural alterations unless they could affect the services or systems (clause 28.2 and 28.3); where consent is not required, the tenant is to notify the landlord under clause 28.2; reinstatement is to be required only where it is reasonable and there is a notification requirement of six months (clause 29.2).

Appendix 2
Prescribed forms of notice under the Landlord and Tenant Act 1954

Form 1

LANDLORD'S NOTICE ENDING A BUSINESS TENANCY WITH PROPOSALS FOR A NEW ONE

Section 25 of the Landlord and Tenant Act 1954

IMPORTANT NOTE FOR THE LANDLORD: If you are willing to grant a new tenancy, complete this form and send it to the tenant. If you wish to oppose the grant of a new tenancy, use form 2 in Schedule 2 to the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004 or, where the tenant may be entitled to acquire the freehold or an extended lease, form 7 in that Schedule, instead of this form.

To: (*insert name and address of tenant)*

From: (*insert name and address of landlord*)

1. This notice applies to the following property: (*insert address or description of property*).

2. I am giving you notice under section 25 of the Landlord and Tenant Act 1954 to end your tenancy on (*insert date*).

3. I am not opposed to granting you a new tenancy. You will find my proposals for the new tenancy, which we can discuss, in the Schedule to this notice.

4. If we cannot agree on all the terms of a new tenancy, either you or I may ask the court to order the grant of a new tenancy and settle the terms on which we cannot agree.

5. If you wish to ask the court for a new tenancy you must do so by the date in paragraph 2, unless we agree in writing to a later date and do so before the date in paragraph 2.

6. Please send all correspondence about this notice to:

Name:

Address:

Signed: Date:

*[Landlord] *[On behalf of the landlord] *[Mortgagee] *[On behalf of the mortgagee]

*(*delete if inapplicable)*

SCHEDULE

LANDLORD'S PROPOSALS FOR A NEW TENANCY

(*attach or insert proposed terms of the new tenancy*)

IMPORTANT NOTE FOR THE TENANT

This Notice is intended to bring your tenancy to an end. If you want to continue to occupy your property after the date specified in paragraph 2 you must act quickly. If you are in any doubt about the action that you should take, get advice immediately from a solicitor or a surveyor.

The landlord is prepared to offer you a new tenancy and has set out proposed terms in the Schedule to this notice. You are not bound to accept these terms. They are merely

suggestions as a basis for negotiation. In the event of disagreement, ultimately the court would settle the terms of the new tenancy.

It would be wise to seek professional advice before agreeing to accept the landlord's terms or putting forward your own proposals.

NOTES

The sections mentioned below are sections of the Landlord and Tenant Act 1954, as amended, (most recently by the **Regulatory Reform** (Business Tenancies) (England and Wales) Order 2003).

Ending of tenancy and grant of new tenancy

This notice is intended to bring your tenancy to an end on the date given in paragraph 2. Section 25 contains rules about the date that the landlord can put in that paragraph.

However, your landlord is prepared to offer you a new tenancy and has set out proposals for it in the Schedule to this notice (section 25(8)). You are not obliged to accept these proposals and may put forward your own.

If you and your landlord are unable to agree terms either one of you may apply to the court. You may not apply to the court if your landlord has already done so (section 24(2A)). If you wish to apply to the court you must do so by the date given in paragraph 2 of this notice, unless you and your landlord have agreed in writing to extend the deadline (sections 29A and 29B).

The court will settle the rent and other terms of the new tenancy or those on which you and your landlord cannot agree (sections 34 and 35). If you apply to the court your tenancy will continue after the date shown in paragraph 2 of this notice while your application is being considered (section 24).

If you are in any doubt about what action you should take, get advice immediately from a solicitor or a surveyor.

Negotiating a new tenancy

Most tenancies are renewed by negotiation. You and your landlord may agree in writing to extend the deadline for making an application to the court while negotiations continue. Either you or your landlord can ask the court to fix the rent that you will have to pay while the tenancy continues (sections 24A to 24D).

You may only stay in the property after the date in paragraph 2 (or if we have agreed in writing to a later date, that date), if by then you or the landlord has asked the court to order the grant of a new tenancy.

If you do try to agree a new tenancy with your landlord remember:

- that your present tenancy will not continue after the date in paragraph 2 of this notice without the agreement in writing mentioned above, unless you have applied to the court or your landlord has done so, and
- that you will lose your right to apply to the court once the deadline in paragraph 2 of this notice has passed, unless there is a written agreement extending the deadline.

Validity of this notice

The landlord who has given you this notice may not be the landlord to whom you pay your rent (sections 44 and 67). This does not necessarily mean that the notice is invalid.

If you have any doubts about whether this notice is valid, get advice immediately from a solicitor or a surveyor.

Form 2

LANDLORD'S NOTICE ENDING A BUSINESS TENANCY AND REASONS FOR REFUSING A NEW ONE

Section 25 of the Landlord and Tenant Act 1954

IMPORTANT NOTE FOR THE LANDLORD: If you wish to oppose the grant of a new tenancy on any of the grounds in section 30(1) of the Landlord and Tenant Act 1954, complete this form and send it to the tenant. If the tenant may be entitled to acquire the freehold or an extended lease, use form 7 in Schedule 2 to the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004 instead of this form.

To: (*insert name and address of tenant)*

From: (*insert name and address of landlord*)

1. This notice relates to the following property: (*insert address or description of property*)

2. I am giving you notice under section 25 of the Landlord and Tenant Act 1954 to end your tenancy on (*insert date*).

3. I am opposed to the grant of a new tenancy.

4. You may ask the court to order the grant of a new tenancy. If you do, I will oppose your application on the ground(s) mentioned in paragraph(s)* of section 30(1) of that Act. I draw your attention to the Table in the Notes below, which sets out all the grounds of opposition.

*(*insert letter(s) of the paragraph(s) relied on*)

5. If you wish to ask the court for a new tenancy you must do so before the date in paragraph 2 unless, before that date, we agree in writing to a later date.

6. I can ask the court to order the ending of your tenancy without granting you a new tenancy. I may have to pay you compensation if I have relied only on one or more of the grounds mentioned in paragraphs (e), (f) and (g) of section 30(1). If I ask the court to end your tenancy, you can challenge my application.

7. Please send all correspondence about this notice to:

Name:

Address:

Signed: Date:

*[Landlord] *[On behalf of the landlord] *[Mortgagee] *[On behalf of the mortgagee]

(**delete if inapplicable)*

IMPORTANT NOTE FOR THE TENANT

This notice is intended to bring your tenancy to an end on the date specified in paragraph 2.

Your landlord is not prepared to offer you a new tenancy. You will not get a new tenancy unless you successfully challenge in court the grounds on which your landlord opposes the grant of a new tenancy.

If you want to continue to occupy your property you must act quickly. The notes below should help you to decide what action you now need to take. If you want to challenge your landlord's refusal to renew your tenancy, get advice immediately from a solicitor or a surveyor.

NOTES

The sections mentioned below are sections of the Landlord and Tenant Act 1954, as amended, (most recently by the **Regulatory Reform** (Business Tenancies) (England and Wales) Order 2003).

Ending of your tenancy

This notice is intended to bring your tenancy to an end on the date given in paragraph 2. Section 25 contains rules about the date that the landlord can put in that paragraph.

Your landlord is not prepared to offer you a new tenancy. If you want a new tenancy you will need to apply to the court for a new tenancy and successfully challenge the landlord's grounds for opposition (see the section below headed '*Landlord's opposition to new tenancy*'). If you wish to apply to the court you must do so before the date given in paragraph 2 of this notice, unless you and your landlord have agreed in writing, before that date, to extend the deadline (sections 29A and 29B).

If you apply to the court your tenancy will continue after the date given in paragraph 2 of this notice while your application is being considered (section 24). You may not apply to the court if your landlord has already done so (section 24(2A) and (2B)).

You may only stay in the property after the date given in paragraph 2 (or such later date as you and the landlord may have agreed in writing) if before that date you have asked the court to order the grant of a new tenancy or the landlord has asked the court to order the ending of your tenancy without granting you a new one.

If you are in any doubt about what action you should take, get advice immediately from a solicitor or a surveyor.

Landlord's opposition to new tenancy

If you apply to the court for a new tenancy, the landlord can only oppose your application on one or more of the grounds set out in section 30(1). If you match the letter(s) specified in paragraph 4 of this notice with those in the first column in the Table below, you can see from the second column the ground(s) on which the landlord relies.

Paragraph of section 30(1)	*Grounds*
(a)	Where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations.
(b)	That the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due.
(c)	That the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding.

Paragraph of section 30(1)	*Grounds*
(d)	That the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding.
(e)	Where the current tenancy was created by the sub-letting of part only of the property comprised in a superior tenancy and the landlord is the owner of an interest in reversion expectant on the termination of that superior tenancy, that the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purposes of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy.
(f)	That on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding.
(g)	On the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.

In this Table 'the holding' means the property that is the subject of the tenancy.

In ground (e), 'the landlord is the owner an interest in reversion expectant on the termination of that superior tenancy' means that the landlord has an interest in the property that will entitle him or her, when your immediate landlord's tenancy comes to an end, to exercise certain rights and obligations in relation to the property that are currently exercisable by your immediate landlord.

If the landlord relies on ground (f), the court can sometimes still grant a new tenancy if certain conditions set out in section 31A are met.

If the landlord relies on ground (g), please note that 'the landlord' may have an extended meaning. Where a landlord has a controlling interest in a company then either the landlord or the company can rely on ground (g). Where the landlord is a company and a person has a controlling interest in that company then either of them can rely on ground (g) (section 30(1A) and (1B)). A person has a 'controlling interest' in a company if, had he been a company, the other company would have been its subsidiary (section 46(2)).

The landlord must normally have been the landlord for at least five years before he or she can rely on ground (g).

Compensation

If you cannot get a new tenancy solely because one or more of grounds (e), (f) and (g) applies, you may be entitled to compensation under section 37. If your landlord has opposed your application on any of the other grounds as well as (e), (f) or (g) you can only get compensation if the court's refusal to grant a new tenancy is based solely on one or more of grounds (e), (f) and (g). In other words, you cannot get compensation under section 37 if the court has refused your tenancy on *other* grounds, even if one or more of grounds (e), (f) and (g) also applies.

If your landlord is an authority possessing compulsory purchase powers (such as a local authority) you may be entitled to a disturbance payment under Part 3 of the Land Compensation Act 1973.

Validity of this notice

The landlord who has given you this notice may not be the landlord to whom you pay your rent (sections 44 and 67). This does not necessarily mean that the notice is invalid.

If you have any doubts about whether this notice is valid, get advice immediately from a solicitor or a surveyor.

Form 3

TENANT'S REQUEST FOR A NEW BUSINESS TENANCY

Section 26 of the Landlord and Tenant Act 1954

To (*insert name and address of landlord*):

From (*insert name and address of tenant*):

1. This notice relates to the following property: (*insert address or description of property*).

2. I am giving you notice under section 26 of the Landlord and Tenant Act 1954 that I request a new tenancy beginning on (*insert date*).

3. You will find my proposals for the new tenancy, which we can discuss, in the Schedule to this notice.

4. If we cannot agree on all the terms of a new tenancy, either you or I may ask the court to order the grant of a new tenancy and settle the terms on which we cannot agree.

5. If you wish to ask the court to order the grant of a new tenancy you must do so by the date in paragraph 2, unless we agree in writing to a later date and do so before the date in paragraph 2.

6. You may oppose my request for a new tenancy only on one or more of the grounds set out in section 30(1) of the Landlord and Tenant Act 1954. You must tell me what your grounds are within two months of receiving this notice. If you miss this deadline you will not be able to oppose renewal of my tenancy and you will have to grant me a new tenancy.

7. Please send all correspondence about this notice to:

Name:

Address:

Signed: Date:

*[Tenant] *[On behalf of the tenant] (**delete whichever is inapplicable)*

SCHEDULE

TENANT'S PROPOSALS FOR A NEW TENANCY

(*attach or insert proposed terms of the new tenancy*)

IMPORTANT NOTE FOR THE LANDLORD

This notice requests a new tenancy of your property or part of it. If you want to oppose this request you must act quickly.

Read the notice and all the Notes carefully. It would be wise to seek professional advice.

NOTES

The sections mentioned below are sections of the Landlord and Tenant Act 1954, as amended, (most recently by the **Regulatory Reform** (Business Tenancies) (England and Wales) Order 2003).

Tenant's request for a new tenancy

This request by your tenant for a new tenancy brings his or her current tenancy to an end on the day before the date mentioned in paragraph 2 of this notice. Section 26 contains rules about the date that the tenant can put in paragraph 2 of this notice.

Your tenant can apply to the court under section 24 for a new tenancy. You may apply for a new tenancy yourself, under the same section, but not if your tenant has already served an application. Once an application has been made to the court, your tenant's current tenancy will continue after the date mentioned in paragraph 2 while the application is being considered by the court. Either you or your tenant can ask the court to fix the rent which your tenant will have to pay whilst the tenancy continues (sections 24A to 24D). The court will settle any terms of a new tenancy on which you and your tenant disagree (sections 34 and 35).

Time limit for opposing your tenant's request

If you do not want to grant a new tenancy, you have two months from the making of your tenant's request in which to notify him or her that you will oppose any application made to the court for a new tenancy. You do not need a special form to do this, but the notice must be in writing and it must state on which of the grounds set out in section 30(1) you will oppose the application. If you do not use the same wording of the ground (or grounds), as set out below, your notice may be ineffective.

If there has been any delay in your seeing this notice, you may need to act very quickly. If you are in any doubt about what action you should take, get advice immediately from a solicitor or a surveyor.

Grounds for opposing tenant's application

If you wish to oppose the renewal of the tenancy, you can do so by opposing your tenant's application to the court, or by making your own application to the court for termination without renewal. However, you can only oppose your tenant's application, or apply for termination without renewal, on one or more of the grounds set out in section 30(1). These grounds are set out below. You will only be able to rely on the ground(s) of opposition that you have mentioned in your written notice to your tenant.

In this Table 'the holding' means the property that is the subject of the tenancy.

Paragraph of section 30(1)	*Grounds*
(a)	Where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations.
(b)	That the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due.
(c)	That the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding.
(d)	That the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding.
(e)	Where the current tenancy was created by the sub-letting of part only of the property comprised in a superior tenancy and the landlord is the owner of an interest in reversion expectant on the termination of that superior tenancy, that the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purposes of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy.
(f)	That on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding.
(g)	On the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.

Compensation

If your tenant cannot get a new tenancy solely because one or more of grounds (e), (f) and (g) applies, he or she is entitled to compensation under section 37. If you have opposed your tenant's application on any of the other grounds mentioned in section 30(1), as well as on one or more of grounds (e), (f) and (g), your tenant can only get compensation if the court's refusal to grant a new tenancy is based solely on ground (e), (f) or (g). In other words, your tenant

cannot get compensation under section 37 if the court has refused the tenancy on *other* grounds, even if one or more of grounds (e), (f) and (g) also applies.

If you are an authority possessing compulsory purchase powers (such as a local authority), your tenant may be entitled to a disturbance payment under Part 3 of the Land Compensation Act 1973.

Negotiating a new tenancy

Most tenancies are renewed by negotiation and your tenant has set out proposals for the new tenancy in paragraph 3 of this notice. You are not obliged to accept these proposals and may put forward your own. You and your tenant may agree in writing to extend the deadline for making an application to the court while negotiations continue. Your tenant may not apply to the court for a new tenancy until two months have passed from the date of the making of the request contained in this notice, unless you have already given notice opposing your tenant's request as mentioned in paragraph 6 of this notice (section 29A(3)).

If you try to agree a new tenancy with your tenant, remember:

- that one of you will need to apply to the court before the date in paragraph 2 of this notice, unless you both agree to extend the period for making an application.
- that any such agreement must be in writing and must be made before the date in paragraph 2 (sections 29A and 29B).

Validity of this notice

The tenant who has given you this notice may not be the person from whom you receive rent (sections 44 and 67). This does not necessarily mean that the notice is invalid.

If you have any doubts about whether this notice is valid, get advice immediately from a solicitor or a surveyor.

Form 4

LANDLORD'S REQUEST FOR INFORMATION ABOUT OCCUPATION AND SUB-TENANCIES

Section 40(1) of the Landlord and Tenant Act 1954

To: (*insert name and address of tenant*)

From: (*insert name and address of landlord*)

1. This notice relates to the following premises: (*insert address or description of premises*)

2. I give you notice under section 40(1) of the Landlord and Tenant Act 1954 that I require you to provide information—

(a) by answering questions (1) to (3) in the Table below;
(b) if you answer 'yes' to question (2), by giving me the name and address of the person or persons concerned;
(c) if you answer 'yes' to question (3), by also answering questions (4) to (10) in the Table below;
(d) if you answer 'no' to question (8), by giving me the name and address of the sub-tenant; and
(e) if you answer 'yes' to question (10), by giving me details of the notice or request.

TABLE

(1)	Do you occupy the premises or any part of them wholly or partly for the purposes of a business that is carried on by you?
(2)	To the best of your knowledge and belief, does any other person own an interest in reversion in any part of the premises?
(3)	Does your tenancy have effect subject to any sub-tenancy on which your tenancy is immediately expectant?
(4)	What premises are comprised in the sub-tenancy?
(5)	For what term does it have effect or, if it is terminable by notice, by what notice can it be terminated?
(6)	What is the rent payable under it?
(7)	Who is the sub-tenant?
(8)	To the best of your knowledge and belief, is the sub-tenant in occupation of the premises or of part of the premises comprised in the sub-tenancy?
(9)	Is an agreement in force excluding, in relation to the sub-tenancy, the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954?
(10)	Has a notice been given under section 25 or 26(6) of that Act, or has a request been made under section 26 of that Act, in relation to the sub-tenancy?

3. You must give the information concerned in writing and within the period of one month beginning with the date of service of this notice.

4. Please send all correspondence about this notice to:

Name:

Address:

Signed: Date:

*[Landlord] *[on behalf of the landlord] **delete whichever is inapplicable*

IMPORTANT NOTE FOR THE TENANT

This notice contains some words and phrases that you may not understand. The Notes below should help you, but it would be wise to seek professional advice, for example, from a solicitor or surveyor, before responding to this notice.

Once you have provided the information required by this notice, you must correct it if you realise that it is not, or is no longer, correct. This obligation lasts for six months from the date of service of this notice, but an exception is explained in the next paragraph. If you need to correct information already given, you must do so within one month of becoming aware that the information is incorrect.

The obligation will cease if, after transferring your tenancy, you notify the landlord of the transfer and of the name and address of the person to whom your tenancy has been transferred.

If you fail to comply with the requirements of this notice, or the obligation mentioned above, you may face civil proceedings for breach of the statutory duty that arises under

section 40 of the Landlord and Tenant Act 1954. In any such proceedings a court may order you to comply with that duty and may make an award of damages.

NOTES

The sections mentioned below are sections of the Landlord and Tenant Act 1954, as amended, (most recently by the **Regulatory Reform** (Business Tenancies) (England and Wales) Order 2003).

Purpose of this notice

Your landlord (or, if he or she is a tenant, possibly your landlord's landlord) has sent you this notice in order to obtain information about your occupation and that of any sub-tenants. This information may be relevant to the taking of steps to end or renew your business tenancy.

Time limit for replying

You must provide the relevant information within one month of the date of service of this notice (section 40(1), (2) and (5)).

Information required

You do not have to give your answers on this form; you may use a separate sheet for this purpose. The notice requires you to provide, in writing, information in the form of answers to questions (1) to (3) in the Table above and, if you answer 'yes' to question (3), also to provide information in the form of answers to questions (4) to (10) in that Table. Depending on your answer to question (2) and, if applicable in your case, questions (8) and (10), you must also provide the information referred to in paragraph 2(b), (d) and (e) of this notice. Question (2) refers to a person who owns an interest in reversion. You should answer 'yes' to this question if you know or believe that there is a person who receives, or is entitled to receive, rent in respect of any part of the premises (other than the landlord who served this notice).

When you answer questions about sub-tenants, please bear in mind that, for these purposes, a sub-tenant includes a person retaining possession of premises by virtue of the Rent (Agriculture) Act 1976 or the Rent Act 1977 after the coming to an end of a sub-tenancy, and 'sub-tenancy' includes a right so to retain possession (section 40(8)).

You should keep a copy of your answers and of any other information provided in response to questions (2), (8) or (10) above.

If, once you have given this information, you realise that it is not, or is no longer, correct, you must give the correct information within one month of becoming aware that the previous information is incorrect. Subject to the next paragraph, your duty to correct any information that you have already given continues for six months after you receive this notice (section 40(5)). You should give the correct information to the landlord who gave you this notice unless you receive notice of the transfer of his or her interest, and of the name and address of the person to whom that interest has been transferred. In that case, the correct information must be given to that person.

If you transfer your tenancy within the period of six months referred to above, your duty to correct information already given will cease if you notify the landlord of the transfer and of the name and address of the person to whom your tenancy has been transferred.

If you do not provide the information requested, or fail to correct information that you have provided earlier, after realising that it is not, or is no longer, correct, proceedings may be taken against you and you may have to pay damages (section 40B).

If you are in any doubt about the information that you should give, get immediate advice from a solicitor or a surveyor.

Validity of this notice

The landlord who has given you this notice may not be the landlord to whom you pay your rent (sections 44 and 67). This does not necessarily mean that the notice is invalid.

If you have any doubts about whether this notice is valid, get advice immediately

Form 5

TENANT'S REQUEST FOR INFORMATION FROM LANDLORD OR LANDLORD'S MORTGAGEE ABOUT LANDLORD'S INTEREST

Section 40(3) of the Landlord and Tenant Act 1954

To: (*insert name and address of reversioner or reversioner's mortgagee in possession [see the first note below])*

From: (*insert name and address of tenant*)

1. This notice relates to the following premises: (*insert address or description of premises*)

2. In accordance with section 40(3) of the Landlord and Tenant Act 1954 I require you—

(a) to state in writing whether you are the owner of the fee simple in respect of the premises or any part of them or the mortgagee in possession of such an owner,

(b) if you answer 'no' to (a), to state in writing, to the best of your knowledge and belief—

(i) the name and address of the person who is your or, as the case may be, your mortgagor's immediate landlord in respect of the premises or of the part in respect of which you are not, or your mortgagor is not, the owner in fee simple;

(ii) for what term your or your mortgagor's tenancy has effect and what is the earliest date (if any) at which that tenancy is terminable by notice to quit given by the landlord; and

(iii) whether a notice has been given under section 25 or 26(6) of the Landlord and Tenant Act 1954, or a request has been made under section 26 of that Act, in relation to the tenancy and, if so, details of the notice or request;

(c) to state in writing, to the best of your knowledge and belief, the name and address of any other person who owns an interest in reversion in any part of the premises;

(d) if you are a reversioner, to state in writing whether there is a mortgagee in possession of your interest in the premises; and

(e) if you answer 'yes' to (d), to state in writing, to the best of your knowledge and belief, the name and address of the mortgagee in possession.

3. You must give the information concerned within the period of one month beginning with the date of service of this notice.

4. Please send all correspondence about this notice to:

Name:

Address:

Signed: Date:

*[Tenant] *[on behalf of the tenant] (**delete whichever is inapplicable*)

IMPORTANT NOTE FOR LANDLORD OR LANDLORD'S MORTGAGEE

This notice contains some words and phrases that you may not understand. The Notes below should help you, but it would be wise to seek professional advice, for example, from a solicitor or surveyor, before responding to this notice.

Once you have provided the information required by this notice, you must correct it if you realise that it is not, or is no longer, correct. This obligation lasts for six months from the

date of service of this notice, but an exception is explained in the next paragraph. If you need to correct information already given, you must do so within one month of becoming aware that the information is incorrect.

The obligation will cease if, after transferring your interest, you notify the tenant of the transfer and of the name and address of the person to whom your interest has been transferred.

If you fail to comply with the requirements of this notice, or the obligation mentioned above, you may face civil proceedings for breach of the statutory duty that arises under section 40 of the Landlord and Tenant Act 1954. In any such proceedings a court may order you to comply with that duty and may make an award of damages.

NOTES

The sections mentioned below are sections of the Landlord and Tenant Act 1954, as amended, (most recently by the **Regulatory Reform** (Business Tenancies) (England and Wales) Order 2003).

Terms used in this notice

The following terms, which are used in paragraph 2 of this notice, are defined in section 40(8):

> 'mortgagee in possession' includes a receiver appointed by the mortgagee or by the court who is in receipt of the rents and profits;
>
> 'reversioner' means any person having an interest in the premises, being an interest in reversion expectant (whether immediately or not) on the tenancy; and
>
> 'reversioner's mortgagee in possession' means any person being a mortgagee in possession in respect of such an interest.

Section 40(8) requires the reference in paragraph 2(b) of this notice to your mortgagor to be read in the light of the definition of 'mortgagee in possession'.

A mortgagee (mortgage lender) will be 'in possession' if the mortgagor (the person who owes money to the mortgage lender) has failed to comply with the terms of the mortgage. The mortgagee may then be entitled to receive rent that would normally have been paid to the mortgagor.

The term 'the owner of the fee simple' means the freehold owner.

The term 'reversioner' includes the freehold owner and any intermediate landlord as well as the immediate landlord of the tenant who served this notice.

Purpose of this notice and information required

This notice requires you to provide, in writing, the information requested in paragraph 2(a) and (c) of the notice and, if applicable in your case, in paragraph 2(b), (d) and (e). You do not need to use a special form for this purpose.

If, once you have given this information, you realise that it is not, or is no longer, correct, you must give the correct information within one month of becoming aware that the previous information is incorrect. Subject to the last paragraph in this section of these Notes, your duty to correct any information that you have already given continues for six months after you receive this notice (section 40(5)).

You should give the correct information to the tenant who gave you this notice unless you receive notice of the transfer of his or her interest, and of the name and address of the person to whom that interest has been transferred. In that case, the correct information must be given to that person.

If you do not provide the information requested, or fail to correct information that you have provided earlier, after realising that it is not, or is no longer, correct, proceedings may be taken against you and you may have to pay damages (section 40B).

If you are in any doubt as to the information that you should give, get advice immediately from a solicitor or a surveyor.

If you transfer your interest within the period of six months referred to above, your duty to correct information already given will cease if you notify the tenant of that transfer and of the name and address of the person to whom your interest has been transferred.

Time limit for replying

You must provide the relevant information within one month of the date of service of this notice (section 40(3), (4) and (5)).

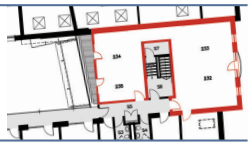
Validity of this notice

The tenant who has given you this notice may not be the person from whom you receive rent (sections 44 and 67). This does not necessarily mean that the notice is invalid.

If you have any doubts about the validity of the notice, get advice immediately from a solicitor or a surveyor.

Appendix 3
The Code for Leasing Business Premises in England and Wales 2007

Leasing Business Premises: Landlord Code



Introduction

This revised lease code is the result of pan-industry discussion between representatives of landlords, tenants and government. The objective is to create a document which is clear, concise and authoritative.

However, our aims are wider. We want the lease code to be used as a checklist for negotiations before the grant of a lease and lease renewals. Landlords should be transparent about any departures from the code in a particular case and the reasons for them.

We have provided model heads of terms and whilst we recognise the code will apply to leases in England and Wales, we believe its intent should apply to the whole of the UK.

Most importantly, we are launching the code with an objective to ensure that parties to a lease have easy access to information explaining the commitments they are making in clear English. We will encourage trade and professional bodies, lenders and government (at all levels) to ensure small businesses are made aware of the code and the advisory pages which accompany it.

Although the code applies to new leases, please also see the British Property Federation declaration, which applies to existing leases, in relation to applications for consent to sublet where there is an existing lease covenant requiring subleases to be at the higher of the passing rent and the market rent.

We hope the code will help the industry in its quest to promote efficiency and fairness in landlord and tenant relationships.

1 Lease Negotiations

Landlords must make offers in writing which clearly state: the rent; the length of the term and any break rights; whether or not tenants will have security of tenure; the rent review arrangements; rights to assign, sublet and share the premises; repairing obligations; and the VAT status of the premises.

Landlords must promote flexibility, stating whether alternative lease terms are available and must propose rents for different lease terms if requested by prospective tenants.

2 Rent Deposits and Guarantees

The lease terms should state clearly any rent deposit proposals, including the amount, for how long and the arrangements for paying or accruing interest at a proper rate. Tenants should be protected against the default or insolvency of the landlord.

State clearly the conditions for releasing rent deposits and guarantees.

3 Length of Term, Break Clauses and Renewal Rights

The length of term must be clear.

The only pre-conditions to tenants exercising any break clauses should be that they are up to date with the main rent, give up occupation and leave behind no continuing subleases. Disputes about the state of the premises, or what has been left behind or removed, should be settled later (like with normal lease expiry).

The fallback position under the Landlord and Tenant Act 1954 is that business tenants have rights to renew their lease. It is accepted that there are a number of circumstances in which that is not appropriate. In such cases landlords should state at the start of negotiations that the protection of the 1954 Act is to be excluded and encourage tenants to seek early advice as to the implications.

4 Rent Review

Rent reviews should be clear and headline rent review clauses should not be used. Landlords should on request offer alternatives to their proposed option for rent review priced on a risk-adjusted basis.

For example, alternatives to upward only rent review might include up/down reviews to market rent with a minimum of the initial rent, or reference to another measure such as annual indexation.

Where landlords are unable to offer alternatives, they should give reasons.

Leases should allow both landlords and tenants to start the rent review process.

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5 Assignment and Subletting

Leases should:

- allow tenants to assign the whole of the premises with the landlord's consent not to be unreasonably withheld or delayed; and
- not refer to any specific circumstances for refusal, although a lease would still be Code compliant if it requires that any group company taking an assignment, when assessed together with any proposed guarantor, must be of at least equivalent financial standing to the assignor (together with any guarantor of the assignor).

Authorised Guarantee Agreements should not be required as a condition of the assignment, unless at the date of the assignment the proposed assignee, when assessed together with any proposed guarantor:

- is of lower financial standing than the assignor (and its guarantor); or
- is resident or registered overseas.

For smaller tenants a rent deposit should be acceptable as an alternative.

If subletting is allowed, the sublease rent should be the market rent at the time of subletting.

Subleases to be excluded from the 1954 Act should not have to be on the same terms as the tenant's lease.

6 Service Charges

Landlords must, during negotiations, provide best estimates of service charges, insurance payments and any other outgoings that tenants will incur under their leases.

Landlords must disclose known irregular events that would have a significant impact on the amount of future service charges.

Landlords should be aware of the RICS 2006 Code of Practice on Service Charges in Commercial Property and seek to observe its guidance in drafting new leases and on renewals (even if granted before that Code is effective).

7 Repairs

Tenants' repairing obligations should be appropriate to the length of term and the condition of the premises.

Unless expressly stated in the heads of terms, tenants should only be obliged to give the premises back at the end of their lease in the same condition as they were in at its grant.

8 Alterations and Changes of Use

Landlords' control over alterations and changes of use should not be more restrictive than is necessary to protect the value, at the time of the application, of the premises and any adjoining or neighbouring premises of the landlord.

Internal non-structural alterations should be notified to landlords but should not need landlords' consent unless they could affect the services or systems in the building.

Landlords should not require tenants to remove permitted alterations and make good at the end of the lease, unless reasonable to do so. Landlords should notify tenants of their requirements at least six months before the termination date.

9 Insurance

Where landlords are insuring the landlord's property, the insurance policy terms should be fair and reasonable and represent value for money, and be placed with reputable insurers.

Landlords must always disclose any commission they are receiving and must provide full insurance details on request.

Rent suspension should apply if the premises are damaged by an insured risk or uninsured risk, other than where caused by a deliberate act of the tenant. If rent suspension is limited to the period for which loss of rent is insured, leases should allow landlords or tenants to terminate their leases if reinstatement is not completed within that period.

Landlords should provide appropriate terrorism cover if practicable to do so.

If the whole of the premises are damaged by an uninsured risk as to prevent occupation, tenants should be allowed to terminate their leases unless landlords agree to rebuild at their own cost.

10 Ongoing Management

Landlords should handle all defaults promptly and deal with tenants and any guarantors in an open and constructive way.

At least six months before the termination date, landlords should provide a schedule of dilapidations to enable tenants to carry out any works and should notify any dilapidations that occur after that date as soon as practicable.

When receiving applications for consents, landlords should where practicable give tenants an estimate of the costs involved.

Landlords should normally request any additional information they require from tenants within five working days of receiving the application. Landlords should consider at an early stage what other consents they will require (for example, from superior landlord or mortgagees) and then seek these. Landlords should make decisions on consents for alterations within 15 working days of receiving full information.

The Code for Leasing Business Premises in England and Wales 2007
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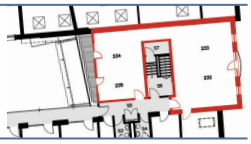
Leasing Business Premises: Occupier Guide



Introduction

A business lease is a legally binding contract between the legal owner (Landlord) and the occupier (Tenant). Failure by either party to comply with the terms of the agreement could result in court action.

The 2007 Code for Leasing Business Premises ('the Lease Code') provides a framework within which a prospective tenant can reasonably expect a landlord to operate. As a prospective tenant, you should not assume that a landlord complies with the Lease Code. The Lease Code does not provide all of the protection you need for your business in leasing premises.

Sometimes the Landlord is also the tenant of another owner. This may restrict the flexibility of terms the Landlord can offer. The Landlord should always state in advance if this is so and provide a copy of the current lease.

If it is proposed to buy an existing lease (assignment) from someone else, be aware that, though parts of this Occupier Guide may help in interpreting some of the terms of the lease, there may be many additional liabilities. Professional advice from a qualified surveyor and a lawyer should be sought.

In this document the following terms have been used:

Landlord	This is the owner of the property or the person owning an existing lease of the property
Tenant	This is the occupier of the property or the person paying rent to a landlord (this Occupier Guide assumes the tenant will be you)
Heads of Terms	This is a summary of the agreement between the parties and is used to instruct lawyers to produce the formal lease. Both the lease and the Heads of Terms should comply with the recommendations of the Lease Code but the Heads of Terms will be superseded once the lease has been granted.

For more information on the Lease Code see Useful Links.

1 Lease negotiations

You should expect the Landlord to make very clear exactly what you are being asked to agree.

You should be able to understand the total extent and duration of the cost and liability you will be taking on if you sign a lease based on the terms being offered by the Landlord.

Tip 1

Make sure you understand every term and condition in the offer including the total cost until the lease ends and ask the Landlord or the Landlord's representative to confirm in writing that the offer meets the Lease Code.

You should know from the offer exactly what the property is.

Tip 2

Make sure the offer clearly shows the extent of the property, with the boundaries clearly marked on plan and the floor area noted, together with all means of access, any access or areas you must share with other occupiers, any limitation of hours of use, any restrictions in the type of use, any legal or planning limitations or obligations that come with the property.

You should also remember that, however good your relationship is or seems to be with the Landlord, the Landlord may sell to another party; the terms you agree and the lease you take on must reflect everything you rely on to conduct and safeguard your business.

The Code for Leasing Business Premises in England and Wales 2007
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Tip 3

Make sure the offer sets out clearly who the Landlord is, together with any superior landlords, and assume that any Landlord will sell his interest to someone else and that you will have to deal with the new owner.

You should request alternative terms if you are not happy with the initial terms of the Landlord's offer, always bearing in mind that any variation (such as lease length, rent review terms – including frequency and basis – break options, etc) may change the level of rent or other terms.

Tip 4

Request written responses from the Landlord, where you expect to need to rely on them. Check that all the things which are important to you and your business have been accurately written down in the Heads of Terms and documented in the lease.

2 Financial matters, rent deposits and guarantees

The Landlord should provide full details of your expected costs involved in leasing the property. This should include all personal or company guarantees, security deposits or other bank guarantees.

Not all costs will be fixed at the time of agreeing the lease. You should expect the Landlord to explain how any costs are calculated so that you can understand the risks and make sure you can afford all of the costs of leasing the property.

Tip 5

It may be helpful to use a checklist (such as that set out below) so that you can ask the Landlord to be explicit about costs and obligations in the lease.

If the Landlord demands a deposit, you should make sure you understand the conditions under which it is held and the basis on which it will be returned to you. You should remember that this is YOUR money that the Landlord is holding as a protection against any failure on your part.

Tip 6

Keep thinking of the deposit as your money and demand that interest on it is accrued at a fair rate. Ask the Landlord to make sure it is held in an account that belongs to you (escrow or stakeholder account) in case the Landlord becomes insolvent. Throughout the term of the lease, make sure you obtain statements from the Landlord to confirm that the money is still in the account and that all interest earned has been paid to you or, if required by the lease, has been held on your behalf within the account. Check that your deposit will be transferred to the new Landlord if the Landlord sells the property to another owner.

Tip 7

Make sure you know when and how you can get your deposit back, such as when you no longer have an interest or have satisfied agreed conditions.

If you are asked to give a personal guarantee, you should avoid using your home as security. You should be able to understand both when and how the Landlord may call on your guarantee, and also what the guarantee would actually cover.

Tip 8

Think of any guarantee as if it WILL be called on the first day of the lease; what would be the personal consequences for you? Can you afford it?

Cost Item	Who pays?	How much? How often?	What is the occupier's cost each year?	If this cost is not fixed, what does it depend on?
Rent	e.g. Tenant			
VAT				
Rates				
Service charges				
Insurance				
Utilities				
Repairs/Dilapidations				
Fitting out/Alterations				
Total each year				
Total lease cost				

3 Rent review

Your lease may contain provisions allowing the Landlord to change the rent. The rules by which the rent can be changed should be clear and understandable. It should be arranged that the Landlord cannot simply impose a rental increase. The basis of rent review should be to the market rent unless clearly stated otherwise. If you agreed increases fixed to an index, the basis should be a published, independent, authoritative source.

If there is an open market rental value provision, it should specifically exclude (or disregard) any improvements you make, other than as part of an explicit obligation, or any value arising from your business. You should also make sure there are controls in the event of disagreement that will be referred to an independent expert or arbitrator to settle.

Tip 9

Check that you understand the basis on which the rent can be changed. Can the rent go down as well as up? You should see if the Landlord is prepared to allow upward or downward rent reviews and if not, you should consider asking for a break option exercisable only by the tenant.

Your lease should include a provision allowing you to serve a rent review notice on the Landlord. If the Landlord does not initiate the rent review, think very carefully before deciding not to serve notice on the Landlord as you may be responsible for paying interest on any increase in rent above the original rent from the appropriate rent review date until the review has been agreed.

Tip 10

Make sure that the interest rate on the difference is no higher than bank base rate. Try to introduce a provision whereby the Landlord forfeits interest on the difference if he/she does not initiate the rent review process prior to the review date.

Tip 11

Avoid strict time limits in the rent review clause (other than referred to in Tip 10) – these could result in you losing the ability to negotiate.

4 Subletting and assignment

Subletting (creating a new lease of all or part of the property)

If your lease allows subletting, you should understand any limitations (in terms of the amount of space, the use and the rent you can charge and the nature of the subtenant you can sublet to).

It is usual for Landlords to insist that subleases are granted outside the protection of the Landlord and Tenant Act 1954 and on similar terms to your lease.

Tip 12

Try to make sure you are NOT required to sublet at the same or higher rent than you pay. You should not be limited other than by reference to the market rent at the time of the subletting.

Be careful that restrictive subletting provisions do not prevent you from, say, sharing your space with a supplier or service provider (for example, an outside cleaning company which you provide with its own cleaner's cupboard)

Tip 13

Ask your Landlord to reflect the flexibility you require in the sharing provisions of the lease. This probably means you must not create a tenancy for your supplier.

Landlord's written consent is likely to be required for subleases.

Tip 14

Make sure your Landlord, including any superior landlords, is required to give consent within a defined (and short) period of time and that he is not allowed to refuse without good reason.

Assignment (disposing of your existing legal interest in the whole premises)

It is common for Landlords to require you to guarantee the lease once you have assigned it to a third party. The form of guarantee (an Authorised Guarantee Agreement or AGA) usually makes you responsible, as a guarantor, for the lease obligations until your assignee (the person to whom you sold your lease) assigns the lease to another party.

Tip 15

Ask the Landlord to limit his requirement for an Authorised Guarantee Agreement to those cases where your proposed buyer (assignee) is financially weaker than you are at the date of assignment. Ask the Landlord to include provisions that will allow you to cancel the Guarantee if defined conditions are met and/or after an agreed period.

Tip 16

Try to agree alternative conditions to avoid you having to enter into an Authorised Guarantee Agreement (for example, by having the new tenant pay a rent deposit).

The Landlord should not impose any condition which requires you to be in compliance with the lease at the time of assignment.

Tip 17

Try to make sure the only precondition for assignment is obtaining the Landlord's consent in writing and that the Landlord may not unreasonably withhold or delay giving his consent.

The Code for Leasing Business Premises in England and Wales 2007
www.leasingbusinesspremises.co.uk

5 Lease length, break clauses and renewals

The Landlord should make clear the length of the lease, whether there are any rights to break the lease and whether you will be entitled to an extension of the lease on expiry (see section 11 below).

Make sure that the length of the lease is appropriate for your business needs; ask the Landlord to offer you a break option exercisable only by the tenant (this will be you unless you have assigned your lease) to give you the opportunity to cancel the lease at a time that suits your business.

A right to break should allow you to walk away from the lease at a given time after informing the Landlord in writing. This should be conditional only upon having paid the rent due under the lease and giving up occupation of the property, leaving behind no continuing subleases. You may have other liabilities to fulfil, but these should not be used to invalidate the right to break.

Tip 18

Be careful that it is only the principal rent and not any other sums (such as service charges) that must be paid in cleared funds before the break date.

When your lease ends, whether by expiry or by exercise of a break option, you will be liable to the Landlord for any sums due and for any repairs you should have carried out during the lease (dilapidations).

Tip 19

When granting any subleases or in sharing possession with any suppliers or business partners, always make sure your agreement with them expires on a date before your right to break, AND that you have not given them any rights to stay in the property beyond the term of your agreement with them.

Be sure that you understand what notices you would be required to serve on the Landlord to end the lease, and how and when these should be served.

The Landlord and Tenant Act 1954 gives you the right to extend your tenancy when your lease runs out.

Unless both you and the Landlord have agreed (in the correct procedure) that the lease is to be excluded from the relevant sections of the Landlord and Tenant Act 1954, you will be entitled to renew your lease unless your Landlord can prove certain specific circumstances, which include redeveloping the property or occupying the space himself.

You should make sure you understand the options available to you when your lease expires. Take professional advice to make sure all notices are properly served and that your interests are protected.

Tip 20

Take professional advice at least six months before the end of the lease and on receipt of any notice from the Landlord under the Act.

6 Service charges

You should expect the Landlord to be explicit in his offer about any service charges, including how these costs are calculated, what they cover (and don't include) and the extent to which you will be obliged to pay towards any capital improvements and long-term repairs or replacements of structure, fabric or machinery and equipment.

Tip 21

Ask the Landlord whether he complies with the Service Charge Code 2006, and ask for a clear estimate in writing of the likely service charge costs for each year of the lease term (to include any known or planned capital costs).

Tip 22

As you are likely to be responsible for the repairs to a proportionate part or the whole of the building you should satisfy yourself that there are no major repairs required at the beginning of your lease or that are likely shortly afterwards.

Tip 23

Make sure the Landlord cannot charge you a greater proportion of cost when he has other space vacant in the estate or building.

7 Repairs

UNLESS you specifically agree at the time of taking the lease to carry out works or to reinstate the property to its original state, check that the lease does not require you to put the property into a better condition than when you take the lease.

Tip 24

It is worthwhile either getting a formal photographic schedule of condition carried out by a firm of surveyors or taking plenty of photographs on or before taking the lease to record the condition at the beginning of the lease.

Tip 25

If you take the photographs yourself, make sure you get the photographs dated and witnessed and keep a set with your lease documents. If you produce your own video schedule of condition, send the Landlord a copy by Recorded Delivery Post.

You should bear in mind if you buy an existing lease (take an assignment of someone else's lease), that the condition of the property when you take it may be poorer than it was at the beginning of the lease. You may be required to put the property back into its original condition so it is worth taking professional advice.

8 Alterations and changes of use

Your lease will limit the use of the property to a specified purpose (for example, B1 (Offices). The lease will usually put the responsibility on you to check that your proposed use complies with any planning consent.

Tip 26

Make sure the Landlord provides you with all relevant information and, if possible, confirms to you that your use complies with his planning consent.

The lease may be quite restrictive in terms of any signage and any alterations you are permitted to make. Before you enter into the lease, you should make sure you are permitted to carry out any works your business needs.

Tip 27

Check what you need to do to the property in order to trade. Make sure the Landlord agrees in writing any changes you intend to make at the beginning of the lease period. Check whether you will be required to remove your alterations at the end of the lease.

The Landlord should be required to give his consent within a reasonable time period (say 21 days) and should not be able to refuse your proposed alterations without good reason.

Tip 28

Make sure your lease allows you to make non-structural alterations except where the Landlord can demonstrate it would affect the operation of the building. You should remember that you should notify the Landlord of any non-structural alterations you do make.

You should be aware of statutory requirements (such as Construction (Design and Management) Regulations 2007 (CDM) that you must comply with when carrying out any works or alterations to the Property. The CDM regulations require you to keep full and detailed formal records and your Landlord will require you to maintain these records throughout the lease.

9 Insurance

You may be required to reimburse the Landlord for his insurance premiums, and the Landlord should tell you what commission payments (if any) he receives.

Tip 29

Ask for a copy of the Landlord's insurance policy and before signing the lease, check with alternative insurers that you are getting value for money for the given level of premium and that the insurance company is reputable. Ask him to confirm to you that he has no intention of changing the scope (and, therefore, the cost and nature) of the insurance cover.

The lease should provide for the Landlord's policy to be used to repair or rebuild the property unless the insurance is invalidated by anything you do, in which case you may be liable for the reinstatement.

Tip 30

Remember to inform the Landlord and his insurer if you intend to change the way you use the property; let them know if you are storing any hazardous chemicals in the context of your business or if you propose to leave the property vacant and unattended at any time. Ask the Landlord to ensure inclusion of such activities in the insurance policy and to consult you over any changes in the insurance policy terms.

Tip 31

Check whether your alterations or improvements would be covered under the Landlord's policy.

10 Tenant's defaults and applications for consent

Tenant default

The lease forms a legal contract between you and your Landlord. Any breach of contract may have serious consequences and you should take care to understand your obligations and steps the Landlord may take against you and, if applicable, your guarantors, including Court action.

The laws relating to Landlord and Tenant relationships are complex and you should seek professional advice so you are clear on your obligations and rights.

A fair lease is one which allows you enough opportunity to fix any problems (without loss to the Landlord) before any legal action is taken.

Tip 32

Check that the Landlord must let you know you are in breach and give you a reasonable opportunity to remedy the breach before taking legal action against you.

You may find that you have failed or forgotten to carry out some obligations under your lease. It is usually best if you are able to carry out these obligations yourself. It may be better sometimes to approach the Landlord and negotiate a reasonable payment to have the Landlord carry out the obligations after your lease has expired.

Tip 33

Try to stay on good terms with the Landlord. This should help make any situation easier to handle and should allow you to run your business without unnecessary outside interruptions.

The remedy for a breach of your agreement may range from the Landlord sending in bailiffs, who may seize goods to the value of the breach, to the Landlord taking back the property from you ('Forfeiture'). You should note that this would not take away your liability to pay arrears of rent.

The Code for Leasing Business Premises in England and Wales 2007
www.leasingbusinesspremises.co.uk

Tip 34

Make sure the 'Forfeiture' provisions in the lease are clear; they should allow you enough time to pay, and should allow you to restructure your business without necessarily making your lease vulnerable to forfeiture.

The Landlord may try to forfeit your lease by locking you out of the Property or by obtaining a court order. In either case you can apply to the Court to give you time to put matters right or to pay what you owe. Seek urgent professional advice in that situation.

New legislation often brings new obligations for owners and occupiers of property. Leases often require tenants to comply with statute at their own cost. You should ensure your obligations under the lease are proportionate to the length and terms of your lease and you should take professional advice and make your own estimate of any expected costs. You should research possible new Regulations that could affect your occupation and your business.

This provision should not be taken lightly and you should ensure that the Property is in compliance with existing regulations (for example, with Disability Discrimination Acts, Town and Country Planning Acts, Health & Safety Acts or Environmental Protection Acts) when you take the lease.

Tip 35

Ask the Landlord to confirm to you in writing that the Property complies with all regulations (some of which are "Statutory Instruments") before entering into the lease.

Tip 36

Stay aware of potential new legislation and Regulations that will affect occupiers of business premises (many trade bodies and professional firms send out newsletters which can help to identify significant changes). Identify the costs and take professional advice to ensure you comply where you are obliged to by your lease.

Applications for consent

You will need to make applications to the Landlord during the lease, for example, if you intend to carry out alterations (see Section 8) or if you propose to sublease or assign your lease (see Section 4). The lease should specify that the Landlord may not unreasonably withhold or delay his consent.

The Landlord's duty to respond only applies from when he has received from you adequate information about the proposed alterations or about the proposed assignee or subtenant and full details of the proposed transaction.

Tip 37

Check what information will be required before making an application and make sure you are able to give the Landlord full details. Ask the Landlord in advance what other consents he may have to get and ask for assurances that this will not add any further delay to the approval process.

Useful Links

The Code for Leasing Business Premises in England and Wales 2007
www.leasingbusinesspremises.co.uk

Bills before Parliament
www.publications.parliament.uk/pa/pabills.htm

Building Regulations
www.communities.gov.uk/index.asp?id=1130474

Health and Safety Executive
www.hse.gov.uk

Service Charge Code
www.servicechargecode.co.uk

Town Planning (Link Site)
www.ukplanning.com/ukp/index.htm

Uniform Business Rates
www.voa.gov.uk

Organisations Endorsing the Code

Association of British Insurers
www.abi.org.uk/

British Council for Offices
www.bco.org.uk

British Property Federation
www.bpf.org.uk

British Retail Consortium
www.brc.org.uk

Communities and Local Government
www.communities.gov.uk

Confederation of British Industry
www.cbi.org.uk

CoreNet Global
www.corenetglobal.org.uk

The Forum of Private Business
www.fpb.org.uk

Federation of Small Businesses
www.fsb.org.uk

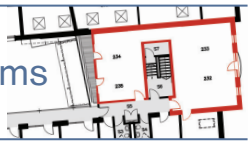
Investment Property Forum
www.ipf.org.uk/

The Law Society of England and Wales
www.lawsociety.org.uk

The Royal Institution of Chartered Surveyors
www.rics.org

Welsh Assembly Government
www.wales.gov.uk/index.htm

Leasing Business Premises: Model Heads of Terms



Note: These Model Heads of Terms follow a similar format to the Code for Leasing Business Premises: Landlord Code.

1.0	**Initial information**	Lease to be Code compliant: Yes / No.
1.1	**Property address**	Detailed description (and Land Registry compliant plan if available) and measured area if relevant, e.g. for rent, service charge and rent reviews.
1.2	**Landlord**	[ ] (Registered no. [ ]) Registered office: Correspondence address: Contact name: E-mail: Telephone: (Fax:) Mobile:
1.3	**Tenant**	[ ] (Registered no. [ ]) Registered office: Correspondence address: Contact name: E-mail: Telephone: (Fax:) Mobile:
1.4	**Rent**	£ per annum exclusive of VAT. Payment dates monthly/quarterly. Is the property VAT elected?
1.5	**Rent free period (and other Incentives)**	
1.6	**Type of lease**	Head lease or sub lease.
1.7	**Landlord's initial works (including timing)**	Long stop date by which works must be done. Is the specification agreed/if not who is providing it?
1.8	**Tenant's initial works (including timing)**	
2.0	**Guarantor/rent deposits**	(a) Identity of guarantor (if any). (b) Rent deposit amount (if any).
3.0	**Lease length, breaks, extensions and rights**	
3.1	**Lease length and start date**	
3.2	**Break clauses or renewal rights**	(a) Notice periods for exercising? To be at least [ ]. (b) Any break clause payments?
3.3	**1954 Act protection**	Does the lease have 1954 Act protection?

3.4 **Rights**

eg. Satellite dish, air conditioning platforms, remote storage areas, signage, etc. Any rights of access, servicing, wayleaves or other matters inc. fire escape.
For car parking – state number and attach plan if relevant.

4.0 **Rent reviews**

(a) Type (market rent, fixed increases, link to an index?).
(b) How often do reviews occur?
(c) For market rent, are there any unusual disregards or assumptions. Arbitrator/Expert.

5.0 **Assignment and subletting**
See check box >

	Prohibited	If not prohibited is CNUW	Permitted without consent
Assignment of whole	Yes/No	Yes/No	Yes/No
Sub-Lease whole	Yes/No	Yes/No	Yes/No
Sub-Lease part	Yes/No	Yes/No	Yes/No
Sub-sub-lease	Yes/No	Yes/No	Yes/No
Concession	Yes/No	Yes/No	Yes/No
Group sharing	Yes/No	Yes/No	Yes/No

For sub lettings consider: Maximum number of occupiers, limitations
Code requires sublettings to be at market rent.
CNUW = Consent not to be unreasonably withheld.

6.0 **Services and service charge**

Provide estimate or actual budgets and confirm proportion. Any special provisions, eg. exclusions special services, e.g. enhanced security?
Any unusual provisions, e.g. sinking fund?

Note: Owners and Occupiers should be aware of the RICS 2006 Code of Practice on Service Charges in Commercial Property and seek to observe its guidance in drafting new leases and on renewals.

7.0 **Repairing obligations**

7.1 **FRI and schedule of condition**

(a) is it full repairing; if so
(b) is it the Landlord who repairs and recovers the cost, or the Tenant who repairs at its own cost?;
(c) is there to be a schedule of condition?

7.2 **Collateral warranties**

Who is giving them?

8.0 **Alterations and use**

8.1 **Alterations**
See check box >

	Prohibited	If not prohibited is CNUW	Permitted without consent
External	Yes/No	Yes/No	Yes/No
External structural	Yes/No	Yes/No	Yes/No
Internal structural	Yes/No	Yes/No	Yes/No
Internal non structural	Yes/No	Yes/No	Yes/No

Note: Is an agreed form of licence to be attached to lease?

8.2 **Permitted use**

Specify use and any ability to change use.

9.0 **Insurance**

(a) Landlord insures and recovers the premium from the Tenant.
(b) Will terrorism be an insured risk?
(c) Mutual break clause on:
• Insured damage?
• Uninsured damage?

10.0	**Lease management**	
10.1	**Dilapidations**	e.g. Dilapidations to be scheduled and given to the Tenant six months before the termination date.
11.0	**Other issues**	
11.1	**Rates and utilities**	Confirm that the Tenant is responsible. Tenant must check actual amount with Local Authority and utility provider.
11.2	**Legal costs**	Each party to pay own including costs of approval for tenant's fit out.
11.3	**Conditions**	e.g. 1. Board approvals 2. Planning 3. Local authority consents. 4. References 5. Superior landlord's consent 6. Survey.
11.4	**General**	1. DDA 1995? 2. Asbestos register? 3. Environmental issues? 4. Health & safety file and other Issues? 5. Energy efficiency certificate?
11.5	**Landlord's solicitors**	[ ] Company address: Contact name: E-mail: Telephone: (Fax:) Mobile:
11.6	**Tenant's solicitors**	[ ] Company address: Contact name: E-mail: Telephone: (Fax:) Mobile:
11.7	**Timing and other matters**	e.g. Exclusivity period, target for exchange?
11.8	**No contract**	These Heads of Terms are subject to contract.
11.9	**Landlord's agent(s)**	[ ] (Registered no. [ ]) Registered office: Correspondence address: Contact name: E-mail: Telephone: (Fax:) Mobile:
11.10	**Tenant's agent(s)**	[ ] (Registered no. [ ]) Registered office: Correspondence address: Contact name: E-mail: Telephone: (Fax:) Mobile:

Appendix 4
Lease of floor(s) of an office block with guarantee and prescribed clauses

The College of Law would like to thank the Practical Law Company for authorising the use in this publication of the following document: Lease of floor(s) of an office block with guarantee and prescribed clauses (complies with Lease Code 2007) (http://uk.practicallaw.com/9-218-6006). For further information about the Practical Law Company, visit http://uk.practicallaw.com/ or call 020 7202 1200. © Legal & Commercial Publishing Limited 2010.

A full repairing and insuring lease of one or more floors of an office block. The landlord retains all external and structural parts of the building and insures. Comprehensive service charge provisions are included that comply with the RICS 2006 Code of Practice on Service Charges in Commercial Property (Service Charge Code).

The lease has been specifically drafted to comply with the Code for Leasing Business Premises in England and Wales 2007 (Lease Code 2007). However, some issues are open to interpretation and for a proper understanding it is important that the lease is read in conjunction with the Drafting note [not reproduced here].

Contents

1. Interpretation
2. Grant
3. Ancillary rights
4. Rights excepted and reserved
5. Third Party Rights
6. The Annual Rent
7. Review of the Annual Rent
8. Services and Service Charge
9. Insurance
10. Rates and taxes
11. Utilities
12. Common items
13. VAT
14. Default interest and interest
15. Costs
16. [Compensation on vacating]
17. No deduction, counterclaim or set-off
18. Registration of this lease
19. Prohibition of dealings
20. Assignments
21. Underlettings
22. Sharing occupation
23. Charging
24. Registration and notification of dealings and occupation
25. Closure of the registered title of this lease

26. Repairs
27. Decoration
28. Alterations and signs
29. Returning the Property to the Landlord
30. Use
31. Management of the Building
32. Compliance with laws
33. Encroachments, obstructions and acquisition of rights
34. Remedy breaches
35. [Indemnity]
36. Landlord's covenant for quiet enjoyment
37. Guarantee and indemnity
38. Condition for re-entry
39. Liability
40. Entire agreement and exclusion of representations
41. Notices, consents and approvals
42. Governing law and jurisdiction
43. Exclusion of 1954 Act protection
44. [Tenant's break clause]
45. Contracts (Rights of Third Parties) Act 1999
46. New tenancy under 1995 Act

Schedules

1. Guarantee and indemnity
2. Break Notice
3. Services, Service Costs and Excluded Costs

PRESCRIBED CLAUSES

LR1. Date of lease
[DATE]

LR2. Title number(s)

LR2.1 Landlord's title number(s)
[INSERT TITLE NUMBER(S) OR LEAVE BLANK IF NONE]

LR2.2 Other title numbers
[TITLE NUMBER(S)] OR [None]

LR3. Parties to this lease

Landlord
[COMPANY NAME]
[REGISTERED OFFICE ADDRESS]
[COMPANY REGISTERED NUMBER]

Tenant
[COMPANY NAME]
[REGISTERED OFFICE ADDRESS]
[COMPANY REGISTERED NUMBER]

Other parties
[[COMPANY] NAME]

[[REGISTERED OFFICE] ADDRESS]
[COMPANY REGISTERED NUMBER]

Guarantor

LR4. Property
In the case of a conflict between this clause and the remainder of this lease then, for the purposes of registration, this clause shall prevail.
See the definition of 'Property' in *Clause 1.1* of this lease.

LR5. Prescribed statements etc.
None.

LR6. Term for which the Property is leased
The term as specified in this lease at *Clause 1.1* in the definition of 'Contractual Term'.

LR7. Premium
None.

LR8. Prohibitions or restrictions on disposing of this lease
This lease contains a provision that prohibits or restricts dispositions.

LR9. Rights of acquisition etc.

LR9.1 Tenant's contractual rights to renew this lease, to acquire the reversion or another lease of the Property, or to acquire an interest in other land
None.

LR9.2 Tenant's covenant to (or offer to) surrender this lease
None.

LR9.3 Landlord's contractual rights to acquire this lease
None.

LR10. Restrictive covenants given in this lease by the Landlord in respect of land other than the Property
None.

LR11. Easements

LR11.1 Easements granted by this lease for the benefit of the Property
The easements as specified in *Clause 3* of this lease.

LR11.2 Easements granted or reserved by this lease over the Property for the benefit of other property
The easements as specified in *Clause 4* of this lease.

LR12. Estate rentcharge burdening the Property
None.

LR13. Application for standard form of restriction
The Parties to this lease apply to enter the following standard form of restriction [against the title of the Property] [against title number]
None.

LR14. Declaration of trust where there is more than one person comprising the Tenant
[OMIT ALL INAPPLICABLE STATEMENTS]
[The Tenant is more than one person. They are to hold the Property on trust for themselves as joint tenants.]
[The Tenant is more than one person. They are to hold the Property on trust for themselves as tenants in common in equal shares.]

[The Tenant is more than one person. They are to hold the Property on trust [COMPLETE AS NECESSARY]]
This lease is dated [DATE]

PARTIES

(1) [COMPANY NAME], incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Landlord**).

(2) [COMPANY NAME], incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Tenant**).

[(3) [COMPANY NAME], incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] **OR** [NAME] of [ADDRESS] and [NAME] of [ADDRESS] (**Guarantor**).]

AGREED TERMS

1. INTERPRETATION

1.1 The definitions and rules of interpretation set out in this clause apply to this lease.

Annual Rent: rent at an initial rate of £[ ] per annum and then as revised pursuant to this lease [and any interim rent determined under the 1954 Act].

[**Break Date:** a date which is at least [NUMBER] [weeks][months] after service of the Break Notice.]

[**Break Notice:** written notice to terminate this lease [in the form set out in *Schedule 2*] specifying the Break Date.]

Building: [DESCRIPTION OF THE BUILDING] shown edged blue on Plan 2.

Certificate: a certificate prepared by the Landlord or the Manager setting out the Service Charge and the Service Costs for the preceeding Service Charge Year.

Certified Accounts: service charge accounts prepared [and audited] by the Landlord's [independent accountants] [or] [managing agents].

CDM Regulations: the Construction (Design and Management) Regulations 2007.

Common Parts: the Building other than the Property and the Lettable Units.

Contractual Term: a term from and including [DATE] to and including [DATE].

Default Interest Rate: [four] percentage points above the Interest Rate.

Deliberate Damage: damage caused deliberately [with the intention of causing damage] by the Tenant [or anyone at the Property or on the Common Parts with the express or implied authority of the Tenant [other than anyone deriving title under the Tenant]].

Excluded Costs: the costs set out in *paragraph 3* of Schedule 3.

Insurance Rent: The aggregate in each year of:

(a) a fair and reasonable proportion of:
   (i) the cost of any premiums (including any IPT chargeable thereon) that the Landlord expends ([before][after] any discount or commission is allowed or paid to the Landlord); and
   (ii) any fees and other expenses that the Landlord reasonably incurs,

in effecting and maintaining insurance of the Building in accordance with this lease, including any professional fees for carrying out any insurance valuation of the Reinstatement [Cost][Value];

(b) a fair and reasonable proportion of the cost of any premiums (including any IPT chargeable thereon) that the Landlord expends ([before][after] any discount or commission is allowed or paid to the Landlord) in effecting public liability insurance in relation to the Common Parts;

(c) the cost of any additional premiums (including any IPT chargeable thereon) and loadings that may be demanded by the Landlord's insurer as a result of any act or default of the Tenant, any person deriving title under the Tenant or any person at the Property with the express or implied authority of any of them;

(d) the cost of any premiums (including any IPT chargeable thereon) that the Landlord expends ([before][after] any discount or commission is allowed or paid to the Landlord) in effecting insurance against loss of the Annual Rent from the Property for [three] years; and

(e) any VAT payable on any sum in (a) to (d) inclusive.

Insured Risks: fire, lightning, explosion, impact, earthquake, storm, tempest, flood, bursting or overflowing of water tanks or pipes, damage to underground water, oil or gas pipes or electricity wires or cables, subsidence, ground slip, heave, riot, civil commotion, strikes, labour or political disturbances, malicious damage, aircraft and aerial devices and articles dropped accidentally from them, and such other risk against which the Landlord may reasonably insure from time to time, and **Insured Risk** means any one of the Insured Risks.

Interest Rate: interest at the base lending rate from time to time of [NAME OF BANK], or if that base lending rate stops being used or published then at a comparable commercial rate reasonably determined by the Landlord.

IPT: Insurance Premium Tax chargeable under the Finance Act 1994 or any similar replacement or additional tax.

Landlord's Neighbouring Property: each and every part of the adjoining and neighbouring property in which the Landlord has an interest known as [DESCRIPTION/ADDRESS OF THE LANDLORD'S NEIGHBOURING PROPERTY] [registered at HM Land Registry with title number[s] [INSERT TITLE NUMBER[S] IF REGISTERED]] [shown edged green on the attached plan marked [INSERT PLAN REFERENCE].

Lettable Unit: a floor [or part of a floor] of the Building other than the Property, that is capable of being let and occupied.

Management Fee: the total of the reasonable costs, fees and disbursements of the Manager which are properly incurred by the Landlord relating to the carrying out and provision of the Management Service.

Management Service: any service provided by, or any function of, the Manager in relation to the provision of the Services and the administration of the Service Charge.

Manager: any managing agent, team, individual or in-house person or persons employed by the Landlord, or by managing agents themselves, or otherwise retained by the Landlord to act on the Landlord's behalf, to budget for, forecast, procure, manage, account for, provide and otherwise administer any of the Building, the Services or the Service Charge.

NIC: National Insurance Contributions or any similar, replacement or additional contributions.

Permitted Use: offices within Use Class B1 of the Town and Country Planning (Use Classes) Order 1987 as at the date this lease is granted.

Permitted Hours: [LIMITS OF NORMAL WEEKDAY HOURS] Mondays to Fridays and [LIMITS OF NORMAL SATURDAY HOURS] on Saturdays other than days which are bank holidays or public holidays in [England][Wales].

Plan 1: the plan attached to this lease marked 'Plan 1'.

Plan 2: the plan attached to this lease marked 'Plan 2'.

Property: the [part of the][ ] [and [ ]] floor[s] of the Building (the floor plan[s] of which [is][are] shown edged red on Plan 1) [in respect of each of those floors] bounded by and including:

(a) [the [floorboards] [floor screed] [OTHER FLOORING BOUNDARY]];

(b) [the [DESCRIPTION OF CEILING BOUNDARY];]

(c) [the interior plaster finishes of exterior walls and columns;]

(d) the plaster finishes of the interior [structural][load-bearing] walls and columns that adjoin [another Lettable Unit or] the Common Parts;]

(e) [the doors and windows within the interior, [structural] [load-bearing] walls and columns that adjoin [another Lettable Unit or] the Common Parts and their frames and fittings;]

(f) [one half of the thickness of the interior, [non-structural] [non-load-bearing] walls [and columns] that adjoin [another Lettable Unit or] the Common Parts;] [and]

(g) [the doors and windows within the interior, [non-structural][non-load-bearing] walls [and columns] that adjoin the Common Parts and their frames and fittings;]

but excluding:

(h) [the windows in the exterior walls and their frames and fittings;]

(i) [the whole of the interior [structural] [load-bearing] walls and columns within that part of the Building other than their plaster finishes and other than the doors and windows and their frames and fittings within such walls;] and

(j) [all Service Media within that part of the Building which do not exclusively serve that part of the Building].

Reinstatement [Cost][Value]: the full [cost of reinstatement][reinstatement value] of the Building as reasonably determined by the Landlord from time to time, taking into account inflation of building costs and including any costs of demolition, site clearance, site protection, shoring up and any other work to the Building that may be required by law and any VAT on any such costs.

[**Rent Commencement Date:** [SPECIFY DATE].]

Rent Payment Dates: [25 March, 24 June, 29 September and 25 December] **OR** [SPECIFY ALTERNATIVE RENT PAYMENT DATES].

Reservations: all of the rights excepted, reserved and granted to the Landlord by this lease.

Review Date: [SPECIFY EACH REVIEW DATE].

Rights: The rights granted by the Landlord to the Tenant in *clause 3.1*.

Service Charge: a fair and reasonable proportion of the Service Costs, calculated by a recognised method on a consistent basis across the Building and the occupiers of the Building, having regard to the physical size, nature of use and benefits to and use by each occupier.

Service Charge Account: any account set up and maintained by the Landlord into which the [estimated] Service Charge paid by the occupiers of the Building is paid.

Service Charge Code: the RICS Code of Practice known as 'Service Charges in Commercial Property' which came into effect on 1 April 2007.

Service Charge Year: the annual accounting period relating to the Services and the Service Costs beginning on [SPECIFY DATE] in [YEAR] and each subsequent year during the term.

Service Costs: the costs listed in *paragraph 2* of Schedule 3.

Service Media: [lifts and lift machinery and equipment and] all media for the supply or removal of heat, electricity, gas, water, sewage, [air-conditioning,] energy, telecommunications, data and all other services and utilities and all structures, machinery and equipment ancillary to those media.

Service Provider: any body, individual, contractor or sub-contractor which is responsible for providing any of the Services, excluding utility providers.

Services: the services listed in *paragraph 1*of Schedule 3.

Third Party Rights: all rights, covenants and restrictions affecting the Building including the matters referred to at the date of this lease in [the property register] [and [entry][entries] [STATE RELEVANT ENTRY NUMBER(S)] of the charges register] of title number [] **OR** [DESCRIPTION OF RELEVANT MATTERS AFFECTING AN UNREGISTERED REVERSION].

VAT: value added tax chargeable under the Value Added Tax Act 1994 or any similar replacement or additional tax.

1927 Act: Landlord and Tenant Act 1927.

1954 Act: Landlord and Tenant Act 1954.

1995 Act: Landlord and Tenant (Covenants) Act 1995.

1.2 A reference to this **lease**, except a reference to the date of this lease or to the grant of this lease, is a reference to this deed and any deed, licence, consent, approval or other instrument supplemental to it.

1.3 The Schedules form part of this agreement and shall have effect as if set out in full in the body of this agreement. Any reference to this agreement includes the Schedules.

1.4 Except where a contrary intention appears, a reference to a clause or Schedule is a reference to a clause of, or Schedule to, this lease and a reference in a Schedule to a paragraph is to a paragraph of that Schedule.

1.5 Clause, Schedule and paragraph headings shall not affect the interpretation of this lease.

1.6 A reference to the **Landlord** includes a reference to the person entitled to the immediate reversion to this lease. A reference to the **Tenant** includes a reference to its successors in title and assigns. A reference to a **guarantor** [is a reference to any guarantor] [includes a reference to the Guarantor and to any other guarantor] of the tenant covenants of this lease including a guarantor who has entered into an authorised guarantee agreement.

1.7 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

1.8 A reference to one gender shall include a reference to the other genders.

1.9 The expressions **landlord covenant** and **tenant covenant** each has the meaning given to it by the 1995 Act.

1.10 Any obligation in this lease on the Tenant not to do something includes an obligation not to agree to or suffer that thing to be done and an obligation to use best endeavours to prevent that thing being done by another person.

1.11 References to the **consent** of the Landlord are to the consent of the Landlord given in accordance with *clause 41.5* and references to the **approval** of the Landlord are to the approval of the Landlord given in accordance with *clause 41.6*.

1.12 Unless the context otherwise requires, references to the **Building**, the **Common Parts**, a **Lettable Unit** and the **Property** are to the whole and any part of them or it.

1.13 The expression **neighbouring property** does not include the Building.

1.14 A reference to the **term** is to the Contractual Term [and any agreed or statutory continuation of this lease].

1.15 A reference to the **end of the term** is to the end of the term however it ends.

1.16 Any phrase introduced by the terms **including**, **include**, **in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.

1.17 A reference to **writing** or **written** includes faxes but does not include e-mail.

1.18 Words in the singular shall include the plural and vice versa.

1.19 References to the **perpetuity period** are to the period of 80 years from the commencement of the term and that period is the perpetuity period for the purposes of section 1 of the Perpetuities and Accumulations Act 1964.

1.20 A **working day** is a day other than a Saturday, Sunday or public holiday in [England][Wales].

1.21 A reference to a statute, statutory provision or subordinate legislation is a reference to it as it is in force [from time to time **OR** as at the date of this lease], taking account of any amendment or re-enactment [and includes any statute, statutory provision or subordinate legislation which it amends or re-enacts].

1.22 A reference to a statute or statutory provision shall include any subordinate legislation made [from time to time **OR** as at the date of this lease] under that statute or statutory provision.

2. GRANT

2.1 [At the request of the Guarantor, the] [The] Landlord lets [with full title guarantee][with limited title guarantee] the Property to the Tenant for the Contractual Term.

2.2 The grant is made together with the Rights, excepting and reserving to the Landlord the Reservations, and subject to the Third Party Rights.

2.3 The grant is made with the Tenant paying the following as rent to the Landlord:

(a) the Annual Rent and all VAT in respect of it;
(b) the Service Charge and all VAT in respect of it;
(c) the Insurance Rent; [and]
(d) all interest payable under this lease[; and
(e) all other sums due under this lease].

3. ANCILLARY RIGHTS

3.1 The Landlord grants the Tenant the following rights:

(a) the right to support and protection from the Common Parts to the extent that the Common Parts provide support and protection to the Property to the date of this lease;
(b) [the right to use external areas of the Common Parts shown hatched [ ] on Plan 2 for the purposes of vehicular and pedestrian access to and egress from the interior of the Building [and to and from the parts of the Common Parts referred to in *clause 3.1(c)* to *clause 3.1(f)*;]

(c) [the right to park [ ] private cars or motorbikes belonging to the Tenant, its employees and visitors within the area edged [ ] on Plan 2;]

(d) [the right to use the area edged [] on Plan 2 for keeping bicycles belonging to the Tenant, its employees and visitors;]

(e) [the right to use the area edged [ ] on Plan 2 for loading and unloading goods and materials;]

(f) [the right to use [ ] bins in the area edged [ ] on Plan 2;]

(g) the right to use the hallways, corridors, stairways, [lifts] and landings of the Common Parts [shown hatched [ ] on Plan 2] for the purposes of access to and egress from the Property [and the lavatories and washrooms referred to in *clause 3.1(h)*];

(h) [the right to use the lavatories [and washrooms] on the [ ] [and [ ]] floor[s] of the Building;]

(i) the right to use and to connect into any Service Media at the Building that belong to the Landlord and serve (but do not form part of) the Property which are in existence at the date of this lease or are installed during the perpetuity period;]

(j) [the right to attach any item to the Common Parts adjoining the Property so far as is reasonably necessary to carry out any works to the Property required or permitted by this lease;]

(k) [the right to display the name and logo of the Tenant (and any authorised undertenant) on a [sign or noticeboard] provided by the Landlord [in the entrance hall of] the Building [and on the Common Parts at the entrance to the Property, in each case] in a form and manner [reasonably] approved by the Landlord; [and]

(l) the right to enter the Common Parts or any other Lettable Unit so far as is reasonably necessary to carry out any works to the Property required or permitted by this lease[; and]

(m) [ANY OTHER SPECIFIC RIGHTS THAT NEED TO BE GRANTED].

3.2 The Rights are granted in common with the Landlord and any other person authorised by the Landlord.

3.3 The Rights are granted subject to the Third Party Rights insofar as the Third Party Rights affect the Common Parts and the Tenant shall not do anything that may interfere with any Third Party Right.

3.4 The Tenant shall exercise the Rights (other than the Right mentioned in *clause 3.1(a)*) only in connection with its use of the Property for the Permitted Use and only during the Permitted Hours and in accordance with any regulations made by the Landlord as mentioned in *clause 31.1*.

3.5 The Tenant shall comply with all laws relating to its use of the Common Parts pursuant to the Rights.

3.6 In relation to the Rights mentioned in *clause 3.1(b)* to *clause 3.1(h)*, the Landlord may, at its discretion, change the route of any means of access to or egress from the interior of the Building and may change the area over which any of those Rights are exercised.

3.7 In relation to the Rights mentioned in *clause 3.1(c)* and *clause 3.1(f)* the Landlord may from time to time designate the spaces or bins (as the case may be) in respect of which the Tenant may exercise that Right.

3.8 In relation to the Rights mentioned in *clause 3.1(i)*, the Landlord may, at its discretion, re-route or replace any such Service Media and that Right shall then apply in relation to the Service Media as re-routed or replaced.

3.9 [In relation to the Right mentioned in *clause 3.1(j)*, where the Tenant requires the consent of the Landlord to carry out the works to the Property, the Tenant may only exercise that Right when that consent has been granted and in accordance with the terms of that consent.]

3.10 In exercising the Right mentioned in *clause 3.1(l)*, the Tenant shall:

(a) except in case of emergency, give reasonable notice to the Landlord and any occupiers of the relevant Lettable Unit(s) of its intention to exercise that Right;

(b) where reasonably required by the Landlord or the occupier of the relevant Lettable Unit(s), exercise that Right only if accompanied by a representative of the Landlord and/or the tenant and/or the occupier of the relevant Lettable Unit(s);

(c) cause as little damage as possible to the Common Parts and the other Lettable Units and to any property belonging to or used by the Landlord or the tenants or occupiers of the other Lettable Units;

(d) cause as little inconvenience as possible to the Landlord and the tenants and occupiers of the other Lettable Units as is reasonably practicable; and

(e) promptly make good (to the satisfaction of the Landlord) any damage caused to the Common Parts (or to any property belonging to or used by the Landlord) by reason of the Tenant exercising that Right.

3.11 Except as mentioned in this *clause 3*, neither the grant of this lease nor anything in it confers any right over the Common Parts or any Lettable Unit or any neighbouring property nor is to be taken to show that the Tenant may have any right over the Common Parts or any Lettable Unit or any neighbouring property, and section 62 of the Law of Property Act 1925 does not apply to this lease.

4. RIGHTS EXCEPTED AND RESERVED

4.1 The following rights are excepted and reserved from this lease to the Landlord for the benefit of the Building and the Landlord's Neighbouring Property [and to the extent possible for the benefit of any neighbouring or adjoining property in which the Landlord acquires an interest during the term]:

(a) rights of light, air, support and protection to the extent those rights are capable of being enjoyed at any time during the term;

(b) the right to use and to connect into Service Media at, but not forming part of, the Property which are in existence at the date of this lease or which are installed or constructed during the perpetuity period; the right to install and construct Service Media at the Property to serve any part of the Building (whether or not such Service Media also serve the Property); and the right to re-route any Service Media mentioned in this clause;

(c) at any time during the term, the full and free right to develop the Landlord's Neighbouring Property [and any neighbouring or adjoining property in which the Landlord acquires an interest during the term] as the Landlord may think fit;

(d) the right to erect scaffolding at the Property or the Building and attach it to any part of the Property or the Building in connection with any of the Reservations;

(e) the right to attach any structure, fixture or fitting to the boundary of the Property in connection with any of the Reservations;

(f) the right to re-route any means of access to or egress from the Property or the Building and to change the areas over which the Rights mentioned in *clause 3.1(a)* to *clause 3.1(e)* are exercised; [and]

(g) the right to re-route and replace any Service Media over which the Rights mentioned in *clause 3.1(i)*are exercised; [and]

(h) [ANY OTHER SPECIFIC RIGHTS THAT NEED TO BE RESERVED].]

notwithstanding that the exercise of any of the Reservations or the works carried out

pursuant to them result in a reduction in the flow of light or air to the Property or the Common Parts or loss of amenity for the Property or the Common Parts [provided that they do not materially adversely affect the use and enjoyment of the Property for the Permitted Use].

4.2 The Landlord reserves the right to enter the Property:

(a) to repair, maintain, install, construct, re-route or replace any Service Media or structure relating to any of the Reservations;

(b) to carry out any works to any other Lettable Unit; and

(c) for any other purpose mentioned in or connected with:

(i) this lease;

(ii) the Reservations; and

(iii) the Landlord's interest in the Property, the Building or the Landlord's Neighbouring Property.

4.3 The Reservations may be exercised by the Landlord and by anyone else who is or becomes entitled to exercise them, and by anyone authorised by the Landlord.

4.4 The Tenant shall allow all those entitled to exercise any right to enter the Property, to do so with their workers, contractors, agents and professional advisors, and to enter the Property at any reasonable time (whether or not during usual business hours) and, except in the case of an emergency, after having given reasonable notice (which need not be in writing) to the Tenant.

4.5 No party exercising any of the Reservations, nor its workers, contractors, agents and professional advisors, shall be liable to the Tenant or to any undertenant or other occupier of or person at the Property for any loss, damage, injury, nuisance or inconvenience arising by reason of its exercising any of the Reservations except for:

(a) physical damage to the Property; or

(b) any loss, damage, injury, nuisance or inconvenience in relation to which the law prevents the Landlord from excluding liability.

5. THIRD PARTY RIGHTS

5.1 The Tenant shall comply with all obligations on the Landlord relating to the Third Party Rights insofar as those obligations relate to the Property and shall not do anything (even if otherwise permitted by this lease) that may interfere with any Third Party Right.

5.2 The Tenant shall allow the Landlord and any other person authorised by the terms of the Third Party Right to enter the Property in accordance with its terms.

6. THE ANNUAL RENT

6.1 The Tenant shall pay the Annual Rent and any VAT in respect of it by four equal instalments in advance on or before the Rent Payment Dates. The payments shall be made by banker's standing order or by any other method that the Landlord requires at any time by giving notice to the Tenant.

6.2 The first instalment of the Annual Rent and any VAT in respect of it shall be made on [the date of this lease and shall be the proportion, calculated on a daily basis, in respect of the period from the date of this lease until the day before the next Rent Payment Date] **OR** [the Rent Commencement Date and shall be the proportion, calculated on a daily basis, in respect of the period from the Rent Commencement Date until the day before the next Rent Payment Date].

7. REVIEW OF THE ANNUAL RENT

7.1 In this clause the **President** is the President for the time being of the Royal Institution of Chartered Surveyors or a person acting on his behalf, and the **Surveyor** is the independent valuer appointed pursuant to *clause 7.7*.

7.2 [The amount of Annual Rent shall be reviewed on each Review Date to the open market rent agreed or determined pursuant to this clause.]

OR

[The amount of Annual Rent shall be reviewed on each Review Date to the greater of:

(a) [the Annual Rent payable immediately before the relevant Review Date (or which would then be payable but for any abatement or suspension of the Annual Rent or restriction on the right to collect it)] **OR** [£[] per annum]; and

(b) the open market rent agreed or determined pursuant to this clause.]

7.3 The open market rent may be agreed between the Landlord and the Tenant at any time before it is determined by the Surveyor.

7.4 If the open market rent is determined by the Surveyor, it shall be the amount that the Surveyor determines is the best annual rent (exclusive of any VAT) at which the Property could reasonably be expected to be let:

(a) in the open market;

(b) at the relevant Review Date;

(c) on the assumptions listed in *clause 7.5*; and

(d) disregarding the matters listed in *clause 7.6*.

7.5 The assumptions are:

(a) the Property is available to let in the open market:

(i) by a willing lessor to a willing lessee (which may be the Tenant);

(ii) as a whole;

(iii) with vacant possession;

(iv) without a fine or a premium;

(v) for a term equal to the unexpired residue of the Contractual Term at the relevant Review Date or a term of [SPECIFY MINIMUM LENGTH OF HYPOTHETICAL TERM] years commencing on the relevant Review Date, if longer; and

(vi) otherwise on the terms of this lease other than as to the amount of the Annual Rent but including the provisions for review of the Annual Rent [, and other than the provision in this lease for a rent-free period];

(b) the willing lessee has had the benefit of any rent-free or other concession or contribution which would be offered in the open market at the relevant Review Date to reflect the need to fit out the Property;

(c) the Property may lawfully be used, and is in a physical state to enable it to be lawfully used, by the willing lessee (or any potential undertenant or assignee of the willing lessee) for any purpose permitted by this lease;

(d) the Landlord and the Tenant have fully complied with their obligations in this lease;

(e) if the Property or any other part of the Building or any Service Media serving the Property, has been destroyed or damaged, it has been fully restored;

(f) no work has been carried out on the Property or any other part of the Building that has diminished the rental value of the Property;

(g) any fixtures, fittings, machinery or equipment supplied to the Property by the Landlord that have been removed by or at the request of the Tenant, or any undertenant or their respective predecessors in title (otherwise than to comply with any law) remain at the Property; and

(h) the willing lessee and its potential assignees and undertenants shall not be disadvantaged by any actual or potential election to waive exemption from VAT in relation to the Property.

7.6 The matters to be disregarded are:

(a) any effect on rent of the fact that the Tenant or any authorised undertenant has been in occupation of the Property;

(b) any goodwill attached to the Property by reason of any business carried out there by the Tenant or by any authorised undertenant or by any of their predecessors in business;

(c) any effect on rent attributable to any physical improvement to the Property carried out [before or] [after the date of this lease,] by or at the expense of the Tenant or any authorised undertenant with all necessary consents, approvals and authorisations and not pursuant to an obligation to the Landlord (other than an obligation to comply with any law);

(d) any effect on rent of any obligation on the Tenant [to fit out the Property or] [to reinstate the Property to the condition or design it was in before any alterations or improvements were carried out]; and

(e) any statutory restriction on rents or the right to recover them.

7.7 The Landlord and the Tenant may appoint an independent valuer at any time before either of them applies to the President for an independent valuer to be appointed. The Landlord or the Tenant may apply to the President for an independent valuer to be appointed at any time after the date which is three months before the relevant Review Date. The independent valuer shall be an associate or fellow of the Royal Institution of Chartered Surveyors.

7.8 The Surveyor shall act as an expert and not as an arbitrator.

7.9 [The Surveyor shall give the Landlord and the Tenant an opportunity to make written representations to the Surveyor and to make written counter-representations commenting on the representations of the other party to the Surveyor.]

7.10 If the Surveyor dies, delays or becomes unwilling or incapable of acting, then either the Landlord or the Tenant may apply to the President to discharge the Surveyor and *clause 7.7* shall then apply in relation to the appointment of a replacement.

7.11 The fees and expenses of the Surveyor and the cost of the Surveyor's appointment and any counsel's fees incurred by the Surveyor shall be payable by the Landlord and the Tenant in the proportions that the Surveyor directs (or if the Surveyor makes no direction, then equally). If the Tenant does not pay its part of the Surveyor's fees and expenses within ten working days after demand by the Surveyor, the Landlord may pay that part and the amount it pays shall be a debt of the Tenant due and payable on demand to the Landlord. The Landlord and the Tenant shall otherwise each bear their own costs in connection with the rent review.

7.12 If the revised Annual Rent has not been agreed by the Landlord and the Tenant or determined by the Surveyor on or before the relevant Review Date, the Annual Rent payable from that Review Date shall continue at the rate payable immediately before that Review Date. [On the date] [No later than five working days after] the revised Annual Rent is agreed or the Surveyor's determination is notified to the Landlord and the Tenant, the Tenant shall pay:

(a) the shortfall (if any) between the amount that it has paid for the period from the Review Date until the Rent Payment Date following the date of agreement or notification of the

revised Annual Rent and the amount that would have been payable had the revised Annual Rent been agreed or determined on or before that Review Date; and

(b) interest at the Interest Rate on that shortfall calculated on a daily basis by reference to the Rent Payment Dates on which parts of the shortfall would have been payable if the revised Annual Rent had been agreed or determined on or before that Review Date and the date payment is received by the Landlord.

7.13 Time shall not be of the essence for the purposes of this clause.

7.14 No guarantor shall have any right to participate in the review of the Annual Rent.

7.15 As soon as practicable after the amount of the revised Annual Rent has been agreed or determined, a memorandum recording the amount shall be signed by or on behalf of the Landlord and the Tenant and endorsed on or attached to this lease and its counterpart. The Landlord and the Tenant shall each bear their own costs in connection with the memorandum.

8. SERVICES AND SERVICE CHARGE

8.1 Subject to *clause 8.5* the Landlord shall provide the Services.

8.2 The Landlord shall administer the Services and the Service Charge in good faith and, except where there are sound reasons for implementing alternative procedures that can be justified and explained, the Landlord shall have regard to the provisions and recommendations of the Service Charge Code.

8.3 The Landlord shall:

(a) ensure that the Services are provided in a commercial and professional manner and that the quality and cost of the Services are appropriate for the Building and are regularly reviewed;

(b) require that Service Providers comply with written performance standards and regularly review, monitor and measure the performance of Service Providers against those written performance standards;

(c) regularly review the cost of each of the Services against the market cost of similar services and, where appropriate, require contractors and suppliers to submit competitive tenders for the supply of any of the Services;

(d) require that each Service Provider regularly reviews the methods, procedures, value and efficiency of the Services that it provides and, where possible, that it demonstrates that it is reviewing the Services where so required, that the Services are being provided to an appropriate standard and that value for money is being achieved;

(e) provide sufficient, capable and appropriately qualified staff of the right type who are capable of administering and providing the Services efficiently and cost-effectively;

(f) establish and maintain a written management policy which shall identify the aims of the Landlord and/or the Manager and any other members of any management team, the method of procurement, administration and management of the Services and shall [make this management policy available for inspection by the Tenant] [provide a copy of the management policy to the Tenant as soon as possible upon request];

(g) establish and operate sound management procedures to ensure that the respective obligations of the Landlord and the Tenant which are set out in this clause are complied with and the Landlord shall record these procedures in the management policy referred to in *clause 8.3(f)*;

(h) ensure that the Management Fee:

(i) is transparent so that the basis on which it is charged and the way in which it is calculated is clear;

(ii) relates only to, and is reasonable for, the Management Service;

(iii) has due regard to the duty of the Manager to observe the principles of the Service Charge Code;

(iv) is charged to the Tenant in accordance with the relevant provisions of the Service Charge Code;

(v) is not linked to a percentage of expenditure on the Services; and

(vi) shall be fixed for a reasonable period of time (subject to indexing);

(i) at reasonable intervals review the cost and quality of the Management Service and compare it against the market cost and quality of similar services. Unless the Landlord and the majority of the occupiers in the Building are satisfied with the results of such review, the Management Service shall be put out to tender in the open market and the tenderer providing the best value for money shall be appointed as the Manager;

(j) require the Manager and the Service Providers to, respectively, operate the Management Service and provide the Services, in accordance with all procedures which are established by the Landlord, pursuant to this clause, in order to maintain the quality of the Services to the standard required by the Service Charge Code;

(k) establish standard procedures for the Building in order to maintain the quality of the Services and shall require that the Manager ensures that the Service Providers comply with those procedures;

(l) deal promptly and efficiently with any reasonable enquiry made by the Tenant which relates to the Service Charge or any of the Services;

(m) invite (and, where appropriate act upon) comment from the Tenant on the performance of the Service Providers, the standard of the Management Service and delivery of the Services;

(n) ensure that (where appropriate) regular meetings are held between the Landlord, the Tenant, the other occupiers in the Building and the Manager;

(o) ensure that any interest earned on the Service Charge Account (in each case, after bank charges, tax and all other appropriate deductions have been accounted for) is credited to the Service Charge Account;

(p) allocate the whole of the Service Cost relating to any of the Services which benefits only one occupier, to that specific occupier; and

(q) as soon as practicable but not later than four months after a disposal of the reversion immediately expectant on the determination of this lease, provide the purchaser with full details of the Service Costs, accruals, prepayments, and all other relevant information for the last [ ] Service Charge Years or any other Service Charge Year for which any part of the procedure set out in *clause 8.8* remains outstanding and up to the date of sale.

8.4 The Landlord shall provide to the Tenant:

(a) details of any proposed works or Services which may substantially increase the Service Charge due for the relevant Service Charge Year and shall notify the Tenant promptly (and in any event within the relevant Service Charge Year) of any likely significant variation in the actual Service Costs of which the Landlord becomes aware;

(b) at the Tenant's request, a summary of the process of any tender which is undertaken in accordance with *clause 8.3* and the results of any tender which applies to any proposed substantial works that would fall within the Service Costs together with full information on the programme of works, costs and the process for keeping the Tenant informed;

(c) information contained in any report or other item where the cost of obtaining this information is a Service Cost;

(d) a schedule showing the apportionment of the Service Costs for each Lettable Unit, together with a commentary on how the apportionments have been calculated;

(e) full details of any plans for the Building where such are likely to affect the Service Costs; and

(f) the Manager's (and where appropriate other Service Providers') contact details and details of each of their respective roles and responsibilities.

8.5 The Landlord shall not be required to:

(a) carry out any works where the need for those works has arisen by reason of any damage or destruction by a risk against which the Landlord is not obliged to insure;

(b) provide any of the Services outside the Permitted Hours; or

(c) replace or renew any part of the Building or any item or system within the Building which has not become beyond economic repair.

8.6 [The Landlord shall not be liable for any interruption in, or disruption to, the provision of any of the Services for any reason that is outside the reasonable control of the Landlord.]

8.7 The Landlord shall not charge any of the Excluded Costs as part of the Service Charge.

8.8 The procedure and obligations of the parties relating to operation of the Service Charge are as follows:

(a) at least one month before the start of each Service Charge Year, the Landlord shall prepare and send to the Tenant an estimate of the Service Costs for that Service Charge Year (in such form to enable the Tenant to compare it with the last issued Certified Accounts) together with an explanatory commentary where appropriate and a statement of the estimated Service Charge for that Service Charge Year;

(b) the Tenant shall pay the estimated Service Charge for each Service Charge Year in four equal instalments on each of the Rent Payment Dates;

(c) in relation to the Service Charge Year current at the date of this lease:

(i) the Tenant's obligations to pay the estimated Service Charge and the actual Service Charge shall be limited to an apportioned part of those amounts, such apportioned part to be calculated on a daily basis for the period from the date of this lease to the end of the Service Charge Year; and

(ii) the estimated Service Charge for which the Tenant is liable shall be paid in equal instalments on [the date of this lease and] the [remaining] Rent Payment Days during the Period from the date of this lease until the end of the Service Charge Year;

(d) as soon as reasonably practicable and no later than four months after the end of each Service Charge Year, the Landlord shall prepare and send to the Tenant a Certificate together with Certified Accounts and the Certificate shall:

(i) be in a form which is reasonably consistent from year to year;

(ii) provide an appropriately detailed and comprehensive summary of Service Costs;

(iii) provide full details of and reasons for any material variations against the estimated Service Charge;

(iv) be accompanied by a separate report providing any other relevant information which is required by the Service Charge Code; and

(v) specify the name and role of the person who has given the Certificate;

(e) if any cost is omitted from the calculation of the Service Charge in any Service Charge Year, the Landlord shall be entitled to include it in the estimate of the Service Charge and the Certificate in any following Service Charge Year;

(f) subject to *clause 8.8(e)* and except in the case of manifest error, the Certificate shall be conclusive as to all matters of fact to which it refers, subject to the Tenant's right to reasonably challenge the expenditure by [referring the matter for Alternative Dispute

Resolution (ADR)], and in the event of any such referral to ADR, each party shall bear its own costs;

(g) the Landlord shall allow the Tenant a reasonable period in which to raise enquiries in respect of the Certified Accounts, shall respond promptly and efficiently to any reasonable enquiries of the Tenant and shall [make] [provide copies of] all relevant paperwork and copies of any supporting documentation [available for inspection by the Tenant] [to the Tenant upon request and upon payment by the Tenant of a reasonable fee];

(h) at the Tenant's request the Landlord shall agree to an independent audit of the Service Costs which shall be undertaken at the Tenant's cost; and

(i) if in respect of any Service Charge Year, the Landlord's estimate of the Service Charge is less than the Service Charge, the Tenant shall pay the difference immediately upon the expiry of the period specified in *clause 8.8(g)* (unless the Tenant shall challenge the Service Charge pursuant to *clause 8.8(f)* in which case the Tenant shall pay the difference immediately upon the final determination of that challenge). If in respect of any Service Charge Year, the Landlord's estimate of the Service Charge is more than the Service Charge, the Landlord shall promptly repay to the Tenant the difference.

8.9 In addition to the Tenant's obligations contained in *clause 8.8* the Tenant shall:

(a) co-operate fully with the Landlord and the Manager in order that the Landlord and the Manager may administer the Service Charge in accordance with the provisions of this clause;

(b) promptly advise the Landlord and the Manager of any changes within the Tenant's organisation that may affect the operation of the Service Charge;

(c) promptly make a written record upon being advised by the Landlord or the Manager of any changes to the operation of the Service Charge;

(d) respond promptly and efficiently to any reasonable enquiry of the Landlord or the Manager; and

(e) be proactive in assisting the Landlord and the Manager with operating and using the Services on a value for money and quality standard basis and follow all procedures reasonably required by the Landlord or the Manager in order to maintain and promote the quality and economic effectiveness of the Services. Such procedures include, but are not be limited to, separating waste to facilitate appropriate and cost effective recycling.

8.10 Where the Landlord is required to comply with any obligation contained in this clause such obligation shall, where relevant, include, in the alternative, an obligation on the Landlord to ensure that the Manager complies with that obligation.

9. INSURANCE

9.1 The Landlord shall effect and maintain insurance of the Building (but excluding [any plate glass and] any Tenant's and trade fixtures in the Property) in accordance with this clause:

(a) unless the insurance is vitiated by any act or omission of either:

(i) the Tenant, any person deriving title under the Tenant or any person at the Property with the express or implied authority of any of them; or

(ii) any tenant of the Landlord of any part of the Building other than the Property, any person deriving title under them or any person in the Building with the express or implied authority of any of them; and

(b) subject to:

(i) any exclusions, limitations, conditions or excesses that may be imposed by the Landlord's insurer; and

(ii) insurance being available on reasonable terms in the London Insurance market.

9.2 Insurance of the Building shall be with reputable insurers, on fair and reasonable terms that represent value for money, for an amount not less than the [Reinstatement Cost][Reinstatement Value] against loss or damage caused by any of the Insured Risks, and shall include additional cover, if practicable, against damage arising from an act of terrorism.

9.3 In relation to any insurance effected by the Landlord under this clause, the Landlord shall:

(a) at the request of the Tenant supply the Tenant with:
  (i) full details of the insurance policy;
  (ii) evidence of payment of the current year's premiums; and
  (iii) details of any commission paid to the Landlord by the Landlord's insurer;
(b) procure that the Tenant is informed of any change in the scope, level or terms of cover [as soon as reasonably practicable after][within five working days after] the Landlord or its agents have become aware of the change;
(c) use all reasonable endeavours to procure that the Landlord's insurer waives its rights of subrogation against the Tenant and any lawful sub-tenants or occupiers of the Property and that the insurance policy contains a non-invalidation provision in favour of the Landlord in respect of any act or default of the Tenant; and
(d) procure that the interest of the Tenant is noted on the policy of insurance either specifically or by way of a general noting of tenants' interests under the conditions of the insurance policy.

9.4 The Tenant shall pay each of the following to the Landlord on demand:

(a) the Insurance Rent; and
(b) a reasonable proportion of any amount that is deducted or disallowed by the Landlord's insurer pursuant to any excess provision in the insurance policy.

9.5 The Tenant shall:

(a) comply at all times with any requirements or recommendations of the Landlord's insurer that relate to the Property or the use by the Tenant of the Common Parts, where written details of those requirements or recommendations have first been given to the Tenant;
(b) give the Landlord notice immediately that any matter occurs in relation to the Tenant or the Property that any insurer or underwriter may treat as material in deciding whether or on what terms, to insure or continue insuring the Building; and
(c) give the Landlord notice immediately that any damage or loss occurs that relates to the Property.

9.6 If the Tenant makes any alteration or addition to the Property, the Tenant shall arrange at its own cost, for a current, independent, VAT inclusive valuation of the [Reinstatement Cost][Reinstatement Value] of the Property, taking into account the alteration or addition, such valuation to be prepared in writing and given to the Landlord within [four weeks] of the alteration or addition being completed.

9.7 In relation to any insurance arranged by the Landlord under this clause, the Tenant shall not do or omit to do anything and shall not permit or suffer anything to be done that may:

(a) vitiate the insurance contract; or
(b) cause any money claimed under the insurance to be withheld; or
(c) cause any premium paid for the insurance to be increased or cause any additional premium to be payable[, unless previously agreed in writing with the Landlord].

9.8 Other than [plate glass and] Tenant's and trade fixtures, the Tenant shall not insure the Property against any of the Insured Risks in such a manner as would permit the Landlord's

insurer to cancel the Landlord's insurance or to reduce the amount of any money payable to the Landlord in respect of any insurance claim.

9.9 Notwithstanding the obligation on the Tenant in *clause 9.8*, if the Tenant [or any person deriving title under or through the Tenant] shall at any time be entitled to the benefit of any insurance of the Property, the Tenant shall immediately cause any money paid to the Tenant under that insurance to be applied in making good the loss or damage in respect of which it was paid.

9.10 If the Building or any part of it is damaged or destroyed by an Insured Risk, the Landlord shall:

(a) make a claim under the insurance policy effected in accordance with this clause;

(b) notify the Tenant immediately if the Landlord's insurer indicates that the [Reinstatement Cost][Reinstatement Value] will not be recoverable in full under the insurance policy; and

(c) subject to *clause 9.11*, use any insurance money received (other than for loss of rent) and any money received from the Tenant under *clause 9.4(b)* to repair the damage in respect of which the money was received or (as the case may be) to rebuild the Building.

9.11 The Landlord shall not be obliged under *clause 9.10* to repair or reinstate the Building or any part of it:

(a) unless and until the Landlord has obtained any necessary planning and other consents for the repairs and reinstatement work; or

(b) so as to provide premises or facilities identical in size, quality and layout to those previously at the Building so long as the premises and facilities provided are reasonably equivalent; or

(c) after a notice has been served pursuant to *clause 9.13* or *clause 9.14*.

9.12 If the Building is damaged or destroyed (other than by Deliberate Damage [that causes either the insurance policy to be vitiated or any money claimed under the insurance to be withheld]) so that the Property is wholly or partly unfit for occupation and use, or the Common Parts are damaged or destroyed so as to make the Property inaccessible or unusable, then payment of the Annual Rent or a fair proportion of it according to the nature and extent of the damage, shall be suspended until the earlier of the following:

(a) the date the Tenant can occupy and use the Property in the manner contemplated by this lease prior to the date of the damage or destruction; and

(b) the end of [three] years from the date of damage or destruction.

9.13 Subject to *clause 9.15*, the Landlord may give the Tenant notice terminating the lease with immediate effect if:

(a) the Property is damaged or destroyed or the Common Parts are damaged or destroyed so as to make the Property inaccessible or unusable; and

(b) the Landlord reasonably decides that it is either impracticable or impossible to reinstate the Property and the Common Parts within [three] years from the date of the damage or destruction.

9.14 The Tenant may give the Landlord notice terminating this lease with immediate effect (subject to *clause 9.15*) in either of the following situations:

(a) where the Property is:

(i) damaged or destroyed in whole [or in part] [other than by Deliberate Damage] so that it is unfit for occupation or use, or the Common Parts are damaged or destroyed so as to make the Property inaccessible or unusable; and

(ii) is not accessible and/or not fit for occupation and use by the end of [three] years from the date of damage or destruction; or

(b) where:

(i) the Property is damaged or destroyed in whole [or in part] [other than by Deliberate Damage and] other than by an Insured Risk[or is not covered by the Landlord's insurance by reason of a limitation in the insurance policy] so that it is unfit for occupation or use, or the Common Parts are damaged or destroyed so as to make the Property inaccessible or unusable; and

(ii) the loss or damage was caused other than by an Insured Risk [or is not covered by the Landlord's insurance by reason of a limitation in the insurance policy] and the Landlord has not given notice to the Tenant within [six months] of the date of damage or destruction that the Landlord will reinstate the Property at the Landlord's own cost.

9.15 Any notice to terminate this lease by either the Landlord or the Tenant under this clause shall be without prejudice to the rights of either party for breach of any of the covenants in the lease.

9.16 If this lease is terminated by either the Landlord or the Tenant under this clause, then any proceeds of the insurance effected by the Landlord shall belong to the Landlord.

10. RATES AND TAXES

10.1 The Tenant shall pay all present and future rates, taxes and other impositions payable in respect of the Property, its use and any works carried out there, other than:

(a) any taxes payable by the Landlord in connection with any dealing with or disposition of the reversion to this lease; or

(b) any taxes, other than VAT and insurance premium tax, payable by the Landlord by reason of the receipt of any of the rents due under this lease.

10.2 If any such rates, taxes or other impositions are payable in respect of the Property together with other land (including any other part of the Building) the Tenant shall pay a fair proportion of the total.

10.3 The Tenant shall not make any proposal to alter the rateable value of the Property or that value as it appears on any draft rating list, without the approval of the Landlord.

10.4 If, after the end of the term, the Landlord loses rating relief (or any similar relief or exemption) because it has been allowed to the Tenant, then the Tenant shall pay the Landlord an amount equal to the relief or exemption that the Landlord has lost.

11. UTILITIES

11.1 The Tenant shall pay all costs in connection with the supply [and removal] of [electricity, gas, water, sewage,] telecommunications [and] data [and other services and utilities] to [or from] the Property.]

11.2 The Tenant shall comply with all laws and with any recommendations of the relevant suppliers relating to [the use of those services and utilities] [the supply and removal of electricity, gas, water, sewage, telecommunications, data and other services and utilities to or from the Property].

12. COMMON ITEMS

12.1 The Tenant shall pay the Landlord on demand a fair proportion of all costs payable by the Landlord for the maintenance, repair, lighting, cleaning and renewal of all Service Media, structures and other items not on the Building but used or capable of being used by the Building in common with other land.

12.2 The Tenant shall comply with all reasonable regulations the Landlord may make from time to time in connection with the use of any of those Service Media, structures or other items.

13. VAT

13.1 All sums payable by the Tenant are exclusive of any VAT that may be chargeable. The Tenant shall pay VAT in respect of all taxable supplies made to it in connection with this lease on the due date for making any payment or, if earlier, the date on which that supply is made for VAT purposes.

13.2 Every obligation on the Tenant, under or in connection with this lease, to pay the Landlord or any other person any sum by way of a refund or indemnity, shall include an obligation to pay an amount equal to any VAT incurred on that sum by the Landlord or other person, except to the extent that the Landlord or other person obtains credit for such VAT under the Value Added Tax Act 1994.

14. DEFAULT INTEREST AND INTEREST

14.1 If any Annual Rent or any other money payable under this lease has not been paid by the date it is due, whether it has been formally demanded or not, the Tenant shall pay the Landlord interest at the Default Interest Rate (both before and after any judgment) on that amount for the period from the due date to and including the date of payment.

14.2 If the Landlord does not demand or accept any Annual Rent or other money due or tendered under this lease because the Landlord reasonably believes that the Tenant is in breach of any of the tenant covenants of this lease, then the Tenant shall, when that amount is accepted by the Landlord, also pay interest at the Interest Rate on that amount for the period from the date the amount (or each part of it) became due until the date it is accepted by the Landlord.

15. COSTS

15.1 The Tenant shall pay the costs and expenses of the Landlord including any solicitors' or other professionals' costs and expenses (incurred both during and after the end of the term) in connection with or in contemplation of:

(a) the enforcement of the tenant covenants of this lease;

(b) serving any notice in connection with this lease under section 146 or 147 of the Law of Property Act 1925 or taking any proceedings under either of those sections, notwithstanding that forfeiture is avoided otherwise than by relief granted by the court;

(c) serving any notice in connection with this lease under section 17 of the 1995 Act;

(d) the preparation and service of a schedule of dilapidations in connection with this lease; and

(e) any consent or approval applied for under this lease, whether or not it is granted [(unless the consent or approval is unreasonably withheld by the Landlord in circumstances where the Landlord is not unreasonably to withhold it)].

15.2 Where the Tenant is obliged to pay or indemnify the Landlord against any solicitors' or other professionals' costs and expenses (whether under this or any other clause of this lease) that obligation extends to those costs and expenses assessed on a full indemnity basis.

16. [COMPENSATION ON VACATING]

Any right of the Tenant or anyone deriving title under the Tenant to claim compensation from the Landlord on leaving the Property under the 1927 Act or the 1954 Act is excluded, except to the extent that the legislation prevents that right being excluded.

17. NO DEDUCTION, COUNTERCLAIM OR SET-OFF

The Annual Rent and all other money due under this lease are to be paid by the Tenant or any guarantor (as the case may be) without deduction, counterclaim or set-off.

18. REGISTRATION OF THIS LEASE

Promptly following the grant of this lease, the Tenant shall apply to register this lease at HM Land Registry. The Tenant shall ensure that any requisitions raised by HM Land Registry in connection with that application are dealt with promptly and properly. Within one month after completion of the registration, the Tenant shall send the Landlord official copies of its title.

19. PROHIBITION OF DEALINGS

Except as expressly permitted by this lease, the Tenant shall not assign, underlet, charge, part with or share possession or share occupation of this lease or the Property or hold the lease on trust for any person (except pending registration of a dealing permitted by this lease at HM Land Registry or by reason only of joint legal ownership).

20. ASSIGNMENTS

20.1 The Tenant shall not assign the whole of this lease without the consent of the Landlord, such consent not to be unreasonably withheld.

20.2 The Tenant shall not assign part only of this lease.

20.3 For the purposes of section 19(1A) of the 1927 Act, where at the date of assignment, either :

(a) the assignee is an individual resident overseas or is a company not incorporated in the United Kingdom; or

(b) in the reasonable opinion of the Landlord, the proposed assignee, when assessed together with any proposed guarantor, is of a lower financial standing than the tenant and its guarantor (if any),

the Landlord and the Tenant agree that the Landlord may impose the condition in *clause 20.4* upon assignment.

20.4 A condition that the assignor [(and any former tenant who because of section 11 of the 1995 Act has not been released from the tenant covenants of this lease)] enters into an authorised guarantee agreement which:

(a) is in respect of all the tenant covenants of this lease;

(b) is in respect of the period beginning with the date the assignee becomes bound by those covenants and ending on the date when the assignee is released from those covenants by virtue of section 5 of the 1995 Act;

(c) imposes principal debtor liability on the assignor (and any former tenant);

(d) requires (in the event of a disclaimer of liability of this lease) the assignor (or former tenant as the case may be) to enter into a new tenancy for a term equal to the unexpired residue of the Contractual Term; and

(e) is otherwise in a form reasonably required by the Landlord.

20.5 The Landlord and the Tenant agree that [if reasonable] the Landlord may give its consent to any assignment subject to a condition that a person of standing acceptable to the Landlord enters into a guarantee and indemnity of the tenant covenants of this lease in the form set out in *Schedule 1* (but with such amendments and additions as the Landlord may reasonably require).

20.6 For the purposes of section 19(1A) of the 1927 Act, if the Tenant wishes to assign this lease to any company that, at the date of assignment is a member of the same group (within the meaning of section 42 of the 1954 Act), the Landlord and the Tenant agree that the Landlord shall not be unreasonable in refusing its consent if in the reasonable opinion of the Landlord, the proposed assignee, when assessed together with any proposed guarantor, is of a lower financial standing than the tenant and its guarantor (if any).

20.7 Nothing in this clause shall prevent the Landlord from giving consent subject to any other reasonable condition, nor from refusing consent to an assignment in any other circumstance where it is reasonable to do so.

21. UNDERLETTINGS

21.1 The Tenant shall not underlet the whole of the Property except in accordance with this clause nor without the consent of the Landlord, such consent not to be unreasonably withheld.

21.2 The Tenant shall not underlet part only of the Property.

21.3 The Tenant shall not underlet the Property:

(a) together with any property or any right over property that is not included within this lease; nor

(b) at a fine or premium or reverse premium; nor

(c) allowing any rent free period to the undertenant that exceeds the period as is then usual in the open market in respect of such a letting.

21.4 The Tenant shall not underlet the Property unless, before the underlease is granted, the Tenant has given the Landlord:

(a) a certified copy of the notice served on the undertenant, as required by section 38A(3)(a) of the 1954 Act, applying to the tenancy to be created by the underlease; and

(b) a certified copy of the declaration or statutory declaration made by the undertenant in accordance with the requirements of section 38A(3)(b) of the 1954 Act.

21.5 Any underletting by the Tenant shall be by deed and shall include:

(a) an agreement between the Tenant and the undertenant that the provisions of sections 24 to 28 of the 1954 Act are excluded from applying to the tenancy created by the underlease;

(b) the reservation of a rent which is not less than the open market rental value of the Property at the date the Property is underlet and which is payable at the same times as the Annual Rent under this lease [(but this shall not prevent an underlease providing for a rent-free period of a length permitted by *clause 21.3(c)*];

(c) provisions for the review of rent at the same dates and on the same basis as the review of rent in this lease, unless the term of the underlease does not extend beyond the next Review Date;

(d) a covenant by the undertenant, enforceable by and expressed to be enforceable by the Landlord (as superior landlord at the date of grant) and its successors in title in their own right, to observe and perform the tenant covenants in the underlease and any document that is supplemental or collateral to it; and

(e) provisions requiring the consent of the Landlord to be obtained in respect of any matter for which the consent of the Landlord is required under this lease,

and shall otherwise not conflict with the terms of this lease and shall be in a form approved by the Landlord [such approval to be given, or refused with reasons, in writing within [ ] days of receipt by the Landlord of the final draft of the underlease and] such approval not to be unreasonably withheld.

21.6 In relation to any underlease granted by the Tenant, the Tenant shall:

(a) not vary the terms of the underlease nor accept a surrender of the underlease without the consent of the Landlord, such consent not to be unreasonably withheld;

(b) enforce the tenant covenants in the underlease and not waive any of them; and

(c) ensure that in relation to any rent review the revised rent is not agreed without the approval of the Landlord, such approval not to be unreasonably withheld.

22. SHARING OCCUPATION

The Tenant may share occupation of the Property with any company that is a member of the same group (within the meaning of section 42 of the 1954 Act) as the Tenant for as long as that company remains within that group and provided that no relationship of landlord and tenant is established by that arrangement.

23. CHARGING

23.1 The Tenant shall not charge the whole of this lease without the consent of the Landlord, such consent not to be unreasonably withheld.

23.2 The Tenant shall not charge part only of this lease.

24. REGISTRATION AND NOTIFICATION OF DEALINGS AND OCCUPATION

24.1 In this clause a **Transaction** is:

(a) any dealing with this lease or the devolution or transmission of, or parting with possession of any interest in it; or

(b) the creation of any underlease or other interest out of this lease, or out of any interest, underlease derived from it, and any dealing, devolution or transmission of, or parting with possession of any such interest or underlease; or

(c) the making of any other arrangement for the occupation of the Property.

24.2 In respect of every Transaction that is registrable at HM Land Registry, the Tenant shall promptly following completion of the Transaction apply to register it (or procure that the relevant person so applies). The Tenant shall (or shall procure that) any requisitions raised by HM Land Registry in connection with an application to register a Transaction are dealt with promptly and properly. Within [one month] of completion of the registration, the Tenant shall send the Landlord official copies of its title (and where applicable of the undertenant's title).

24.3 No later than one month after a Transaction the Tenant shall:

(a) give the Landlord's solicitors notice of the Transaction; [and]

(b) deliver two certified copies of any document effecting the Transaction to the Landlord's solicitors[; and

(c) pay the Landlord's solicitors a registration fee of £30 (plus VAT)].

24.4 If the Landlord so requests, the Tenant shall promptly supply the Landlord with full details of the occupiers of the Property and the terms upon which they occupy it.

25. CLOSURE OF THE REGISTERED TITLE OF THIS LEASE

[Within one month] [Immediately] after the end of the term (and notwithstanding that the term has ended), the Tenant shall make an application to close the registered title of this lease and shall ensure that any requisitions raised by HM Land Registry in connection with that application are dealt with promptly and properly; the Tenant shall keep the Landlord informed of the progress and completion of its application.

26. REPAIRS

26.1 The Tenant shall keep the Property clean and tidy and in good repair [and condition] [except that the Tenant shall not be required to put the Property into any better state of repair or condition than it was in at the date of this lease as evidenced by the schedule of condition initialled by the parties to this lease and annexed to this lease].

26.2 The Tenant shall not be liable to repair the Property to the extent that any disrepair has been caused by an Insured Risk, unless and to the extent that:

(a) the Landlord's insurance has been vitiated or any insurance proceeds withheld in consequence of any act or omission of the Tenant, any person deriving title under the Tenant or any person at the Property or on the Common Parts with the actual or implied authority of the Tenant or any person deriving title under the Tenant; or

(b) the insurance cover in relation to that disrepair is excluded, limited or unavailable.

27. DECORATION

27.1 The Tenant shall decorate the Property as often as is reasonably necessary and also in the last three months before the end of the term.

27.2 All decoration shall be carried out in a good and proper manner using good quality materials that are appropriate to the Property and the Permitted Use and shall include all appropriate preparatory work.

27.3 All decoration carried out in the last three months of the term shall also be carried out to the satisfaction of the Landlord and using materials, designs and colours approved by the Landlord.

27.4 [The Tenant shall replace the floor coverings at the Property within the three months before the end of the term with new ones of good quality and appropriate to the Property and the Permitted Use.]

28. ALTERATIONS AND SIGNS

28.1 The Tenant shall not make any alteration to the Property without the consent of the Landlord, such consent not to be unreasonably withheld, other than as mentioned in *clause 28.2*.

28.2 Subject to *clause 28.3*, the Tenant may make non-structural alterations without the consent of the Landlord provided that the Tenant shall:

(a) make good any damage to the Property and to any part of the Common Parts; and

(b) immediately after completion of such alterations give to the Landlord copies of the plans and specifications for the alterations.

28.3 The Tenant shall not install nor alter the route of any Service Media at the Property, nor do anything that may affect the Service Media, without the consent of the Landlord, such consent not to be unreasonably withheld.

28.4 The Tenant shall not attach any sign, fascia, placard, board, poster or advertisement to the Property so as to be seen from the outside of the Building.

28.5 Where the consent of the Landlord is required under this clause, the Landlord shall determine the Tenant's application for consent within [15] working days of receiving all the information that the Landlord [reasonably] considers necessary to allow the Landlord to determine the application.

29. RETURNING THE PROPERTY TO THE LANDLORD

29.1 At the end of the term the Tenant shall return the Property to the Landlord in the repair and condition required by this lease.

29.2 If the Landlord reasonably so requires and gives the Tenant notice no later than six months before the end of the term, the Tenant shall remove items it has fixed to the Property, remove any alterations it has made to the Property and make good any damage caused to the Property by that removal.

29.3 At the end of the term, the Tenant shall remove from the Property all chattels belonging to or used by it.

29.4 The Tenant irrevocably appoints the Landlord to be the Tenant's agent to store or dispose of any chattels or items it has fixed to the Property and which have been left by the Tenant on the Property for more than ten working days after the end of the term. The Landlord shall not be liable to the Tenant by reason of that storage or disposal. The Tenant shall indemnify the Landlord in respect of any claim made by a third party in relation to that storage or disposal.

29.5 If the Tenant does not comply with its obligations in this clause, then, without prejudice to any other right or remedy of the Landlord, the Tenant shall pay the Landlord an amount equal to the Annual Rent at the rate reserved immediately before the end of the term for the period that it would reasonably take to put the Property into the condition it would have been in had the Tenant performed its obligations under this clause. The amount shall be a debt due on demand from the Tenant to the Landlord.

30. USE

30.1 The Tenant shall not use the Property for any purpose other than the Permitted Use.

30.2 [The Tenant shall not use the Property outside the Permitted Hours [without the approval of the Landlord].]

30.3 [If the Landlord gives its approval to the Tenant using the Property outside the Permitted Hours, the Tenant shall observe all [reasonable and proper] regulations that the Landlord makes relating to that use and shall pay the Landlord all costs incurred by the Landlord in connection with that use, including the whole of the cost of any Services provided by the Landlord attributable to the use by the Tenant of the Property outside the Permitted Hours.]

30.4 The Tenant shall not use the Property for any illegal purpose nor for any purpose or in a manner that would cause loss, damage, injury, nuisance or inconvenience to the Landlord, the other tenants or occupiers of the Lettable Units or any owner or occupier of neighbouring property.

30.5 The Tenant shall not overload any structural part of the Building nor any Service Media at or serving the Property.

31. MANAGEMENT OF THE BUILDING

31.1 The Tenant shall observe all [reasonable and proper] regulations made by the Landlord from time to time in accordance with the principles of good estate management and notified to the Tenant relating to:

(a) the use of the Common Parts;
(b) the management of the Building; and
(c) the use of any Service Media, structures or other items outside the Building which are used or capable of being used by the Building in common with other land.

31.2 Nothing in this lease shall impose or be deemed to impose any restriction on the use of any other Lettable Unit or any neighbouring property.

32. COMPLIANCE WITH LAWS

32.1 The Tenant shall comply with all laws relating to:

(a) the Property and the occupation and use of the Property by the Tenant;
(b) the use of all Service Media and machinery and equipment at or serving the Property;
(c) any works carried out at the Property; and
(d) all materials kept at or disposed from the Property.

32.2 Without prejudice to any obligation on the Tenant to obtain any consent or approval under this lease, the Tenant shall carry out all works that are required under any law to be carried out at the Property whether by the owner or the occupier.

32.3 Within five working days after receipt of any notice or other communication affecting the Property or the Building (and whether or not served pursuant to any law) the Tenant shall:

(a) send a copy of the relevant document to the Landlord; and

(b) in so far as it relates to the Property, take all steps necessary to comply with the notice or other communication and take any other action in connection with it as the Landlord may require.

32.4 The Tenant shall not apply for any planning permission for the Property.

32.5 The Tenant shall comply with its obligations under the CDM Regulations including all requirements in relation to the provision and maintenance of a health and safety file.

32.6 The Tenant shall supply all information to the Landlord that the Landlord reasonably requires from time to time to comply with the Landlord's obligations under the CDM Regulations.

32.7 As soon as the Tenant becomes aware of any defect in the Property, it shall give the Landlord notice of it. The Tenant shall indemnify the Landlord against any liability under the Defective Premises Act 1972 in relation to the Property by reason of any failure of the Tenant to comply with any of the tenant covenants in this lease.

32.8 The Tenant shall keep the Property equipped with all fire prevention, detection and fighting machinery and equipment and fire alarms which are required under all relevant laws or required by the insurers of the Property or reasonably recommended by them or reasonably required by the Landlord and shall keep that machinery, equipment and alarms properly maintained and available for inspection.

33. ENCROACHMENTS, OBSTRUCTIONS AND ACQUISITION OF RIGHTS

33.1 The Tenant shall not grant any right or licence over the Property to any person nor permit any person to make any encroachment over the Property.

33.2 The Tenant shall not obstruct the flow of light or air to the Property.

33.3 The Tenant shall not make any acknowledgement that the flow of light or air to the Property or any other part of the Building or that the means of access to the Building is enjoyed with the consent of any third party.

33.4 The Tenant shall immediately notify the Landlord if any person takes or threatens to take any action to obstruct the flow of light or air to the Property.

34. REMEDY BREACHES

34.1 The Landlord may enter the Property to inspect its condition and state of repair and may give the Tenant notice of any breach of any of the tenant covenants in this lease relating to the condition or repair of the Property.

34.2 If the Tenant has not begun any works needed to remedy that breach within two months following that notice (or if works are required as a matter of emergency, then immediately) or if the Tenant is not carrying out the works with all due speed, then the Landlord may enter the Property and carry out the works needed.

34.3 The costs incurred by the Landlord in carrying out any works pursuant to this clause (and any professional fees and any VAT in respect of those costs) shall be a debt due from the Tenant to the Landlord and payable on demand.

34.4 Any action taken by the Landlord pursuant to this clause shall be without prejudice to the Landlord's other rights.

34.5 Not less than six months before the end of the term, the Landlord shall serve a schedule of dilapidations on the Tenant and shall notify the Tenant of any other dilapidations that occur after the schedule of dilapidations has been served as soon as possible.

35. [INDEMNITY]

The Tenant shall keep the Landlord indemnified against all expenses, costs, claims, damage and loss (including any diminution in the value of the Landlord's interest in the Building and loss of amenity of the Building) arising from any breach of any tenant covenants in this lease, or any act or omission of the Tenant, any undertenant or their respective workers, contractors or agents or any other person on the Property or the Common Parts with the actual or implied authority of any of them.

36. LANDLORD'S COVENANT FOR QUIET ENJOYMENT

The Landlord covenants with the Tenant, that, so long as the Tenant pays the rents reserved by and complies with its obligations in this lease, the Tenant shall have quiet enjoyment of the Property without any lawful interruption by the Landlord or any person claiming under the Landlord.

37. GUARANTEE AND INDEMNITY

37.1 [The provisions of *Schedule 1* apply.]

37.2 [If any of the events mentioned in *clause 38.1(c)* occur in relation to a guarantor that is a corporation, or if any of the events mentioned in *clause 38.1(d)* occur in relation to one or more individuals that is a guarantor or if one or more of those individuals dies or becomes incapable of managing its affairs the Tenant shall, if the Landlord requests, procure that a person of standing acceptable to the Landlord, within [ ] days of that request, enters into a replacement or additional guarantee and indemnity of the tenant covenants of this lease in the same form as that entered into by the former guarantor.]

37.3 [*Clause 37.2* shall not apply in the case of a person who is guarantor by reason of having entered into an authorised guarantee agreement.]

37.4 For so long as any guarantor remains liable to the Landlord, the Tenant shall, if the Landlord requests, procure that the guarantor joins in any consent or approval required under this lease and consents to any variation of the tenant covenants of this lease.

38. CONDITION FOR RE-ENTRY

38.1 The Landlord may re-enter the Property (or any part of the Property in the name of the whole) at any time after any of the following occurs:

(a) any rent is unpaid 21 days after becoming payable whether it has been formally demanded or not; or

(b) any breach of any condition of, or tenant covenant, in this lease; or

(c) where the Tenant [or any guarantor] is a corporation:

(i) the taking of any step in connection with any voluntary arrangement or any other compromise or arrangement for the benefit of any creditors of the Tenant [or guarantor]; or

(ii) the making of an application for an administration order or the making of an administration order in relation to the Tenant [or guarantor]; or

(iii) the giving of any notice of intention to appoint an administrator, or the filing at court of the prescribed documents in connection with the appointment of an administrator, or the appointment of an administrator, in any case in relation to the tenant [or the guarantor]; or

(iv) the appointment of a receiver or manager or an administrative receiver in relation to any property or income of the Tenant [or guarantor]; or

(v) the commencement of a voluntary winding-up in respect of the Tenant [or guarantor], except a winding-up for the purpose of amalgamation or

reconstruction of a solvent company in respect of which a statutory declaration of solvency has been filed with the Registrar of Companies; or

(vi) the making of a petition for a winding-up order or a winding-up order in respect of the Tenant [or guarantor]; or

(vii) the striking-off of the Tenant [or guarantor] from the Register of Companies or the making of an application for the Tenant [or the guarantor] to be struck-off; or

(viii) the Tenant [or guarantor] otherwise ceasing to exist; or

(d) where the Tenant [or any guarantor] is an individual:

(i) the taking of any step in connection with any voluntary arrangement or any other compromise or arrangement for the benefit of any creditors of the Tenant [or guarantor]; or

(ii) the presentation of a petition for a bankruptcy order or the making of a bankruptcy order against the Tenant [or guarantor].

38.2 If the Landlord re-enters the Property (or any part of the Property in the name of the whole) pursuant to this clause, this lease shall immediately end, but without prejudice to any right or remedy of the Landlord in respect of any breach of covenant by the Tenant [or any guarantor].

39. LIABILITY

39.1 At any time when the Landlord, the Tenant or a guarantor is more than one person, then in each case those persons shall be jointly and severally liable for their respective obligations arising under this lease. The Landlord may take action against, or release or compromise the liability of, any one of those persons or grant time or other indulgence to any one of them without affecting the liability of any other of them.

39.2 The obligations of the Tenant and any guarantor arising by virtue of this lease are owed to the Landlord and the obligations of the Landlord are owed to the Tenant.

39.3 In any case where the facts are or should reasonably be known to the Tenant, the Landlord shall not be liable to the Tenant for any failure of the Landlord to perform any landlord covenant in this lease unless and until the Tenant has given the Landlord notice of the facts that give rise to the failure and the Landlord has not remedied the failure within a reasonable time.

40. ENTIRE AGREEMENT AND EXCLUSION OF REPRESENTATIONS

40.1 This lease constitutes the whole agreement between the parties relating to the transaction contemplated by the grant of this lease and supersedes all previous agreements between the parties relating to the transaction.

40.2 [The Tenant acknowledges that in entering into this lease it has not relied on] [The Tenant and the Guarantor acknowledge that in entering into this lease neither has relied on], and shall have no right or remedy in respect of, any statement or representation made by or on behalf of the Landlord.

40.3 Nothing in this lease constitutes or shall constitute a representation or warranty that the Property or the Common Parts may lawfully be used for any purpose allowed by this lease.

40.4 Nothing in this clause shall limit or exclude any liability for fraud.

41. NOTICES, CONSENTS AND APPROVALS

41.1 Except where this lease specifically states that a notice need not be in writing, or where notice is given in an emergency, any notice given pursuant to this lease shall:

(a) be in writing in the English language; and

(b) be:

(i) delivered personally; or
(ii) delivered by commercial courier; or
(iii) sent by fax; or
(iv) sent by pre-paid first-class post or recorded delivery; or
(v) (if the notice is to be served by post outside the country from which it is sent) sent by airmail requiring signature on delivery.

41.2 A notice is deemed to have been received:

(a) if delivered personally, at the time of delivery; or
(b) if delivered by commercial courier, at the time of signature of the courier's receipt; or
(c) if sent by fax, at the time of transmission; or
(d) if sent by pre-paid first-class post or recorded delivery, 48 hours from the date of posting; or
(e) if sent by airmail, five days from the date of posting;
(f) if deemed receipt under the previous paragraphs of this clause is not within business hours (meaning 9.00 am to 5.30 pm on a working day in the place of receipt), when business next starts in the place of receipt.

41.3 To prove service, it is sufficient to prove that the notice:

(a) if sent by fax, was transmitted by fax to the fax number of the party; or
(b) if sent by post, that the envelope containing the notice was properly addressed and posted.

41.4 Section 196 of the Law of Property Act 1925 shall otherwise apply to notices given under this lease.

41.5 Where the consent of the Landlord is required under this lease, a consent shall only be valid if it is given by deed, unless:

(a) it is given in writing and signed by a person duly authorised on behalf or the Landlord; and
(b) it expressly states that the Landlord waives the requirement for a deed in that particular case.

If a waiver is given, it shall not affect the requirement for a deed for any other consent.

41.6 Where the approval of the Landlord is required under this lease, an approval shall only be valid if it is in writing and signed by or on behalf of the Landlord, unless:

(a) the approval is being given in a case of emergency; or
(b) this lease expressly states that the approval need not be in writing.

41.7 If the Landlord gives a consent or approval under this lease, the giving of that consent or approval shall not imply that any consent or approval required from a third party has been obtained, nor shall it obviate the need to obtain any consent or approval from a third party.

42. GOVERNING LAW AND JURISDICTION

42.1 This lease and any dispute or claim arising out of or in connection with it or its subject matter shall be governed by and construed in accordance with the law of England and Wales.

42.2 The Landlord, the Tenant, [the Guarantor] and any [other] guarantor irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim or matter arising under or in connection with this lease or its subject matter or the legal relationships established by it.

43. EXCLUSION OF 1954 ACT PROTECTION

43.1 The parties confirm that:

(a) the Landlord served a notice on the Tenant, as required by section 38A(3)(a) of the 1954 Act, applying to the tenancy created by this lease, [not less than 14 days] before [this lease] [DETAILS OF AGREEMENT FOR LEASE] was entered into [a certified copy of which notice is annexed to this lease];

(b) [the Tenant] [[NAME OF DECLARANT] who was duly authorised by the Tenant to do so] made a [statutory] declaration dated [DATE] in accordance with the requirements of section 38A(3)(b) of the 1954 Act [a certified copy of which [statutory] declaration is annexed to this lease]; and

(c) [there is no agreement for lease to which this lease gives effect.]

43.2 The parties agree that the provisions of sections 24 to 28 of the 1954 Act are excluded in relation to the tenancy created by this lease.

43.3 The parties confirm that:

(a) the Landlord served a notice on the Guarantor, as required by section 38A(3)(a) of the 1954 Act, applying to the tenancy to be entered into by the Guarantor pursuant to paragraph 4 of the Schedule, [not less than 14 days] before [this lease] [DETAILS OF AGREEMENT FOR LEASE] was entered into (a certified copy of which notice is annexed to this lease); and

(b) [the Guarantor] [[NAME OF DECLARANT], who was duly authorised by the Guarantor to do so], made a [statutory] declaration dated [DATE] in accordance with the requirements of section 38A(3)(b) of the 1954 Act (a certified copy of which [statutory] declaration is annexed to this lease).

44. [TENANT'S BREAK CLAUSE]

44.1 The Tenant may terminate this lease by serving a Break Notice [at any time on or after [EARLIEST DATE]] on the Landlord.

44.2 A Break Notice served by the Tenant shall be of no effect if, at the Break Date:

(a) the Tenant has not paid [in cleared funds] any part of the Annual Rent, or any VAT in respect of it, which was due to have been paid; or

(b) the Tenant remains in occupation of any part of the Property; or

(c) there are any continuing subleases of the Property.

44.3 Subject to *clause 44.2*, following service of a Break Notice this lease shall terminate on the Break Date.

44.4 Termination of this lease on the Break Date shall not affect any other right or remedy that either party may have in relation to any earlier breach of this lease.

44.5 On the Break Date, the Landlord shall refund to the Tenant the proportion of the Annual Rent and any VAT paid in respect of it for the period from and including the Break Date, to but excluding the next Rent Payment Date, calculated on a daily basis.

45. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

A person who is not a party to this lease shall not have any rights under or in connection with it by virtue of the Contracts (Rights of Third Parties) Act 1999.

46. NEW TENANCY UNDER 1995 ACT

This lease creates a new tenancy for the purposes of the 1995 Act.

This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

SCHEDULE 1
GUARANTEE AND INDEMNITY

1. GUARANTEE AND INDEMNITY

1.1 The Guarantor guarantees to the Landlord that the Tenant shall:

(a) pay the rents reserved by this lease and observe and perform the tenant covenants of this lease and that if the Tenant fails to pay any of those rents or to observe or perform any of those tenant covenants, the Guarantor shall pay or observe and perform them; and

(b) observe and perform any obligations the Tenant enters into in an authorised guarantee agreement made in respect of this lease (the **Authorised Guarantee Agreement**) and that if the Tenant fails to do so, the Guarantor shall observe and perform those obligations.

1.2 The Guarantor covenants with the Landlord as a separate and independent primary obligation to indemnify the Landlord against any failure by the Tenant:

(a) to pay any of the rents reserved by this lease or any failure to observe or perform any of the tenant covenants of this lease; and

(b) to observe or perform any of the obligations the Tenant enters into in the Authorised Guarantee Agreement.

2. GUARANTOR'S LIABILITY

2.1 The liability of the Guarantor under *paragraph 1.1(a)* and *paragraph 1.2(a)* shall continue until the end of the term, or until the Tenant is released from the tenant covenants of this lease by virtue of the 1995 Act, if earlier.

2.2 The liability of the Guarantor shall not be affected by:

(a) any time or indulgence granted by the Landlord to the Tenant; or

(b) any delay or forbearance by the Landlord in enforcing the payment of any of the rents or the observance or performance of any of the tenant covenants of this lease (or the Tenant's obligations under the Authorised Guarantee Agreement) or in making any demand in respect of any of them; or

(c) any refusal by the Landlord to accept any rent or other payment due under this lease where the Landlord believes that the acceptance of such rent or payment may prejudice its ability to re-enter the Property; or

(d) the Landlord exercising any right or remedy against the Tenant for any failure to pay the rents reserved by this lease or to observe or perform the tenant covenants of this lease (or the Tenant's obligations under the Authorised Guarantee Agreement); or

(e) the Landlord taking any action or refraining from taking any action in connection with any other security held by the Landlord in respect of the Tenant's liability to pay the rents reserved by this lease or observe and perform the tenant covenants of the lease (or the Tenant's obligations under the Authorised Guarantee Agreement) including the release of any such security; or

(f) [a release or compromise of the liability of any one of the persons who is the Guarantor, or the grant of any time or concession to any one of them; or]

(g) any legal limitation or disability on the Tenant or any invalidity or irregularity of any of the tenant covenants of the lease (or the Tenant's obligations under the Authorised Guarantee Agreement) or any unenforceability of any of them against the Tenant; or

(h) the Tenant being dissolved, or being struck off the register of companies or otherwise ceasing to exist, or, if the Tenant is an individual, by the Tenant dying or becoming incapable of managing its affairs; or

(i) without prejudice to *paragraph 4*, the disclaimer of the Tenant's liability under this lease or the forfeiture of this lease; or

(j) the surrender of part of the Property, except that the Guarantor shall not be under any liability in relation to the surrendered part in respect of any period after the surrender; or

(k) by any other act or omission except an express [written] release [under seal] of the Guarantor by the Landlord

2.3 [The liability of each of the persons making up the Guarantor is joint and several.]

2.4 Any sum payable by the Guarantor shall be paid without any deduction, set-off or counter-claim against the Landlord or the Tenant.

3. VARIATIONS AND SUPPLEMENTAL DOCUMENTS

3.1 The Guarantor shall, at the request of the Landlord, join in and give its consent to the terms of any consent, approval, variation or other document that may be entered into by the Tenant in connection with this lease (or the Authorised Guarantee Agreement).

3.2 The Guarantor shall not be released by any variation of the rents reserved by, or the tenant covenants in, this Lease (or the Tenant's obligations under the Authorised Guarantee Agreement) whether or not:

(a) the variation is material or prejudicial to the Guarantor; or

(b) the variation is made in any document; or

(c) the Guarantor has consented, in writing or otherwise, to the variation.

3.3 The liability of the Guarantor shall apply to the rents reserved by and the tenant covenants in this lease (and the Tenant's obligations under the Authorised Guarantee Agreement) as varied except to the extent that the liability of the Guarantor is affected by section 18 of the 1995 Act.

4. GUARANTOR TO TAKE A NEW LEASE OR MAKE PAYMENT

4.1 If this lease is forfeited or the liability of the Tenant under this lease is disclaimed and the Landlord gives the Guarantor notice not later than [six] months after the forfeiture or the Landlord having received notice of the disclaimer, the Guarantor shall enter into a new lease of the Property on the terms set out in *paragraph 4.2*.

4.2 The rights and obligations under the new lease shall take effect from the date of the forfeiture or disclaimer and the new lease shall:

(a) be granted subject to the right of any person to have this lease vested in them by the court and to the terms on which any such order may be made and subject to the rights of any third party existing at the date of the grant;

(b) be for a term that expires at the same date as the end of the Contractual Term of this lease had there been no forfeiture or disclaimer;

(c) reserve as an initial annual rent an amount equal to the Annual Rent payable under this lease at the date of the forfeiture or disclaimer or which would be payable but for any abatement or suspension of the Annual Rent or restriction on the right to collect it and which is subject to review on the same terms and dates provided by this lease (subject to *paragraph 5*); [and]

(d) be excluded from sections 24 to 28 of the 1954 Act; and

(e) otherwise be on the same terms as this lease (as varied if there has been any variation).

4.3 The Guarantor shall pay the Landlord's solicitors' costs and disbursements (on a full indemnity basis) and any VAT in respect of them in relation to the new lease and shall execute and deliver to the Landlord a counterpart of the new lease within one month after service of the Landlord's notice.

4.4 The grant of a new lease and its acceptance by the Guarantor shall be without prejudice to any other rights which the Landlord may have against the Guarantor or against any other person or in respect of any other security that the Landlord may have in connection with this lease.

4.5 The Landlord may, instead of giving the Guarantor notice pursuant to *paragraph 4.1* but in the same circumstances and within the same time limit, require the Guarantor to pay an amount equal to [six] months Annual Rent and the Guarantor shall pay that amount on demand.

5. RENT AT THE DATE OF FORFEITURE OR DISCLAIMER

5.1 If at the date of the forfeiture or disclaimer there is a rent review pending under this lease, then the initial annual rent to be reserved by the new lease shall be subject to review on the date on which the term of the new lease commences on the same terms as those that apply to a review of the Annual Rent under this lease, such review date to be included in the new lease.

5.2 If *paragraph 5.1* applies, then the review for which it provides shall be in addition to any rent reviews that are required under *paragraph 4.2(c)*.

6. PAYMENTS IN GROSS AND RESTRICTIONS ON THE GUARANTOR

6.1 Any payment or dividend that the Landlord receives from the Tenant (or its estate) or any other person in connection with any insolvency proceedings or arrangement involving the Tenant shall be taken and applied as a payment in gross and shall not prejudice the right of the Landlord to recover from the Guarantor to the full extent of the obligations that are the subject of this guarantee and indemnity.

6.2 The Guarantor shall not claim in competition with the Landlord in any insolvency proceedings or arrangement of the Tenant in respect of any payment made by the Guarantor pursuant to this guarantee and indemnity. If it otherwise receives any money in such proceedings or arrangement, it shall hold that money on trust for the Landlord to the extent of its liability to the Landlord.

6.3 The Guarantor shall not, without the consent of the Landlord, exercise any right or remedy that it may have (whether against the Tenant or any other person) in respect of any amount paid or other obligation performed by the Guarantor under this guarantee and indemnity unless and until all the obligations of the Guarantor under this guarantee and indemnity have been fully performed.

7. OTHER SECURITIES

7.1 The Guarantor warrants that it has not taken and covenants that it shall not take any security from or over the assets of the Tenant in respect of any liability of the Tenant to the Guarantor. If it does take or hold any such security it shall hold it for the benefit of the Landlord.

7.2 This guarantee and indemnity is in addition to any other security that the Landlord may at any time hold from the Guarantor or the Tenant or any other person in respect of the liability of the Tenant to pay the rents reserved by this lease and to observe and perform the tenant covenants of this lease. It shall not merge in or be affected by any other security.

7.3 The Guarantor shall not be entitled to claim or participate in any other security held by the Landlord in respect of the liability of the Tenant to pay the rents reserved by this lease or to observe and perform the tenant covenants of this lease.

SCHEDULE 2
BREAK NOTICE

[INSERT FORM OF BREAK NOTICE]

SCHEDULE 3
SERVICES, SERVICE COSTS AND EXCLUDED COSTS

1. SERVICES

The **Services** are:

(a) cleaning, maintaining, decorating and repairing the Common Parts, including the structural parts, the outsides of the windows and all Service Media forming part of the Common Parts, and remedying any inherent defect;

(b) providing heating to the internal areas of the Common Parts [and the Lettable Units] during such periods of the year as the Landlord reasonably considers appropriate, and cleaning, maintaining, repairing and replacing the heating machinery and equipment;

(c) lighting the Common Parts and cleaning, maintaining, repairing and replacing lighting machinery and equipment on the Common Parts;

(d) supplying hot and cold water, soap, paper, towels and other supplies for any lavatories, washrooms, kitchens and utility areas on the Common Parts, and cleaning, maintaining, repairing and replacing the furniture, fittings and equipment in those areas;

(e) keeping the lifts on the Common Parts in reasonable working order and cleaning, maintaining, repairing and replacing the lifts and lift machinery and equipment;

(f) cleaning, maintaining, repairing and replacing refuse bins on the Common Parts;

(g) cleaning, maintaining, repairing and replacing signage for the Common Parts;

(h) cleaning, maintaining, repairing, operating and replacing security machinery and equipment (including closed circuit television) on the Common Parts;

(i) cleaning, maintaining, repairing, operating and replacing fire prevention, detection and fighting machinery and equipment and fire alarms on the Common Parts;

(j) cleaning, maintaining, repairing and replacing a signboard showing the names and logos of the tenants and other occupiers [in the entrance hall of the Building];

(k) maintaining the landscaped and grassed areas of the Common Parts;

(l) cleaning, maintaining, repairing and replacing the floor coverings on the internal areas of the Common Parts;

(m) cleaning, maintaining, repairing and replacing the furniture and fittings on the Common Parts;

(n) [providing air conditioning for the internal areas of the [Common Parts] [Building] and cleaning, maintaining, repairing and replacing air conditioning equipment serving the [Common Parts][Building];

(o) [providing [security] [reception] [cleaning and maintenance] staff for the Building;]

(p) [ANY OTHER SPECIFIC SERVICES REQUIRED]; and

(q) any other service or amenity that the Landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building.

2. SERVICE COSTS

The **Service Costs** (excepting the Excluded Costs) are the total of:

(a) all of the reasonable and properly incurred costs of:

  (i) providing the Services;

(ii) the supply and removal of electricity, gas, water, sewage and other utilities to and from the [Common Parts][Building];

(iii) complying with the recommendations and requirements of the insurers of the Building (insofar as those recommendations and requirements relate to the Common Parts);

(iv) complying with all laws relating to the Common Parts, their use and any works carried out to them, relating to the use of all Service Media, machinery and equipment at or serving the Common Parts and relating to any materials kept at or disposed of from the Common Parts;

(v) complying with the Third Party Rights insofar as they relate to the Common Parts;

(vi) taking any steps (including proceedings) that the Landlord considers necessary to prevent or remove any encroachment over the Common Parts or to prevent the acquisition of any right over the Common Parts (or Building as a whole) or to remove any obstruction to the flow of light or air to the Common Parts (or the Building as a whole); and

(vii) borrowing to fund major expenditure on any Service which is infrequent or of an unusual nature.

(b) the Management Fee and all of the reasonable and properly incurred costs, fees and disbursements of:

(i) the accountants employed by the Landlord to prepare, audit and certify the service charge accounts; and

(ii) a procurement specialist who is employed or retained to achieve greater value for money and cost effectiveness in relation to the Service Costs.

(c) all costs incurred in relation to [security][reception][cleaning and maintenance] staff for the Building as follows:

(i) salaries (and all appropriate benefits);

(ii) employers' costs (including NIC and tax, costs of compliance with statutory requirements, pension, welfare, training and insurance contributions);

(iii) uniforms; and

(iv) all equipment and supplies needed for the proper performance of their duties.

(d) all rates, taxes and impositions payable in respect of the Common Parts, their use and any works carried out on them (other than any taxes payable by the Landlord in connection with any dealing with or disposition of its reversionary interest in the Building);

(e) the reasonable and proper cost of complying with any of the Landlord's obligations contained in *clause 8*;

(f) any VAT payable in respect of any of the items mentioned above except to the extent that the Landlord is able to recover such VAT.

3. EXCLUDED COSTS

The **Excluded Costs** are any costs which relate to or arise from:

(a) matters between the Landlord and an occupier in the Building, including, but not limited to, costs relating to or arising from:

(i) enforcement of covenants to pay rent and other monies payable under the occupier's lease;

(ii) the letting of any Lettable Unit;

(iii) any consents required under the relevant lease, including but not limited to consents to assign, sublet, alterations and extended opening hours; and

(iv) rent reviews;

(b) failure or negligence of the Landlord or Manager;

(c) any Lettable Unit which is unlet;

(d) any shortfall in the costs of providing any of the Services to a Lettable Unit for which the Landlord has agreed a special concession (not being a properly constituted weighting formula);

(e) the maintenance or operation of:

(i) any premises within the Building used by the Landlord for its own purposes (except where such use is wholly or partly in connection with the management of the Building itself, in which case the whole or a reasonable part, as the case may be, of such costs shall be a Service Cost);

(ii) any cost centre within the Building that generates income for the Landlord (except where such income is credited to the Service Charge Account, in which case the whole of such costs shall be a Service Cost);

(iii) the initial provision of any items that are reasonably to be considered part of the original design and construction of the fabric, plan or equipment of the Building together with the initial setting up that is reasonably to be considered part of the original development of the Building;

(iv) any future development of the Building;

(v) the replacement of any item of the fabric, plant, equipment or materials necessary for the operation of the Building, except where it is beyond economic repair at the time of such replacement or except where the expenditure is necessary for the purposes of good estate management and following the analysis of reasonable options and alternatives (in which case the Landlord shall upon request provide to the Tenant evidence justifying such cost);

(vi) the improvement of any item (where the cost exceeds the costs of normal maintenance, repair or replacement) except where the expenditure can be justified for the purposes of good estate management and following the analysis of reasonable options and alternatives (in which case the Landlord shall upon request provide to the Tenant evidence justifying such cost); and

(vii) any service provided by reason of damage to or destruction of the Common Parts by a risk against which the Landlord is obliged to insure.

Signed as a deed by [NAME OF LANDLORD] acting by [NAME OF FIRST DIRECTOR] and [NAME OF SECOND DIRECTOR/SECRETARY]

.....
Director

.....
Director/
Secretary

Signed as a deed by [NAME OF TENANT] acting by [NAME OF FIRST DIRECTOR] and [NAME OF SECOND DIRECTOR/SECRETARY]

.....
Director

.....
Director/
Secretary

Signed as a deed by [NAME OF GUARANTOR] acting by [NAME OF FIRST DIRECTOR] and [NAME OF SECOND DIRECTOR/SECRETARY]

.....
Director

.....
Director/
Secretary

OR

Signed as a deed by [NAME OF GUARANTOR] in the presence of [NAME OF WITNESS]

.....
[SIGNATURE OF GUARANTOR]

.....
[SIGNATURE OF WITNESS]

.....
[NAME OF WITNESS]

.....

.....
[ADDRESS OF WITNESS]

Signed as a deed by [NAME OF GUARANTOR] in the presence of [NAME OF WITNESS]

.....
[SIGNATURE OF GUARANTOR]

.....
[SIGNATURE OF WITNESS]

.....
[NAME OF WITNESS]

.....

.....
[ADDRESS OF WITNESS]

Appendix 5
Specimen Authorised Guarantee Agreement

THIS DEED IS DATED . . . .

Parties

- [*FULL COMPANY NAME*] incorporated and registered in England and Wales with company number [*NUMBER*] whose registered office is at [*REGISTERED OFFICE ADDRESS*](Landlord).
- [*FULL COMPANY NAME]* incorporated and registered in England and Wales with company number [*NUMBER]* whose registered office is at *[REGISTERED OFFICE ADDRESS]*(Tenant).

Background

1 This agreement is supplemental and collateral to the Lease and to the Licence to Assign.

2 The Landlord is entitled to the immediate reversion to the Lease.

3 The residue of the term granted by the Lease is vested in the Tenant.

4 The Tenant intends to assign the Lease and has agreed to enter into an authorised guarantee agreement with the Landlord.

1. Agreed terms

1.1 The definitions and rules of interpretation set out in this clause apply to this agreement.

Assignee**:** the person or persons defined as assignee in the Licence to Assign.

Lease: a lease of [*ADDRESS/DESCRIPTION OF THE PROPERTY]* dated [*DATE*] and made between [*PARTIES*], and all documents supplemental or collateral to that lease.

Licence to Assign: a licence to assign the Lease dated *[DATE*] and made between [*PARTIES*].

Property: [*ADDRESS/DESCRIPTION OF THE PROPERTY]* as [more particularly described in and] demised by the Lease.

[1954 Act: Landlord and Tenant Act 1954.]

1.2 References to the Landlord include a reference to the person entitled for the time being to the immediate reversion to the Lease.

1.3 The expression Tenant Covenants has the meaning given to it by the Landlord and Tenant (Covenants) Act 1995.

1.4 References to the Completion of the Assignment are to the date on which the deed of assignment to the Assignee is dated and not to the registration of that deed at Land Registry.

1.5 Unless otherwise specified a reference to a particular law is a reference to it as it is in force for the time being taking account of any amendment, extension, application or re-enactment and includes any subordinate laws for the time being in force made under it.

1.6 A Person includes a corporate or unincorporated body.

1.7 Except where a contrary intention appears, a reference to a clause or schedule is a reference to a clause of, or schedule to this agreement, and a reference in a schedule to a paragraph is to a paragraph of that schedule.

1.8 Clause, schedule and paragraph headings are not to affect the interpretation of this agreement.

2. Consideration and effect

2.1 The obligations on the Tenant in this agreement are owed to the Landlord and are made in consideration of the Landlord's consent granted in the Licence to Assign.

2.2 The provisions of this agreement shall take effect on the date the Assignee becomes bound by the Tenant Covenants of the Lease, and are to continue until the end of the term of the Lease (however it may end) and during any agreed or statutory continuation of it, or until the Assignee is released from the tenant covenants of the Lease by virtue of the Landlord and Tenant (Covenants) Act 1995, whichever is earlier.

2.3 If the Tenant is more than one person, then each of those persons shall be jointly and individually liable for their respective obligations arising by virtue of this agreement or the assignment. The Landlord may release or compromise the liability of any one of those persons or grant any time or concession to any one of them without affecting the liability of any other of them.

3. Guarantee and indemnity

3.1 The Tenant guarantees to the Landlord that the Assignee will pay the rents reserved by the Lease and observe and perform the Tenant Covenants of the Lease and that if the Assignee fails to pay any of those rents or to observe or perform any of those Tenant Covenants, the Tenant will pay or observe and perform them.

3.2 The Tenant covenants with the Landlord as a separate and independent primary obligation to indemnify the Landlord against any failure to pay any of the rents reserved by the Lease or any failure to observe or perform any of the Tenant Covenants of the Lease.

4. Tenant's liability

4.1 The liability of the Tenant shall not be affected by:

4.1.1 Any time or indulgence granted by the Landlord to the Assignee (or to any person to whom the Assignee has assigned the Lease pursuant to an assignment that is an excluded assignment under section 11 of the Landlord and Tenant (Covenants) Act 1995); or

4.1.2 Any delay or forbearance by the Landlord in enforcing the payment of any of the rents or the observance or performance of any of the tenant covenants of the Lease or in making any demand in respect of any of them; or

4.1.3 Any refusal by the Landlord to accept any rent or other payment due under the Lease where the Landlord believes that the acceptance of such rent or payment may prejudice its ability to re-enter the Property; or

4.1.4 The Landlord exercising any right or remedy against the Assignee for any failure to pay the rents reserved by the Lease or to observe or perform the tenant covenants of the Lease; or

4.1.5 The Landlord taking any action or refraining from taking any action in connection with any other security held by the Landlord in respect of the Assignee's liability to pay the rents reserved by the Lease and observe and perform the tenant covenants of the Lease (including the release of any such security); or

4.1.6 A release or compromise of the liability of any one of the persons who is the Tenant, or the grant of any time or concession to any one of them; or

4.1.7 Any legal limitation or disability on the Assignee or any invalidity or irregularity of any of the tenant covenants of the Lease or any unenforceability of any of them against the Assignee; or

4.1.8 The Assignee being dissolved or being struck off the register of companies or otherwise ceasing to exist; or

4.1.9 Without prejudice to clause 6, the disclaimer of the liability of the Assignee under the Lease; or

4.1.10 The surrender of part of the Property, except that the Tenant shall not be under any liability in relation to the surrendered part in respect of any period after the surrender; or

4.1.11 Any other act or omission except an express release of the Tenant made by the Landlord under seal.

4.2 Any sum payable by the Tenant under this agreement is to be paid without any deduction, set-off or counter-claim against the Landlord or the Assignee.

5. Variations and supplemental documents

5.1 The Tenant shall, at the request of the Landlord, join in and give its consent to the terms of any licence, consent, variation or other document that may be entered into by the Assignee in connection with the Lease.

5.2 The Tenant is not be released from liability under this agreement by any variation of the rents reserved by, or the Tenant Covenants in, the Lease, whether or not:

5.2.1 The variation is material or prejudicial to the Tenant; or

5.2.2 The Tenant has consented to the variation.

5.3 The liability of the Tenant under this agreement shall apply to the rents reserved by and the Tenant Covenants of the Lease as varied except to the extent that the liability of the Tenant is affected by section 18 of the Landlord and Tenant (Covenants) Act 1995.

6. Tenant to take a new lease

6.1 If the liability of the Assignee under the Lease is disclaimed and the Landlord gives the Tenant written notice within six months after the Landlord receives notice of that disclaimer, the Tenant shall enter into a new lease of the Property on the terms set out in clause 6.2.

6.2 The rights and obligations under the new lease are to take effect from the date of the disclaimer and the new lease shall:

6.2.1 Be granted subject to the right of any person to have the Lease vested in them by the court and to the terms on which any such order may be made and subject to the rights of any third party existing at the date of the grant;

6.2.2 Be for a term that expires at the same date as the end of the contractual term granted by the Lease had there been no disclaimer;

6.2.3 Reserve as an initial annual rent an amount equal to the rent which is payable under the Lease on the date of the disclaimer (subject to clause 7) and which is subject to review on the same terms and dates provided by the Lease; [and]

6.2.4 [Be excluded from sections 24 to 28 of the 1954 Act; and]

6.2.5 Otherwise be on the same terms as the Lease (as varied if there has been any variation other than a variation in respect of which and to the extent that the Tenant is not liable by virtue of section 18 of the Landlord and Tenant (Covenants) Act 1995).

6.3 [The parties confirm that:

6.3.1 the Landlord served a notice on the Tenant, as required by section 38A(3)(a) of the 1954 Act, applying to the tenancy to be entered into by the Tenant pursuant to clause 6.1 [not less than 14 days] before the authorised guarantee agreement was entered into (a certified copy of which notice is annexed to this agreement); and

6.3.2 [the Tenant] [*[NAME OF DECLARANT*], who was duly authorised by the Tenant to do so], made a [statutory] declaration dated [*DATE*] in accordance with the requirements of section 38A(3)(b) of the 1954 Act (a certified copy of which [statutory] declaration is annexed to this agreement).]

6.4 The Tenant shall pay the Landlord's solicitor's costs and disbursements (on a full indemnity basis) and any VAT on them in relation to the new lease and shall execute and deliver to the Landlord a counterpart of the new lease within one month after service of the Landlord's notice.

6.5 The grant of a new lease and its acceptance by the Tenant shall be without prejudice to any other rights which the Landlord may have against the Tenant or against any other person or in respect of any other security that the Landlord may have in connection with the Lease.

7. Rent at the date of disclaimer

7.1 If at the date of the disclaimer there is a rent review pending under the Lease, then:

7.1.1 the relevant review date in the Lease shall also be a rent review date in the new lease;

7.1.2 the rent to be first reserved by the new lease shall be the open market rent of the Property at the relevant review date as agreed or determined in accordance with the new lease;

7.1.3 until the rent is agreed or determined the rent under the new lease shall be payable at the rate that was payable under the Lease immediately before the disclaimer; and

7.1.4 the provisions in the new lease relating to the payment of any shortfall and interest following agreement or determination of a rent review shall apply in relation to any shortfall between the rent payable and the rent first reserved, in respect of the period after the date of the disclaimer.

7.2 If at the date of the disclaimer there is any abatement or suspension of the rent reserved by the Lease, then, for the purposes for this agreement, that rent shall be deemed to be the amount which would be payable under the Lease but for the abatement or suspension, but without prejudice to the provisions relating to abatement or suspension to be contained in the new lease.

8. Payments in gross and restrictions on the Tenant

8.1 Any payment or dividend that the Landlord receives from the Assignee (or its estate) or any other person in connection with any insolvency proceedings or arrangement involving the Assignee shall be taken and applied as a payment in gross and shall not prejudice the right of the Landlord to recover from the Tenant to the full extent of the obligations that are the subject of the guarantee and indemnity in this agreement.

8.2 The Tenant shall not claim in competition with the Landlord in any insolvency proceedings or arrangement of the Assignee in respect of any payment made by the Tenant pursuant to the guarantee and indemnity in this agreement. If it otherwise receives any money in such proceedings or arrangement, it shall hold that money on trust for the Landlord to the extent of its liability to the Landlord.

8.3 The Tenant shall not, without the consent of the Landlord, exercise any right or remedy that it may have (whether against the Assignee or any other person) in respect of any amount paid or other obligation performed by the Tenant under the guarantee and indemnity in this agreement unless and until all the obligations of the Tenant under the guarantee and indemnity in this agreement have been fully performed.

9. Other securities

9.1 The Tenant warrants that it has not taken and covenants that it will not take any security from or over the assets of the Assignee in respect of any liability of the Assignee to the Tenant. If it does take or hold any such security it shall hold it for the benefit of the Landlord.

9.2 This agreement is in addition to any other security that the Landlord may at any time hold from the Tenant or the Assignee or any other person in respect of the liability of the Assignee to pay the rents reserved by the Lease and to observe and perform the tenant covenants of the Lease. It shall not merge in or be affected by any other security.

9.3 The Tenant shall not be entitled to claim or participate in any other security held by the Landlord in respect of the liability of the Assignee to pay the rents reserved by the Lease or to observe and perform the tenant covenants of the Lease.

10. Costs

On completion of this agreement the Tenant is to pay the reasonable costs and disbursements of the Landlord's solicitors and its managing agents in connection with this agreement. This obligation extends to costs and disbursements assessed on a full indemnity basis and to any value added tax in respect of those costs and disbursements except to the extent that the Landlord is able to recover that value added tax.

11. Indemnity

The Tenant will indemnify the Landlord against all costs and claims arising from any breach of the terms of this agreement.

12. Notices

Any notice given pursuant to this agreement shall be in writing and shall be delivered by hand or sent by pre-paid first class post or recorded delivery or by any other means permitted by the Lease. A correctly addressed notice sent by pre-paid first class post shall be deemed to have been delivered at the time at which it would have been delivered in the normal course of the post.

13. Contracts (Rights of Third Parties) Act 1999

No term of this agreement shall be enforceable under the Contracts (Rights of Third Parties) Act 1999 by any third party.

Appendix 6
Extracts from the Landlord and Tenant Act 1954, Part II

SECURITY OF TENURE FOR BUSINESS, PROFESSIONAL AND OTHER TENANTS

TENANCIES TO WHICH PART II APPLIES

23. Tenancies to which Part II applies

(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.

(1A) Occupation or the carrying on of a business—

(a) by a company in which the tenant has a controlling interest; or

(b) where the tenant is a company, by a person with a controlling interest in the company,

shall be treated for the purposes of this section as equivalent to occupation or, as the case may be, the carrying on of a business by the tenant.

(1B) Accordingly references (however expressed) in this Part of this Act to the business of, or to use, occupation or enjoyment by, the tenant shall be construed as including references to the business of, or to use, occupation or enjoyment by, a company falling within subsection (1A)(a) above or a person falling within subsection (1A)(b) above.

(2) In this Part of this Act the expression 'business' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate.

(3) In the following provisions of this Part of this Act the expression 'the holding', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies.

(4) Where the tenant is carrying on a business, in all or any part of the property comprised in a tenancy, in breach of a prohibition (however expressed) of use for business purposes which subsists under the terms of the tenancy and extends to the whole of that property, this Part of this Act shall not apply to the tenancy unless the immediate landlord or his predecessor in title has consented to the breach or the immediate landlord has acquiesced therein.

In this subsection the reference to a prohibition of use for business purposes does not include a prohibition of use for the purposes of a specified business, or of use for purposes of any but a specified business, but save as aforesaid includes a prohibition of use for the purposes of some one or more only of the classes of business specified in the definition of that expression in subsection (2) of this section.

Continuation and Renewal of Tenancies

24. Continuation of tenancies to which Part II applies and grant of new tenancies

(1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the following provisions of this Act either the tenant or the landlord under such a tenancy may apply to the court for an order for the grant of a new tenancy—

(a) if the landlord has given notice under section 25 of this Act to terminate the tenancy, or

(b) if the tenant has made a request for a new tenancy in accordance with section twenty-six of this Act.

(2) The last foregoing subsection shall not prevent the coming to an end of a tenancy by notice to quit given by the tenant, by surrender or forfeiture, or by the forfeiture of a superior tenancy unless—

(a) in the case of a notice to quit, the notice was given before the tenant had been in occupation in right of the tenancy for one month; . . .

(b) . . ..

(2A) Neither the tenant nor the landlord may make an application under subsection (1) above if the other has made such an application and the application has been served.

(2B) Neither the tenant nor the landlord may make such an application if the landlord has made an application under section 29(2) of this Act and the application has been served.

(2C) The landlord may not withdraw an application under subsection (1) above unless the tenant consents to its withdrawal.

(3) Notwithstanding anything in subsection (1) of this section,—

(a) where a tenancy to which this Part of this Act applies ceases to be such a tenancy, it shall not come to an end by reason only of the cesser, but if it was granted for a term of years certain and has been continued by subsection (1) of this section then (without prejudice to the termination thereof in accordance with any terms of the tenancy) it may be terminated by not less than three nor more than six months' notice in writing given by the landlord to the tenant;

(b) where, at a time when a tenancy is not one to which this Part of this Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which this Part of this Act applies after the giving of the notice.

24A. Applications for determination of interim rent while tenancy continues

(1) Subject to subsection (2) below, if—

(a) the landlord of a tenancy to which this Part of this Act applies has given notice under section 25 of this Act to terminate the tenancy; or

(b) the tenant of such a tenancy has made a request for a new tenancy in accordance with section 26 of this Act,

either of them may make an application to the court to determine a rent (an 'interim rent') which the tenant is to pay while the tenancy ('the relevant tenancy') continues by virtue of section 24 of this Act and the court may order payment of an interim rent in accordance with section 24C or 24D of this Act.

(2) Neither the tenant nor the landlord may make an application under subsection (1) above if the other has made such an application and has not withdrawn it.

(3) No application shall be entertained under subsection (1) above if it is made more than six months after the termination of the relevant tenancy.

24B. Date from which interim rent is payable

(1) The interim rent determined on an application under section 24A(1) of this Act shall be payable from the appropriate date.

(2) If an application under section 24A(1) of this Act is made in a case where the landlord has given a notice under section 25 of this Act, the appropriate date is the earliest date of termination that could have been specified in the landlord's notice.

(3) If an application under section 24A(1) of this Act is made in a case where the tenant has made a request for a new tenancy under section 26 of this Act, the appropriate date is

the earliest date that could have been specified in the tenant's request as the date from which the new tenancy is to begin.

24C. Amount of interim rent where new tenancy of whole premises granted and landlord not opposed

(1) This section applies where—

(a) the landlord gave a notice under section 25 of this Act at a time when the tenant was in occupation of the whole of the property comprised in the relevant tenancy for purposes such as are mentioned in section 23(1) of this Act and stated in the notice that he was not opposed to the grant of a new tenancy; or

(b) the tenant made a request for a new tenancy under section 26 of this Act at a time when he was in occupation of the whole of that property for such purposes and the landlord did not give notice under subsection (6) of that section,

and the landlord grants a new tenancy of the whole of the property comprised in the relevant tenancy to the tenant (whether as a result of an order for the grant of a new tenancy or otherwise).

(2) Subject to the following provisions of this section, the rent payable under and at the commencement of the new tenancy shall also be the interim rent.

(3) Subsection (2) above does not apply where—

(a) the landlord or the tenant shows to the satisfaction of the court that the interim rent under that subsection differs substantially from the relevant rent; or

(b) the landlord or the tenant shows to the satisfaction of the court that the terms of the new tenancy differ from the terms of the relevant tenancy to such an extent that the interim rent under that subsection is substantially different from the rent which (in default of such agreement) the court would have determined under section 34 of this Act to be payable under a tenancy which commenced on the same day as the new tenancy and whose other terms were the same as the relevant tenancy.

(4) In this section 'the relevant rent' means the rent which (in default of agreement between the landlord and the tenant) the court would have determined under section 34 of this Act to be payable under the new tenancy if the new tenancy had commenced on the appropriate date (within the meaning of section 24B of this Act).

(5) The interim rent in a case where subsection (2) above does not apply by virtue only of subsection (3)(a) above is the relevant rent.

(6) The interim rent in a case where subsection (2) above does not apply by virtue only of subsection (3)(b) above, or by virtue of subsection (3)(a) and (b) above, is the rent which it is reasonable for the tenant to pay while the relevant tenancy continues by virtue of section 24 of this Act.

(7) In determining the interim rent under subsection (6) above the court shall have regard—

(a) to the rent payable under the terms of the relevant tenancy; and

(b) to the rent payable under any sub-tenancy of part of the property comprised in the relevant tenancy,

but otherwise subsections (1) and (2) of section 34 of this Act shall apply to the determination as they would apply to the determination of a rent under that section if a new tenancy of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of the court and the duration of that new tenancy were the same as the duration of the new tenancy which is actually granted to the tenant.

(8) In this section and section 24D of this Act 'the relevant tenancy' has the same meaning as in section 24A of this Act.

24D. Amount of interim rent in any other case

(1) The interim rent in a case where section 24C of this Act does not apply is the rent which it is reasonable for the tenant to pay while the relevant tenancy continues by virtue of section 24 of this Act.

(2) In determining the interim rent under subsection (1) above the court shall have regard—

(a) to the rent payable under the terms of the relevant tenancy; and

(b) to the rent payable under any sub-tenancy of part of the property comprised in the relevant tenancy,

but otherwise subsections (1) and (2) of section 34 of this Act shall apply to the determination as they would apply to the determination of a rent under that section if a new tenancy from year to year of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of the court.

(3) If the court—

(a) has made an order for the grant of a new tenancy and has ordered payment of interim rent in accordance with section 24C of this Act, but

(b) either—

(i) it subsequently revokes under section 36(2) of this Act the order for the grant of a new tenancy; or

(ii) the landlord and tenant agree not to act on the order,

the court on the application of the landlord or the tenant shall determine a new interim rent in accordance with subsections (1) and (2) above without a further application under section 24A(1) of this Act.

25. Termination of tenancy by the landlord

(1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as 'the date of termination'):

Provided that this subsection has effect subject to the provisions of section 29B(4) of this Act and the provisions of Part IV of this Act as to the interim continuation of tenancies pending the disposal of applications to the court.

(2) Subject to the provisions of the next following subsection, a notice under this section shall not have effect unless it is given not more than twelve nor less than six months before the date of termination specified therein.

(3) In the case of a tenancy which apart from this Act could have been brought to an end by notice to quit given by the landlord—

(a) the date of termination specified in a notice under this section shall not be earlier than the earliest date on which apart from this Part of this Act the tenancy could have been brought to an end by notice to quit given by the landlord on the date of the giving of the notice under this section; and

(b) where apart from this Part of this Act more than six months' notice to quit would have been required to bring the tenancy to an end, the last foregoing subsection shall have effect with the substitution for twelve months of a period six months longer than the length of notice to quit which would have been required as aforesaid.

(4) In the case of any other tenancy, a notice under this section shall not specify a date of termination earlier than the date on which apart from this Part of this Act the tenancy would have come to an end by effluxion of time.

(5) . . .

(6) A notice under this section shall not have effect unless it states whether the landlord is opposed to the grant of a new tenancy to the tenant.

(7) A notice under this section which states that the landlord is opposed to the grant of a new tenancy to the tenant shall not have effect unless it also specifies one or more of the grounds specified in section 30(1) of this Act as the ground or grounds for his opposition.

(8) A notice under this section which states that the landlord is not opposed to the grant of a new tenancy to the tenant shall not have effect unless it sets out the landlord's proposals as to—

(a) the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy);

(b) the rent to be payable under the new tenancy; and

(c) the other terms of the new tenancy.

26. Tenant's request for a new tenancy

(1) A tenant's request for a new tenancy may be made where the current tenancy is a tenancy granted for a term of years certain exceeding one year, whether or not continued by section twenty-four of this Act, or granted for a term of years certain and thereafter from year to year.

(2) A tenant's request for a new tenancy shall be for a tenancy beginning with such date, not more than twelve nor less than six months after the making of the request, as may be specified therein:

Provided that the said date shall not be earlier than the date on which apart from this Act the current tenancy would come to an end by effluxion of time or could be brought to an end by notice to quit given by the tenant.

(3) A tenant's request for a new tenancy shall not have effect unless it is made by notice in the prescribed form given to the landlord and sets out the tenant's proposals as to the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy), as to the rent to be payable under the new tenancy and as to the other terms of the new tenancy.

(4) A tenant's request for a new tenancy shall not be made if the landlord has already given notice under the last foregoing section to terminate the current tenancy, or if the tenant has already given notice to quit or notice under the next following section; and no such notice shall be given by the landlord or the tenant after the making by the tenant of a request for a new tenancy.

(5) Where the tenant makes a request for a new tenancy in accordance with the foregoing provisions of this section, the current tenancy shall, subject to the provisions of sections 29B(4) and 36(2) of this Act and the provisions of Part IV of this Act as to the interim continuation of tenancies, terminate immediately before the date specified in the request for the beginning of the new tenancy.

(6) Within two months of the making of a tenant's request for a new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in section thirty of this Act the landlord will oppose the application.

27. Termination by tenant of tenancy for fixed term

(1) Where the tenant under a tenancy to which this Part of this Act applies, being a tenancy granted for a term of years certain, gives to the immediate landlord, not later than three months before the date on which apart from this Act the tenancy would come to an end by effluxion of time, a notice in writing that the tenant does not desire the tenancy to be continued, section twenty-four of this Act shall not have effect in relation to the tenancy

unless the notice is given before the tenant has been in occupation in right of the tenancy for one month.

(1A) Section 24 of this Act shall not have effect in relation to a tenancy for a term of years certain where the tenant is not in occupation of the property comprised in the tenancy at the time when, apart from this Act, the tenancy would come to an end by effluxion of time.

(2) A tenancy granted for a term of years certain which is continuing by virtue of section twenty-four of this Act shall not come to an end by reason only of the tenant ceasing to occupy the property comprised in the tenancy but may be brought to an end on any day by not less than three months' notice in writing given by the tenant to the immediate landlord, whether the notice is given after the date on which apart from this Act the tenancy would have come to an end or before that date, but not before the tenant has been in occupation in right of the tenancy for one month.

(3) Where a tenancy is terminated under subsection (2) above, any rent payable in respect of a period which begins before, and ends after, the tenancy is terminated shall be apportioned, and any rent paid by the tenant in excess of the amount apportioned to the period before termination shall be recoverable by him.

28. Renewal of tenancies by agreement

Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies.

29. Order by court for grant of new tenancy or termination of current tenancy

(1) Subject to the provisions of this Act, on an application under section 24(1) of this Act, the court shall make an order for the grant of a new tenancy and accordingly for the termination of the current tenancy immediately before the commencement of the new tenancy.

(2) Subject to the following provisions of this Act, a landlord may apply to the court for an order for the termination of a tenancy to which this Part of this Act applies without the grant of a new tenancy—

(a) if he has given notice under section 25 of this Act that he is opposed to the grant of a new tenancy to the tenant; or

(b) if the tenant has made a request for a new tenancy in accordance with section 26 of this Act and the landlord has given notice under subsection (6) of that section.

(3) The landlord may not make an application under subsection (2) above if either the tenant or the landlord has made an application under section 24(1) of this Act.

(4) Subject to the provisions of this Act, where the landlord makes an application under subsection (2) above—

(a) if he establishes, to the satisfaction of the court, any of the grounds on which he is entitled to make the application in accordance with section 30 of this Act, the court shall make an order for the termination of the current tenancy in accordance with section 64 of this Act without the grant of a new tenancy; and

(b) if not, it shall make an order for the grant of a new tenancy and accordingly for the termination of the current tenancy immediately before the commencement of the new tenancy.

(5) The court shall dismiss an application by the landlord under section 24(1) of this Act if the tenant informs the court that he does not want a new tenancy.

(6) The landlord may not withdraw an application under subsection (2) above unless the tenant consents to its withdrawal.

29A. Time limits for applications to court

(1) Subject to section 29B of this Act, the court shall not entertain an application—

(a) by the tenant or the landlord under section 24(1) of this Act; or

(b) by the landlord under section 29(2) of this Act,

if it is made after the end of the statutory period.

(2) In this section and section 29B of this Act 'the statutory period' means a period ending—

(a) where the landlord gave a notice under section 25 of this Act, on the date specified in his notice; and

(b) where the tenant made a request for a new tenancy under section 26 of this Act, immediately before the date specified in his request.

(3) Where the tenant has made a request for a new tenancy under section 26 of this Act, the court shall not entertain an application under section 24(1) of this Act which is made before the end of the period of two months beginning with the date of the making of the request, unless the application is made after the landlord has given a notice under section 26(6) of this Act.

29B. Agreements extending time limits

(1) After the landlord has given a notice under section 25 of this Act, or the tenant has made a request under section 26 of this Act, but before the end of the statutory period, the landlord and tenant may agree that an application such as is mentioned in section 29A(1) of this Act, may be made before the end of a period specified in the agreement which will expire after the end of the statutory period.

(2) The landlord and tenant may from time to time by agreement further extend the period for making such an application, but any such agreement must be made before the end of the period specified in the current agreement.

(3) Where an agreement is made under this section, the court may entertain an application such as is mentioned in section 29A(1) of this Act if it is made before the end of the period specified in the agreement.

(4) Where an agreement is made under this section, or two or more agreements are made under this section, the landlord's notice under section 25 of this Act or tenant's request under section 26 of this Act shall be treated as terminating the tenancy at the end of the period specified in the agreement or, as the case may be, at the end of the period specified in the last of those agreements.

30. Opposition by landlord to application for a new tenancy

(1) The grounds on which a landlord may oppose an application under section 24(1) of this Act, or make an application under section 29(2) of this Act, are such of the following grounds as may be stated in the landlord's notice under section twenty-five of this Act or, as the case may be, under subsection (6) of section twenty-six thereof, that is to say:—

(a) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;

(b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;

(c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding;

(d) that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding;

(e) where the current tenancy was created by the sub-letting of part only of the property comprised in a superior tenancy and the landlord is the owner of an interest in reversion expectant on the termination of that superior tenancy, that the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy;

(f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding;

(g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.

(1A) Where the landlord has a controlling interest in a company, the reference in subsection (1)(g) above to the landlord shall be construed as a reference to the landlord or that company.

(1B) Subject to subsection (2A) below, where the landlord is a company and a person has a controlling interest in the company, the reference in subsection (1)(g) above to the landlord shall be construed as a reference to the landlord or that person.

(2) The landlord shall not be entitled to oppose an application under section 24(1) of this Act, or make an application under section 29(2) of this Act, on the ground specified in paragraph (g) of the last foregoing subsection if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the purchase or creation thereof the holding has been comprised in a tenancy or successive tenancies of the description specified in subsection (1) of section twenty-three of this Act.

(2A) Subsection (1B) above shall not apply if the controlling interest was acquired after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the acquisition of the controlling interest the holding has been comprised in a tenancy or successive tenancies of the description specified in section 23(1) of this Act.

(3) . . .

31. Dismissal of application for new tenancy where landlord successfully opposes

(1) If the landlord opposes an application under subsection (1) of section twenty-four of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy.

(2) Where the landlord opposes an application under section 24(1) of this Act, or makes an application under section 29(2) of this Act, on one or more of the grounds specified in section 30(1)(d) to (f) of this Act but establishes none of those grounds, and none of the other grounds specified in section 30(1) of this Act, to the satisfaction of the court, then if the court would have been satisfied on any of the grounds specified in section 30(1)(d) to (f) of this Act if the date of termination specified in the landlord's notice or, as the case may be, the date specified in the tenant's request for a new tenancy as the date from which the new tenancy is to begin, had been such later date as the court may determine, being a date not more than one year later than the date so specified,—

(a) the court shall make a declaration to that effect, stating of which of the said grounds the court would have been satisfied as aforesaid and specifying the date determined by the court as aforesaid, but shall not make an order for the grant of a new tenancy;

(b) if, within fourteen days after the making of the declaration, the tenant so requires the court shall make an order substituting the said date for the date specified in the said landlord's notice or tenant's request, and thereupon that notice or request shall have effect accordingly.

31A. Grant of new tenancy in some cases where section 30(1)(f) applies

(1) Where the landlord opposes an application under section 24(1) of this Act on the ground specified in paragraph (f) of section 30(1) of this Act, or makes an application under section 29(2) of this Act on that ground, the court shall not hold that the landlord could not reasonably carry out the demolition, reconstruction or work of construction intended without obtaining possession of the holding if—

(a) the tenant agrees to the inclusion in the terms of the new tenancy of terms giving the landlord access and other facilities for carrying out the work intended and, given that access and those facilities, the landlord could reasonably carry out the work without obtaining possession of the holding and without interfering to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried on by the tenant; or

(b) the tenant is willing to accept a tenancy of an economically separable part of the holding and either paragraph (a) of this section is satisfied with respect to that part or possession of the remainder of the holding would be reasonably sufficient to enable the landlord to carry out the intended work.

(2) For the purposes of subsection (1)(b) of this section a part of a holding shall be deemed to be an economically separable part if, and only if, the aggregate of the rents which, after the completion of the intended work, would be reasonably obtainable on separate lettings of that part and the remainder of the premises affected by or resulting from the work would not be substantially less than the rent which would then be reasonably obtainable on a letting of those premises as a whole.

32. Property to be comprised in new tenancy

(1) Subject to the following provisions of this section, an order under section twenty-nine of this Act for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of the order.

(1A) Where the court, by virtue of paragraph (b) of section 31A(1) of this Act, makes an order under section 29 of this Act for the grant of a new tenancy in a case where the tenant is willing to accept a tenancy of part of the holding, the order shall be an order for the grant of a new tenancy of that part only.

(2) The foregoing provisions of this section shall not apply in a case where the property comprised in the current tenancy includes other property besides the holding and the landlord requires any new tenancy ordered to be granted under section twenty-nine of this Act to be a tenancy of the whole of the property comprised in the current tenancy; but in any such case—

(a) any order under the said section twenty-nine for the grant of a new tenancy shall be an order for the grant of a new tenancy of the whole of the property comprised in the current tenancy, and

(b) references in the following provisions of this Part of this Act to the holding shall be construed as references to the whole of that property.

(3) Where the current tenancy includes rights enjoyed by the tenant in connection with the holding, those rights shall be included in a tenancy ordered to be granted under section twenty-nine of this Act except as otherwise agreed between the landlord and the tenant or, in default of such agreement, determined by the court.

33. Duration of new tenancy

Where on an application under this Part of this Act the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fifteen years, and shall begin on the coming to an end of the current tenancy.

34. Rent under new tenancy

(1) The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—

(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,

(b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),

(c) any effect on rent of an improvement to which this paragraph applies,

(d) in the case of a holding comprising licensed premises, any addition to its value attributable to the licence, if it appears to the court that having regard to the terms of the current tenancy and any other relevant circumstances the benefit of the licence belongs to the tenant.

(2) Paragraph (c) of the foregoing subsection applies to any improvement carried out by a person who at the time it was carried out was the tenant, but only if it was carried out otherwise than in pursuance of an obligation to his immediate landlord, and either it was carried out during the current tenancy or the following conditions are satisfied, that is to say,—

(a) that it was completed not more than twenty-one years before the application to the court was made; and

(b) that the holding or any part of it affected by the improvement has at all times since the completion of the improvement been comprised in tenancies of the description specified in section 23(1) of this Act; and

(c) that at the termination of each of those tenancies the tenant did not quit.

(2A) If this Part of this Act applies by virtue of section 23(1A) of this Act, the reference in subsection (1)(d) above to the tenant shall be construed as including—

(a) a company in which the tenant has a controlling interest, or

(b) where the tenant is a company, a person with a controlling interest in the company.

(3) Where the rent is determined by the court the court may, if it thinks fit, further determine that the terms of the tenancy shall include such provision for varying the rent as may be specified in the determination.

(4) It is hereby declared that the matters which are to be taken into account by the court in determining the rent include any effect on rent of the operation of the provisions of the Landlord & Tenant (Covenants) Act 1995.

35. Other terms of new tenancy

(1) The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder), including, where different persons own interests which fulfil the conditions specified in section 44(1) of this Act in different parts of it, terms as to the apportionment of the rent, shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances.

(2) In subsection (1) of this section the reference to all relevant circumstances includes (without prejudice to the generality of that reference) a reference to the operation of the provisions of the Landlord and Tenant (Covenants) Act 1995.

36. Carrying out of order for new tenancy

(1) Where under this Part of this Act the court makes an order for the grant of a new tenancy, then, unless the order is revoked under the next following subsection or the landlord and the tenant agree not to act upon the order, the landlord shall be bound to execute or make in favour of the tenant, and the tenant shall be bound to accept, a lease or agreement for a tenancy of the holding embodying the terms agreed between the landlord and the tenant or determined by the court in accordance with the foregoing provisions of this Part of this Act; and where the landlord executes or makes such a lease or agreement the tenant shall be bound, if so required by the landlord, to execute a counterpart or duplicate thereof.

(2) If the tenant, within fourteen days after the making of an order under this Part of this Act for the grant of a new tenancy, applies to the court for the revocation of the order the court shall revoke the order; and where the order is so revoked, then, if it is so agreed between the landlord and the tenant or determined by the court, the current tenancy shall continue, beyond the date at which it would have come to an end apart from this subsection, for such period as may be so agreed or determined to be necessary to afford to the landlord a reasonable opportunity for reletting or otherwise disposing of the premises which would have been comprised in the new tenancy; and while the current tenancy continues by virtue of this subsection it shall not be a tenancy to which this Part of this Act applies.

(3) Where an order is revoked under the last foregoing subsection any provision thereof as to payment of costs shall not cease to have effect by reason only of the revocation; but the court may, if it thinks fit, revoke or vary any such provision or, where no costs have been awarded in the proceedings for the revoked order, award such costs.

(4) A lease executed or agreement made under this section, in a case where the interest of the lessor is subject to a mortgage, shall be deemed to be one authorised by section ninety-nine of the Law of Property Act 1925 (which confers certain powers of leasing on mortgagors in possession), and subsection (13) of that section (which allows those

powers to be restricted or excluded by agreement) shall not have effect in relation to such a lease or agreement.

37. Compensation where order for new tenancy precluded on certain grounds

(1) Subject to the provisions of this Act, in a case specified in subsection (1A), (1B) or (1C) below (a 'compensation case') the tenant shall be entitled on quitting the holding to recover from the landlord by way of compensation an amount determined in accordance with this section.

(1A) The first compensation case is where on the making of an application by the tenant under section 24(1) of this Act the court is precluded (whether by subsection (1) or subsection (2) of section 31 of this Act) from making an order for the grant of a new tenancy by reason of any of the grounds specified in paragraphs (e), (f) and (g) of section 30(1) of this Act (the 'compensation grounds') and not of any grounds specified in any other paragraph of section 30(1).

(1B) The second compensation case is where on the making of an application under section 29(2) of this Act the court is precluded (whether by section 29(4)(a) or section 31(2) of this Act) from making an order for the grant of a new tenancy by reason of any of the compensation grounds and not of any other grounds specified in section 30(1) of this Act.

(1C) The third compensation case is where—

(a) the landlord's notice under section 25 of this Act or, as the case may be, under section 26(6) of this Act, states his opposition to the grant of a new tenancy on any of the compensation grounds and not on any other grounds specified in section 30(1) of this Act; and

(b) either—

(i) no application is made by the tenant under section 24(1) of this Act or by the landlord under section 29(2) of this Act; or

(ii) such an application is made but is subsequently withdrawn.

(2) Subject to the following provisions of this section, compensation under this section shall be as follows, that is to say,—

(a) where the conditions specified in the next following subsection are satisfied in relation to the whole of the holding it shall be the product of the appropriate multiplier and twice the rateable value of the holding,

(b) in any other case it shall be the product of the appropriate multiplier and the rateable value of the holding.

(3) The said conditions are—

(a) that, during the whole of the fourteen years immediately preceding the termination of the current tenancy, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes;

(b) that, if during those fourteen years there was a change in the occupier of the premises, the person who was the occupier immediately after the change was the successor to the business carried on by the person who was the occupier immediately before the change.

. . .

(8) In subsection (2) of this section 'the appropriate multiplier' means such multiplier as the Secretary of State may by order made by statutory instrument prescribe and different multipliers may be so prescribed in relation to different cases.

37A. Compensation for possession obtained by misrepresentation

(1) Where the court—

(a) makes an order for the termination of the current tenancy but does not make an order for the grant of a new tenancy, or

(b) refuses an order for the grant of a new tenancy,

and it subsequently made to appear to the court that the order was obtained, or the court was induced to refuse the grant, by misrepresentation or the concealment of material facts, the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of the order or refusal.

(2) Where—

(a) the tenant has quit the holding—

(i) after making but withdrawing an application under section 24(1) of this Act; or

(ii) without making such an application; and

(b) it is made to appear to the court that he did so by reason of misrepresentation or the concealment of material facts,

the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of quitting the holding.

38. Restriction on agreements excluding provisions of Part II

(1) Any agreement relating to a tenancy to which this Part of this Act applies (whether contained in the instrument creating the tenancy or not) shall be void (except as provided by section 38A of this Act) in so far as it purports to preclude the tenant from making an application or request under this Part of this Act or provides for the termination or the surrender of the tenancy in the event of his making such an application or request or for the imposition of any penalty or disability on the tenant in that event.

(2) Where—

(a) during the whole of the five years immediately preceding the date on which the tenant under a tenancy to which this Part of this Act applies is to quit the holding, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes, and

(b) if during those five years there was a change in the occupier of the premises, the person who was the occupier immediately after the change was the successor to the business carried on by the person who was the occupier immediately before the change,

any agreement (whether contained in the instrument creating the tenancy or not and whether made before or after the termination of that tenancy) which purports to exclude or reduce compensation under section 37 of this Act shall to that extent be void, so however that this subsection shall not affect any agreement as to the amount of any such compensation which is made after the right to compensation has accrued.

(3) In a case not falling within the last foregoing subsection the right to compensation conferred by section 37 of this Act may be excluded or modified by agreement.

38A. Agreements to exclude provisions of Part 2

(1) The persons who will be the landlord and the tenant in relation to a tenancy to be granted for a term of years certain which will be a tenancy to which this Part of this Act applies may agree that the provisions of sections 24 to 28 of this Act shall be excluded in relation to that tenancy.

(2) The persons who are the landlord and the tenant in relation to a tenancy to which this Part of this Act applies may agree that the tenancy shall be surrendered on such date or

in such circumstances as may be specified in the agreement and on such terms (if any) as may be so specified.

(3) An agreement under subsection (1) above shall be void unless—

(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ('the 2003 Order'); and

(b) the requirements specified in Schedule 2 to that Order are met.

(4) An agreement under subsection (2) above shall be void unless—

(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 3 to the 2003 Order; and

(b) the requirements specified in Schedule 4 to that Order are met.

40. Duties of tenants and landlords of business premises to give information to each other

(1) Where a person who is an owner of an interest in reversion expectant (whether immediately or not) on a tenancy of any business premises has served on the tenant a notice in the prescribed form requiring him to do so, it shall be the duty of the tenant to give the appropriate person in writing the information specified in subsection (2) below.

(2) That information is—

(a) whether the tenant occupies the premises or any part of them wholly or partly for the purposes of a business carried on by him;

(b) whether his tenancy has effect subject to any sub-tenancy on which his tenancy is immediately expectant and, if so—

(i) what premises are comprised in the sub-tenancy;

(ii) for what term it has effect (or, if it is terminable by notice, by what notice it can be terminated);

(iii) what is the rent payable under it;

(iv) who is the sub-tenant;

(v) (to the best of his knowledge and belief) whether the sub-tenant is in occupation of the premises or of part of the premises comprised in the sub-tenancy and, if not, what is the sub-tenant's address;

(vi) whether an agreement is in force excluding in relation to the sub-tenancy the provisions of sections 24 to 28 of this Act; and

(vii) whether a notice has been given under section 25 or 26(6) of this Act, or a request has been made under section 26 of this Act, in relation to the sub-tenancy and, if so, details of the notice or request; and

(c) (to the best of his knowledge and belief) the name and address of any other person who owns an interest in reversion in any part of the premises.

(3) Where the tenant of any business premises who is a tenant under such a tenancy as is mentioned in section 26(1) of this Act has served on a reversioner or a reversioner's mortgagee in possession a notice in the prescribed form requiring him to do so, it shall be the duty of the person on whom the notice is served to give the appropriate person in writing the information specified in subsection (4) below.

(4) That information is—

(a) whether he is the owner of the fee simple in respect of the premises or any part of them or the mortgagee in possession of such an owner,

(b) if he is not, then (to the best of his knowledge and belief)—

(i) the name and address of the person who is his or, as the case may be, his mortgagor's immediate landlord in respect of those premises or of the part in respect of which he or his mortgagor is not the owner in fee simple;

(ii) for what term his or his mortgagor's tenancy has effect and what is the earliest date (if any) at which that tenancy is terminable by notice to quit given by the landlord; and

(iii) whether a notice has been given under section 25 or 26(6) of this Act, or a request has been made under section 26 of this Act, in relation to the tenancy and, if so, details of the notice or request;

(c) (to the best of his knowledge and belief) the name and address of any other person who owns an interest in reversion in any part of the premises; and

(d) if he is a reversioner, whether there is a mortgagee in possession of his interest in the premises and, if so, (to the best of his knowledge and belief) what is the name and address of the mortgagee.

(5) A duty imposed on a person by this section is a duty—

(a) to give the information concerned within the period of one month beginning with the date of service of the notice; and

(b) if within the period of six months beginning with the date of service of the notice that person becomes aware that any information which has been given in pursuance of the notice is not, or is no longer, correct, to give the appropriate person correct information within the period of one month beginning with the date on which he becomes aware.

(6) This section shall not apply to a notice served by or on the tenant more than two years before the date on which apart from this Act his tenancy would come to an end by effluxion of time or could be brought to an end by notice to quit given by the landlord.

(7) Except as provided by section 40A of this Act, the appropriate person for the purposes of this section and section 40A(1) of this Act is the person who served the notice under subsection (1) or (3) above.

(8) In this section—

'business premises' means premises used wholly or partly for the purposes of a business;

'mortgagee in possession' includes a receiver appointed by the mortgagee or by the court who is in receipt of the rents and profits, and 'his mortgagor' shall be construed accordingly;

'reversioner' means any person having an interest in the premises, being an interest in reversion expectant (whether immediately or not) on the tenancy;

'reversioner's mortgagee in possession' means any person being a mortgagee in possession in respect of such an interest; and

'sub-tenant' includes a person retaining possession of any premises by virtue of the Rent (Agriculture) Act 1976 or the Rent Act 1977 after the coming to an end of a sub-tenancy, and 'sub-tenancy' includes a right so to retain possession.

40B. Proceedings for breach of duties to give information

A claim that a person has broken any duty imposed by section 40 of this Act may be made the subject of civil proceedings for breach of statutory duty; and in any such proceedings a court may order that person to comply with that duty and may make an award of damages.

42. Groups of companies

(1) For the purposes of this section two bodies corporate shall be taken to be members of a group if and only if one is a subsidiary of the other or both are subsidiaries of a third body corporate or the same person has a controlling interest in both.

(2) Where a tenancy is held by a member of a group, occupation by another member of the group, and the carrying on of a business by another member of the group, shall be treated for the purposes of section twenty-three of this Act as equivalent to occupation or the carrying on of a business by the member of the group holding the tenancy; and in

relation to a tenancy to which this Part of this Act applies by virtue of the foregoing provisions of this subsection—

(a) references (however expressed) in this Part of this Act and in the Ninth Schedule to this Act to the business of or to use occupation or enjoyment by the tenant shall be construed as including references to the business of or to use occupation or enjoyment by the said other member;

(b) the reference in paragraph (d) of subsection (1) of section thirty-four of this Act to the tenant shall be construed as including the said other member; and

(c) an assignment of the tenancy from one member of the group to another shall not be treated as a change in the person of the tenant.

(3) Where the landlord's interest is held by a member of a group—

(a) the reference in paragraph (g) of subsection (1) of section 30 of this Act to intended occupation by the landlord for the purposes of a business to be carried on by him shall be construed as including intended occupation by any member of the group for the purposes of a business to be carried on by that member; and

(b) the reference in subsection (2) of that section to the purchase or creation of any interest shall be construed as a reference to a purchase from or creation by a person other than a member of the group.

43. Tenancies excluded from Part II

(1) This Part of this Act does not apply—

(a) to a tenancy of an agricultural holding which is a tenancy in relation to which the Agricultural Holdings Act 1986 applies or a tenancy which would be a tenancy of an agricultural holding in relation to which that Act applied if subsection (3) of section 2 of that Act did not have effect or, in a case where approval was given under subsection (1) of that section, if that approval had not been given;

(aa) to a farm business tenancy;

(b) to a tenancy created by a mining lease;

(2) This Part of this Act does not apply to a tenancy granted by reason that the tenant was the holder of an office, appointment or employment from the grantor thereof and continuing only so long as the tenant holds the office, appointment or employment, or terminable by the grantor on the tenant's ceasing to hold it, or coming to an end at a time fixed by reference to the time at which the tenant ceases to hold it:

Provided that this subsection shall not have effect in relation to a tenancy granted after the commencement of this Act unless the tenancy was granted by an instrument in writing which expressed the purpose for which the tenancy was granted.

(3) This Part of this Act does not apply to a tenancy granted for a term certain not exceeding six months unless—

(a) the tenancy contains provision for renewing the term or for extending it beyond six months from its beginning; or

(b) the tenant has been in occupation for a period which, together with any period during which any predecessor in the carrying on of the business carried on by the tenant was in occupation, exceeds twelve months.

44. Meaning of 'the landlord' in Part II, and provisions as to mesne landlords, etc

(1) Subject to subsections (1A) and (2) below, in this Part of this Act the expression 'the landlord', in relation to a tenancy (in this section referred to as 'the relevant tenancy'), means the person (whether or not he is the immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—

(a) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and

(b) that it is either the fee simple or a tenancy which will not come to an end within fourteen months by effluxion of time and, if it is such a tenancy, that no notice has been given by virtue of which it will come to an end within fourteen months or any further time by which it may be continued under section 36(2) or section 64 of this Act,

and is not itself in reversion expectant (whether immediately or not) on an interest which fulfils those conditions.

(1A) The reference in subsection (1) above to a person who is the owner of an interest such as is mentioned in that subsection is to be construed, where different persons own such interests in different parts of the property, as a reference to all those persons collectively.

(2) References in this Part of this Act to a notice to quit given by the landlord are references to a notice to quit given by the immediate landlord.

(3) The provisions of the Sixth Schedule to this Act shall have effect for the application of this Part of this Act to cases where the immediate landlord of the tenant is not the owner of the fee simple in respect of the holding.

Index

adjudication 120
administration 293, 297
  administrator
    appointment 297
    powers and duties 297
  moratorium 298
  rent 309
advertising 218
agreement for lease
  completion date 137–8
  decision on readiness for occupation 137
  deducing title 139
  defects in work or materials and 138–9
  departure from agreed plans and specifications 136–7
  example 136–9
  form of lease 139
  incorporation of conditions of sale 139
  liability for delay 138
  merging with lease 139
  penalties for delay 138
  premises 139
  responsibility for damage 139
  standard of works 137
  supervision 137
  when used 135–6
  work to be carried out 136
airspace 163
alienation 197–207
  notice of 206–7
  restrictions on 199–203
    consent 203–6, 245–6
    covenants 199–200
  see also **assignment of leases**; **subleases**
alterations
  alterations clause 216–18
  Code for Leasing Business Premises 2007 210, 220
  covenants against
    absolute covenants 216–17
    compensation for improvements 220
    fully qualified covenants 217
    landlord's concerns 215–16
    need for 215–16
    other lease clauses 218–19
    qualified covenants 217
    tenant's concerns 215
  landlord's consent 217–18
  lease controls 216–19
  restrictions outside lease 219–20
  withholding consent 217–18
  see also **improvements**
alternative accommodation
  offer of 280
appeals
  certificates of lawful use or development 61
  contaminated land 81, 82
appeals – *continued*
  enforcement notices 69–71
    costs 71
    documentation 70
    effect 71
    fees 70
    forum 70
    further appeals 71
    grounds 69–70
    procedure 70–1
    time limits 70
    who may appeal 70
    written representations 71
  planning obligations 57
  planning permission 44–8
    appeal form 47
    challenging appeal decision 48
    costs 48
    hearing 48
    initial procedure 45–6
    inquiry 46–7
    statement of case 46
    types 46–8
    who may appeal 45
    written representations 46
  refusal of certificate of lawful use or development 61
arbitration 120
architects 104–5
asbestos 73–4
  Control of Asbestos Regulations 2006 95–6
  duty holder 95–6
  duty to assess if present 95
  enforcement 96
  landlord and tenant issues 96
  non-domestic premises 95
assignment of leases 197
  assignee's guarantor 160
  consent
    applications for 245–6
    consent not to be unreasonably withheld 204–6, 246
    refusal 203–6
    restrictions on charging for consent 206
  covenants against 199–200, 245
    remedies for breach 257
  covenants and 154–5, 246
  detailed provisions 200–3
  excluded 156
  guarantee payments 156, 202–3
  indemnity and 154, 155, 156
  licence to assign 246, 247
  privity of estate and 154
  virtual assignments 207
  see also **authorised guarantee agreement**
assignment of rights
  construction projects 117

authorised guarantee agreement 247–8
content 247–8
LTA 1954 considerations 248
specimen 385–9

bailiffs
distress remedy and 254
bankruptcy 293, 296
effect 296
forfeiture and 265
guarantee for lease and 159
non-payment of rent and 254
rent 308
restrictions 297
trustee in bankruptcy 296
powers 297
boundaries
lease of part 237
breach of condition notice 63
breach of covenant
landlord's breach 258–60
landlord's remedies 253–8
obligation not to derogate from grant 260
other covenants 257–8, 264–5, 280
quiet enjoyment 259–60
remedies for landlord 253–8
repairing covenant 255–7, 258
tenant's breach 253–8
tenant's remedies 258–60
break clauses 147, 165–6, 262
building
definition of 144
building contractors 103–4
building operations 30
see also **construction projects**

call options 21
Carbon Reduction Commitment Energy Efficiency Scheme (CRC Scheme) 91–2
case law
change of use 30–1
certificates of completion 138
certificates of lawful use or development 60
appeals 61
effect 60
existing development 60
issue 60
offences 61
onus of proof 60
proposed development 61
change of use
case law 30–1
Code for Leasing Business Premises 2007 210, 220
non-statutory guidance 31
statutory clarifications 31
charges
fixed 13, 199
floating 13, 199
priority 13
restrictions 199
clawback *see* overage
climate change 73, 89
climate change – *continued*
Carbon Reduction Commitment Energy Efficiency Scheme 91–2
Climate Change Act 2008 91–2
enforcement 90
European Union Emissions Trading Scheme 90
Greenhouse Gas Permits 90
Kyoto Protocol 90
Code for Leasing Business Premises 2007 148–9
alterations 210, 220
change of use 210, 220
guarantee agreements 202–3
insurance 225, 227, 228
refusal of consent for lease 203
rent 251
service charges 243
text 335–45
collateral warranties 115–17
commercial developments
value added tax 123, 124–5
commercial property
meaning 3
purchasers 3–4
common parts 145
Community Infrastructure Levy 51
company voluntary arrangements 292, 294–5
approval 294
moratorium 294–5
rent 308
compensation
exclusion 147
for failure to obtain new tenancy 283–5
for improvements 220
penalties for delay 138
stop notices 68–9
completion certificate 138
completion notice 41
conditional agreements 18–21
condition 19–20
time for performance 20–1
types 19
conduits 143
consent
alterations 217–18
assignment of leases
applications for 245–6
consent not to be unreasonably withheld 204–6, 246
refusal 203–6
restrictions on charging for consent 206
virtual assignments 207
delay in obtaining 206
disclaimer 310
subleases 249
consent not to be unreasonably withheld 204–6
refusal 203–6
restrictions on charging for consent 206
construction, design and management coordinator 105
construction management 111–12
construction projects 103–20
adjudication 120

construction projects – *continued*
agreement for lease and
completion date 137–8
decision on readiness for occupation 137
deducing title 139
defects in work or materials 138–9
departure from agreed plans and specifications 136–7
example 136–9
form of lease 139
incorporation of conditions of sale 139
liability for delay 138
merging with lease 139
penalties for delay 138
premises 139
responsibility for damage 139
standard of works 137
supervision 137
when used 135–6
work to be carried out 136
arbitration 120
construction management 111–12
contract types 106–12
design and build contract 107–9
dispute resolution 119–20
duties owed to third parties
legislation 113
liability for economic loss 114–15
liability for physical damage 114
tort liability 113–14
legislation 120
management contracting 109–10
pricing 112
protection for other parties
assignment of rights 117
collateral warranties 115–17
declaration of trust of rights 117
defect liability periods 119
forced enforcement of remedies 119
latent defects insurance 118
limiting repair covenants 118–19
reconstruction as ground for opposition to new tenancy 280–2
traditional procurement 106–7
who is involved
architect 104–5
building contractor 103–4
construction, design and management coordinator 105
employer 103
engineers 105
project manager 105
quantity surveyor 105
contaminated land 73, 76–84
appeals 81, 82
apportionment of liability 80–1
appropriate persons 77, 79
asbestos *see* **asbestos**
case law 81
definition 76
enforcement 82
exclusion tests 80
landlord and tenant issues 83
contaminated land – *continued*
liability 80–1
local authority duties 77
planning and 82–3
pollution linkage 78–9
regime 77–82
review 83–4
remediation notice 79, 81, 82
responsibility 79
risks 76–7
sanctions 82
searches and enquiries 100
significant harm 77–8
special sites 79
statutory guidance 77
contracts
conditional agreements 18–21
condition 19–20
time for performance 20–1
types 19
construction projects 103–4, 106–12
duties owed to third parties 112–14
estate contracts *see* **agreement for lease**
fixed price lump-sum 112
guaranteed maximum price 112
insolvency 293–4
joint ventures 5–7
measurement contracts 112
option agreements 21–3
put and call options 21
terms 22–3
uses 21–2
overage *see* **overage**
privity 151, 153, 155–6, 157
for sale 17–18
searches and enquiries 99–101
enquiries of seller 100
investigation of title 101
local 99
special 101
types 18–23
costs
appeal against enforcement notices 71
appeals 48
value added tax on 128
county planning authorities 28
courts
application under LTA 1954 277–8
renewal lease 285–7
covenants 146, 148, 151
against alterations
absolute covenants 216–17
compensation for improvements 220
fully qualified covenants 217
landlord's concerns 215–16
need for 215–16
other lease clauses 218–19
qualified covenants 217
tenant's concerns 215
against assignment 154–5, 199–200, 245, 246
remedies for breach 257
against subletting 199–200
direct 155

covenants – *continued*
liability of parties on covenants in lease 133–4
limiting repair covenants 118–19
named tenants 211
negative 212
positive 212
quiet enjoyment 223–4
remedies for breach 259–60
remedies for breach
landlord's breach 258–60
landlord's remedies 253–8
non-payment of rent 254–5
obligation not to derogate from grant 260
other covenants 257–8, 280
repairing covenant 255–7
tenant's remedies 258–60
repairing
covenant to yield up in repair 195
decoration 195–6, 219
definition of subject matter 190
enforcement 195
insured risks 229
landlords 196
remedies for breach 255–7, 258
tenants 190
subleases 251
successors and 152–3
to pay rent 169
user
ancillary clauses 213–14
extent of landlord's control 212–13
need for 209
permitted use 210–12
remedies for breach 257
which touch and concern 154–5
criminal offences
certificates of lawful use or development 61
Japanese knotweed 97
non-compliance with enforcement notice 66–7
obstruction of right of entry 62
stop notices 68

damage
construction projects 114
insurance and 229–31
termination of lease 232
damages
breach of covenants 255–6, 257, 259
quiet enjoyment 260
dealings with part 198–9
death
guarantee for lease and 159
debt finance 10
due diligence 11
loan agreements 11–12
security
further advances 14
need for 12–13
perfection 13–14
term sheet 10–11
declaration of trust of rights
construction projects 117
decoration
covenant to repair and 195–6, 219
lease of part 239
default notice 253
defects
agreement for lease and 138–9
inherent defects 191
latent defects insurance 118
liability periods in construction projects 119
see also **repairs**
defences
non-compliance with enforcement notice 67
demolition 30
grounds for opposition to new tenancy 280–2
Department for Communities and Local Government
administrative powers 28
circulars 28, 31, 39–40
planning obligations 53–5
unilateral undertakings 58
legislative powers 28
quasi-judicial powers 28
deposits 160–1
derogation
obligation not to derogate from grant 260
design and build contract 107–9
developers
planning obligations 56
as purchasers 4
development
certificates of lawful use or development 61
change of use 30–1
definition 29, 143
demolition 30
operations not constituting development 30
permitted
GPD Order 33–6
resumption of previous use 33
use classes 31–3, 211
development plans
definition 29
importance 28–9
new system 29
regional planning 28–9
disclaimer
consent 310
effect 310–11
meaning 309
persons able to disclaim 309
property disclaimed 309
timing 310
Display Energy Certificates 93
dispute resolution 119–20
adjudication 120
arbitration 120
legislation 120
distress remedy 170, 254
district planning authorities 28
doctrine of waste *see* waste
drafting of leases
commencement 143
covenants 146
definitions section 143–5

drafting of leases – *continued*
exceptions and reservations 146
execution 148
forfeiture clause 235
habendum 146
interpretation clauses 145
Land Registry prescribed clause leases 142
lease of part 237–8
letting 145–6
operative words 145
parcels clause 146
prescribed clauses 142
principles 141
provisos 146–7
reddendum 146
rules of construction 141–2
schedules 147–8
structure 143–8
subleases 249–51
value added tax 126–7
drainage
searches and enquiries 100

easements
lease of part 237
economic loss
construction projects 114–15
employees
lease of part 240
employers
construction projects 103
energy performance 73, 92–3
air conditioning assessments 94
enforcement 94
practical effect 94
Energy Performance Certificates 89, 93
enforcement
asbestos regulations 96
contaminated land 82
energy performance 94
environmental regulation and permitting 89
EU ETS 90
forced enforcement of remedies 119
notice *see* **enforcement notice**
nuisance 85
planning control 59–71
definitions 59
time limits 59–60
planning law
appeals 69–71
breach of condition notice 63
injunctions 69
planning contravention notice 62–3
right of entry 61–2
stop notice 67–9
time limits 64
planning obligations 52–3
Regulatory Enforcement and Sanctions Act 2008 95
enforcement notice 63–7
appeals 69–71
challenging 64
contents 65

enforcement notice – *continued*
defences 67
effect 66
invalidity 66
issue 64
non-compliance 66–7
nullity 66
offences 66–7
service 65–6
time limits 64
validity 66
variation 66
withdrawal 66
engineering operations 30
engineers in construction projects 105
entry
for repairs 195
right of 61–2
subleases 251
Environment Agency
contaminated land 83–4
Environmental Damage Regulations 2009 86
environmental regulation and permitting 73, 86–7
enforcement 89
offences 87–8
permit requirement 87–9
environmental risk management 73, 74–5
desktop study 75
enquiries of consultants 75
enquiries of seller 75
indemnities 76
insurance 76
warranties 75
equity funding 10
estate contracts *see* agreement for lease
European Union Emissions Trading Scheme (EU ETS) 90
expiry of leases 261

finance
debt finance 10
due diligence 11
loan agreements 11–12
security 12–14
term sheet 10–11
equity funding 10
forward funding 9
methods 9–10
sale and leaseback 3, 10
share capital 9
fixtures 163–4
removal 164
repair 163–4
***force majeure* clauses 138**
forfeiture 262–3
breach of other covenants 258, 264–5
breach of repairing covenant 257, 265
clause 235
insolvency and 265, 307–8
non-payment of rent 255, 263
s 146 notice 264
subtenants/mortgagees and 265–6

forfeiture – *continued*
waiver of right 263
forward funding 9
frustration 170, 231–2

gender
in deeds 145
goodwill
rent review and 184
Greater London area 28
development plans 29
green leases 89, 94
Greenhouse Gas Permits 90
guarantees
assignment of leases and 156, 202–3
guarantors of leases 156
assignee's guarantor 160
bankruptcy or liquidation of tenant 159
death of tenant 159
discharge or release 158–9
drafting points 160
extent of guarantee 157–8
giving time 158
release of co-guarantor 158
variations 158

habendum 146
hazardous substances 88
hearings
appeals 48
heating
lease of part 239
highways
searches and enquiries 100

improvements
compensation for 220
rent review and 184–5
repairing covenants and 192–3
indemnity
assignment of leases and 154, 155, 156
environmental issues 76
subleases 251
individual voluntary arrangements 292, 294–5
approval 294
moratorium 294–5
rent 308
Infrastructure Planning Commission 41
injunctions 69, 257–8
inquiry
planning appeals 46–7
insolvency
administration 293, 297
administrator appointment and powers 297
moratorium 298
rent 309
bankruptcy *see* **bankruptcy**
compulsory liquidation 293
contracts 293–4
disclaimer 309–11
forfeiture and 265, 307–8
guarantee for lease and 159
identification of contract type 293–4

insolvency – *continued*
importance 291
insolvency official 293
liquidation 293, 298
compulsory 293, 298, 299
moratorium 299
powers and duties of liquidator 298–9
rent 309
voluntary 293, 298, 299
non-payment of rent and 254
preferences 299–301
receivership 292–3, 295–6
breach of repairing covenant 259
rent 308
reducing perceived risk 291–2
regimes 292–3
rent 308–9
setting aside transactions 299–301
tenant 301–8
landlord's remedies 301–7
transactions at an undervalue 299–301
vesting orders 311
voluntary arrangements 294
approval 294
company 292, 294–5
individual 292, 294–5
moratorium 294–5
rent 308
voluntary liquidation 293
see also **liquidation (winding up)**
insurance
additional provisions 233
breach of covenant to insure 257
by landlord 226
by tenant 233–4
Code for Leasing Business Premises 2007 225
compliance with terms 228–9
damage to premises 229–31
environmental 76
latent defects insurance 118
lease of part 243
losses covered 227–8
payment 228
reinstatement 229–30
impossible 232
retention of monies 232–3
risks covered 143, 227–8
sum insured 228
uninsured risks 233
what insured 226
in whose name 226–7
interest 143
on deposits 161
rent and 170–1
interim rent 169, 278–9
interpretation clauses 145
investors
as purchasers 3–4

Japanese knotweed
impact 96
liability 97
joint and several liability 145

joint ventures
contractual 5–6
partnerships 6
special purpose vehicles 6–7

Kyoto Protocol 90

Land Registry
prescribed clause leases 142
landlord
breach of covenant by 258–60
drafting points 159–60
party to lease 151–3
remedies for breach 253–4
latent defects insurance 118
leases
agreements for *see* **agreement for lease**
assignment *see* **assignment of leases**
covenants 146, 148
assignment of lease and 154–5
liability of parties on covenants in lease 133–4
limiting repair covenants 118–19
successors and 152–3
distinguished from licences 134
drafting
commencement 143
definitions section 143–5
execution 148
interpretation clauses 145
lease of part 237–8
letting 145–6
principles 141
provisos 146–7
rules of construction 141–2
schedules 147–8
structure 143–8
subleases 249–51
value added tax 126–7
office blocks 347–84
options to renew 167
parcels clauses 146, 163–4
of part
boundaries 237
easements 237
insurance 243
repairs 237–8
service charges 238–42
sinking and reserve funds 242–3
parties
guarantors 156–60
landlord 151–3
rent deposits 160–1
successors 152–3
tenants 153–6
rent *see* **rent**
security of tenure *see* **security of tenure**
stamp duty land tax and 128–9
term 144, 146, 165–7
renewal lease 285–7
subleases 250
termination *see* **termination of leases**
value added tax and 126–7, 144
licences
distinguished from leases 134
licence to assign 246, 247
liquidation (winding up) 159, 254, 298
compulsory 293, 298, 299
moratorium 299
powers and duties of liquidator 298–9
rent 309
types 293, 298
voluntary 293, 298, 299
see also **insolvency**
local authorities 28
contaminated land 77
development plans *see* **development plans**
enforcement and *see* **enforcement**
planning obligations *see* **planning obligations**
planning permission *see* **planning permission**
local development frameworks 29
local plans 29
local searches and enquiries 99

major infrastructure projects
planning permission 41
management contracting 109–10
managing agents
lease of part 240
merger
agreement for lease 139
termination of leases 266
mining operations 30
misrepresentation 146–7
mortgages
forfeiture and 266
legal mortgage 13
restrictions 199

National Planning Framework 29
noise 223–4
notice
of assignment/subleases 206–7
enforcement *see* **enforcement notice**
s146 notice 264
service *see* **service of notices**
stop *see* **stop notice**
to quit 261–2
under LTA
counter-notices 276
prescribed forms 321–34
s25 notices 273–4
nuisance 73, 84
enforcement 85
private 84
public 84–5
rule in *Rylands v Fletcher* 85
standing 84
statutory 85
trespass 85

occupation
decision on readiness for occupation 137
occupation by landlord as ground for opposition to new tenancy 282–3
purchase by occupiers 3

offences *see* criminal offences
office blocks
lease of floor(s) 347–84
operations
definition 30
not constituting development 30
option agreements 21–3
pre-emption agreements 23
put and call options 21
terms 22–3
uses 21–2
options to renew 167
overage 23–5
bond 25
clawback and 23–4
drafting considerations 24–5
freehold right of re-entry 25
guarantee 25
meaning 23
mortgage or charge 25
negative 24
payment
amount 25
security for 25
positive 24
positive covenant 25
ransom strips 25
restrictive covenant 25
securing 25
seller's lien 25
trigger event 24–5

parcels clauses 146, 163–4
part, lease of
boundaries 237
easements 237
insurance 243
repairs 237–8
service charges 238–42
sinking and reserve funds 242–3
parties to leases
guarantors 156–60
assignee's guarantor 160
bankruptcy or liquidation of tenant 159
death of tenant 159
discharge or release 158–9
drafting points 160
extent of guarantee 157–8
giving time 158
release of co-guarantor 158
variations 158
landlord 151–3
drafting points 159–60
successors 152–3
rent deposits 160–1
tenants 153–6
parting with possession 198
permitted development
GPD Order 33–6
resumption of previous use 33
permitted use 210–12
pipes 143
planning contravention notice 62–3
planning law
enforcement 59–71
appeals 69–71
breach of condition notice 63
definitions 59
enforcement notice 63–7, 69–71
injunctions 69
planning contravention notice 62–3
right of entry 61–2
stop notice 67–9
time limits 59–60, 64
sources, legislation 27
planning obligations 51–8
developer 56
enforceability 52–3
formalities 52
Government policy 53–5
LPA 56
meaning 52
modification and discharge 57
practical points 55–7
reform 51
unilateral undertakings 57–8
when used 52
planning permission 29
abandonment 40
Agricultural Holdings Certificate 42
appeals 44–8
challenging appeal decision 48
costs 48
form 47
hearing 48
initial procedure 45–6
inquiry 46–7
statement of case 46
types 46–8
who may appeal 45
written representations 46
application for
action by planning authority 43
certificates with 42
covenants against 218, 219
decision 43
fee 42
full or outline 36–7
notification 42–3
preliminary steps 41–2
procedure 42–3
submission 42–3
article 7 certificate 42
basis for decision 37–8
completion notice 41
conditional 38–40
Central Government guidance 39–40
judicial restrictions on power 38–9
Section 73 and Section 73A applications 43–4
contaminated land 82–3
deemed refusal 43
discrimination 38
duration 40
effect 40–1
environmental considerations 38
full 37

planning permission – *continued*
implementation 40–1
major infrastructure projects 41
modification 40
outline 36–7
planning register entry 43
power to decline to determine 43
procedure after decision 43
refusal 43
deemed 43
renewal 41
reserved matters 37
revocation 40
searches and enquiries 99
time limit for decision 43
when required 29–30
policy guidance notes 28
pollution *see* contaminated land
pre-emption agreements 23
preferences 299–301
privity of contract 151, 153, 155–6, 157
privity of estate 154
project manager 105
put options 21

quantity surveyors 105
quiet enjoyment
covenant for 223–4
remedies for breach 260

rack rent lease 3
receivership 259, 292–3, 295–6
breach of repairing covenant 259
rent 308
reddendum 146
Regional Development Agencies 29
regional spatial strategy 29
registered property 14
Regulatory Enforcement and Sanctions Act 2008 95
remedies
breach of covenant
landlord's breach 258–60
landlord's remedies 253–8
obligation not to derogate from grant 260
other covenants 257–8, 264–5, 280
quiet enjoyment 259–60
repairing covenant 255–7, 258
tenant's breach 253–8
tenant's remedies 258–60
distress 170, 254
forced enforcement 119
injunctions 69, 257–8
non-payment of rent 170, 254–5, 263
right to overriding lease 258
self-help 256, 259
specific performance 256–7, 258, 259
see also **damages**; **forfeiture**
renewal of leases
options to renew 167
rent 144
abatement 146
amount 169–70

rent – *continued*
Code for Leasing Business Premises 2007 251
covenant to pay 169
delay in payment 280
deposits 160–1
insolvency and 254, 308–9
interest charged 170–1
interim 169, 278–9
non-payment 170, 254–5
forfeiture for 255, 263
other payments reserved as 170
premiums and 179
reddendum 146
renewal lease 285–6
rent-free periods 127, 169
review *see* **rent review**
subleases 250–1
suspension 170, 230–1
time for payment 170
value added tax 171
rent review 148
assumptions 176–83
duration of lease 179
fitting out 181
landlord's obligations 182
premiums 178–9
rent-free periods 178, 180–1
restoration of damage 182
reverse premium 178
sub-tenancies 177
tenant's obligations 182
terms of lease 180
use of premises 179
vacant possession 177–8
VAT 183
whole or part 177
willing parties 177
work diminishing value 182–3
dates 175–6
disregards 183–5
goodwill 184
improvements 184–5
occupation 183
statutory restrictions 185
fixed increases 173
index-linked 173
late 186–7
mechanics 185–6
need for 173
open market revaluations 174–5, 176
comparables 176
defining 176
instructions to valuer 176
upwards only 174–5
upwards/downwards 175
penultimate day 175–6
recording 187
regularity 175
time of essence 185
turnover 173–4
types of review clauses 173–5
valuer
appointment 185

rent review – *continued*
capacity 186
costs 186
instructions 176
repairs
access for 195
agreement for lease and 138–9
covenants
definition of subject matter 190
enforcement 195
insured risks 229
landlord's 196
limiting repair covenants 118–19
remedies for breach 255–7, 258, 265
tenant's 190
decoration 195–6, 219
extent of liability 190–4
reducing 194–5
failure to repair 279–80
fixtures 163–4
inherent defects 191
lease of part 237–8
meaning 190–1
multi-occupied building 189
scope 191–3
standard of 193–4
whole building 189
yielding up in repair 195
reserve funds
lease of part 242–3
reserved matters
planning permission 37
reserved rights 164
residential property
value added tax on development 123, 124
resumption of previous use 33
reverse premiums
value added tax and 127
RICS Code of Practice for Service Charges 243
***Rylands v Fletcher* 85**

sale and leaseback 3, 10
searches and enquiries
contaminated land 100
enquiries of seller 100
highways 100
investigation of title 101
local 99
special 101
survey and inspection 100–1
security of tenure
business tenants 134, 147, 267–87
application of LTA 1954 267–9
competent landlord 269–70
continuation tenancies 272–3
contracting out 270–2
definitions 269–70
exclusions 269
holding 270
order for new lease 287
protection 267
renewal lease 285–7
interim rent 169, 278–9
security of tenure – *continued*
termination of leases under LTA 1954 273–7
application to courts 277–8
compensation for failure to obtain new tenancy 283–5
counter-notices 276
grounds of opposition to new tenancy 279–83
prescribed forms of notice 321–34
s25 notices 273–4
s26 requests 275–6
service of notices and requests 276–7
self-help remedies 256, 259
seller
searches and enquiries 100
service charges 148, 170
landlord's covenant to perform services 240–1
payment
advance payments 242
certification of amounts due 242
final payments and adjustments 242
RICS Code of Practice 243
services to be provided 239–40
tenant's contribution 241
service of notices 147
default notice 253
enforcement notice 65–6
stop notice 68
under LTA 1954 276–7
share capital 9
sharing possession 198–9
signs 218
sinking funds
lease of part 242–3
special searches 101
specific performance 256–7, 258, 259
stamp duty land tax 128–9, 167
stop notice 67–9
compensation 68–9
contents 68
offences 68
service 68
temporary 69
withdrawal 68
structure plans 29
subcontractors
construction projects 103–4
subleases 197–8
break clauses and 166
consent 249
consent not to be unreasonably withheld 204–6
refusal 203–6
restrictions on charging for consent 206
covenants 251
covenants against 199–200
dealings with part 198–9
detailed provisions 203
disclaimer effect 311
drafting points 249–51
forfeiture and 265–6
grounds for opposition to new tenancy 280
indemnity 251

subleases – *continued*
liability of subtenants 249
non-payment of rent 255
reasons for subletting 249
rent 250–1
rights of access 251
sub-tenant's concerns 252
term 250
succession
landlords 152–3
surrender of leases 128, 266
surveys 100–1
sweeping-up clauses 240

taxation
stamp duty land tax 128–9
transfers of going concerns 128
value added tax
commercial developments 123, 124–5
on costs 128
drafting points 126–7
option to charge 125–7
rent and 171, 183
rent-free periods and 127
residential developments 123, 124
reverse premiums and 127
surrenders and 128
term of lease 144, 146, 165–7
renewal lease 285
rent review and 179
SDLT impact 167
subleases 250
termination of leases
damage to property
landlord 232
tenant 232
expiry 261
forfeiture *see* **forfeiture**
merger 266
notice to quit 261–2
operation of break clause 262
restriction on *see* **security of tenure**
surrender 128, 266
under LTA 1954 273–7
application to courts 277–8
compensation for failure to obtain new tenancy 283–5
counter-notices 276
grounds of opposition to new tenancy 279–83
prescribed forms of notice 321–34
s25 notices 273–4
s26 requests 275–6
service of notices and requests 276–7
time for performance
conditional agreements 20–1
liability for delay 138
penalties for delay 138
time limits
agreement to extend 278
appeal against enforcement notices 70
defect liability periods 119
enforcement of planning law 59–60, 64
title
agreement for lease and 139
investigation 101
tort liability
construction projects 113–14
Town and Country Planning (Development Management Procedure) Order 2010 48
transactions at an undervalue 299–301
transfers of going concerns
value added tax and 128
trespass 85
trust of rights
construction projects 117

underground 163
unilateral undertakings 57–8
uninsured risks 233
unitary councils 28
unregistered property 14
use
certificates of lawful use or development 61
covenants *see* **user covenants**
permitted 146
resumption of previous use 33
of use 30–1
use classes 31–3, 211
user covenants
ancillary clauses 213–14
extent of landlord's control
absolute covenants 212
fully qualified covenants 213
qualified covenants 212–13
need for 209
landlord's concerns 209–10
tenant's concerns 210
permitted use 210–12
remedies for breach 257

value added tax
commercial developments 123, 124–5
on costs 128
drafting points 126–7
leases and 126–7, 144
option to charge
how election made 125
should election be made 126
who or what is affected 125–6
rent and 171, 183
rent-free periods and 127
residential developments 123, 124
reverse premiums and 127
surrenders and 128
transfers of going concerns 128
vesting orders 311

Wales 28
regional planning 29
walking possession agreement 254
warranties
collateral 115–17
environmental issues 75
waste 88, 218
water 87–8, 89
winding up *see* liquidation (winding up)