Lease
(based on Model Commercial Lease)

Guidance Notes

Introduction

In England and Wales, the Model Commercial Lease ("**MCL**") has published a suite of commercial leases (complemented by ancillary documents). The MCL is a collaboration between the British Property Federation, various prominent law firms, landlord representatives and trade organisations. The MCL is intended as a reasonably balanced document for routine letting transactions having a term longer than (say) five years; the template also readily lends itself to customisation, in order to reflect the intended transaction. The aim of the MCL is to avoid unnecessary negotiation of routine content while attaining institutional acceptance.

The MCL documents can be found on the MCL website at **http://www.modelcommerciallease.co.uk** and different versions are available for offices, shops, shopping centre units and industrial/logistics units.

The documents are based on version 1.5 of the MCL – the main changes from version 1.4a are highlighted in the Explanatory Note which can be found on the MCL website at Model Commercial Lease - Guidance

The PSG share the aim of the MCL wanting to produce documents which represent a balanced position for both parties so we have collaborated with the MCL and 'kilted' the MCL rather than producing a Scottish specific lease. This is particularly useful for clients with properties in both jurisdictions. Scottish versions of the MCL are available on the PSG website. We have adopted the same approach to 'kilting' the MCL documents which we used for the City of London Law Society Certificate of Title. We have not innovated on the MCL and have limited our amendments to where there are differences in law that need to be addressed. So, for example, we have included provisions:

- displacing the common law provisions that the subjects are reasonably fit for the purpose for which they are let;
- displacing the landlord's common law repairing obligations;
- dealing with irritancy;
- providing that *rei interitus* does not apply;
- granting warrandice; and
- dealing with Scottish specific legislation, such as the Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016.

In this Guidance Note, we highlight where the MCL has taken a different approach to that adopted by other organisations or from what may be more familiar in Scottish leases. For example, the MCL approach to uninsured risks is more balanced between the parties than the approach normally taken which is more landlord friendly.

We have not changed defined terms where it is clear what the term means even if in Scotland we would traditionally use a different term. So we use the term Demise rather than Grant in the heading (which is not included when interpreting the Lease anyway). This is for the benefit of clients who are taking leases using the MCL north and south of the border. The language used in the leases will be the same except where there are legal differences. Each lease needs to be read in conjunction with the footnotes within the document and also the following overview which is intended to help users to review, use and amend the MCL. It has no legal status.

Where there are references to "we" or "us" in this Guidance Note, the derivation is more likely to be the MCL team to whom we give full credit.

References to Clause numbers (and any Parts of the Schedule) in this Guidance Note are to the Clause numbers in the Lease (based on the Model Commercial Lease of Part of Building (Office) (MCL - Office 02)) (v1.5). They may differ in other versions of the MCL.

1. **Form**

1.1 All defined terms are in the definitions section, unless used only in a particular Part of the Schedule.

1.2 The PSG has decided not to display key information (such as rent review dates or break dates) on any front sheet, as it can be misleading, contradictory or even wrong.

1.3 Clause 3 covers the demise, rent and term. Clause 4 covers the Tenant's specific obligations and Clause 5, the Landlord's specific obligations. General agreements are in Clause 6. There is an optional break clause in Clause 7. There is no optional guarantee provision. The separate PSG Guarantee is available if required.

1.4 The various Parts of the Schedule cover:

- Part 1 - Tenant's Rights
- Part 2 – Landlord's Reserved Rights
- Part 3 – Rent Review
- Part 4 – Services and Service Charge
- Part 5 – Insurance and Damage Provisions
- Part 6 – Permitted Works
- Part 7 – Sustainability
- Part 8 – Sub-letting
- Part 9 – Plans

1.5 In the food and drink leases, a separate Part of the Schedule deals with additional catering obligations, licensing and seating areas.

1.6 In the retail leases (RETAIL-04, 06 and 08), Part 10 of the Schedule deals with the turnover rent provisions.

1.7 In the industrial/logistics leases, Part 9 of the Schedule deals with optional environmental provisions where the proposed use requires environmental permits.

2. Footnotes

There are extensive footnotes. Please read them. They will explain, for example, why something has been done in a particular way or why a particular compromise or "concession" has been adopted. They will also explain square brackets and serve as prompts to delete definitions that are not needed on the facts (eg "Break Date" where there is no break clause). The MCL style tries to avoid "taking positions" for either party, but acknowledges one or two may have slipped through.

3. Language

3.1 We have used modern language, but retained some traditional usage such as calling the landlord and the tenant by those names, rather than "we" and "you". It is sensible to retain this modern drafting style when amending the existing text or adding additional provisions.

3.2 In common with many modern leases, the MCL team have updated some definitions so, for example, Break Date *(not Termination Date)*, End Date *(not Expiration of the Term etc)* and Rent Days *(not Quarter Days)*.

3.3 We have avoided expressions like "*provided always that*" and "*for the avoidance of doubt*".

4. Interpretation clause

Check this carefully. We have included a few innovative provisions such as:

4.1 making consent always subject to reasonableness, except where the Lease states that a party has absolute discretion or, in the alienation clause, where it is subject to the additional provisions set out in that clause. Scottish practitioners may otherwise be accustomed to the opposite "default" scenario where it is assumed that a party - invariably the Landlord – enjoys absolute discretion except where the Lease provides for reasonableness.

4.2 requiring the Landlord to act reasonably when exercising rights or imposing requirements under the MCL, except where the Lease states that the Landlord has absolute discretion;

4.3 a new clause allowing electronic transfers of plans and drawings in response to the way in which they now tend to be transmitted and stored;

4.4 a general provision that (except where the Tenant has breached its obligations), if one party has to pay money to the other, the costs must be reasonable and proper and reasonably and properly incurred - so you do not need to insert these words every time you see a reference to one party paying the other's costs; and

4.5 strengthening the concept of "taking a matter into consideration" to give the other party comfort that at least there is a process to be followed before a decision is reached, even if that final decision is taken at the relevant person's absolute discretion.

5. Clause 3 - Demise, term and rent

5.1 There is an option for monthly rents.

5.2 The default position is that all sums are paid by electronic transfer rather than by cheque or direct debit.

5.3 Some of the retail leases (RETAIL-04, 06 and 08) include the option for turnover rents.

5.4 Set-off is addressed at Clause 3.8.

6. **Clauses 4.1- 4.7 - Tenant's obligations - financial**

6.1 There is a 10 business day period of grace for all payments (other than the Rent), but Interest runs from the due date (or date of demand) if they are not paid within that time.

6.2 We have softened the indemnity considerably so that it does not cover tenant breaches. Instead, the normal rules of loss and damage will apply. It also requires the Landlord to keep the Tenant properly informed and to mitigate its loss (at the Tenant's cost).

7. **Clauses 4.9 and 4.10 - Tenant's obligations - repair**

7.1 The repairing obligation displaces on to the Tenant the Landlord's historic common law obligations and imposes full liability, to include both ordinary and extraordinary repairs.

7.2 There is an optional schedule of condition rider at Clause 4.9.2(a) (bearing in mind how common they are now) where the Premises must be kept in no worse state of repair and condition than the state of repair and condition as evidenced by the Schedule of Condition.

7.3 In addition to the two most widely adopted options at Clause 4.9.2(a), there are the following two additional possibilities:

to keep the Premises [and any External Works]:

7.3.1 [in good and substantial repair and condition and clean and tidy and as necessary renew, replace and rebuild the Premises [and any External Works] but in respect of those parts of the Premises [and any External Works] [shown] [described] in the Schedule of Condition, the Tenant's obligations under this clause will be restricted to keeping those parts clean and tidy and in no worse state of repair and condition than the state of repair and condition evidenced by the Schedule of Condition[1]]

OR

7.3.2 [clean and tidy and free from damage caused by an act or omission of the Tenant[2]]

7.4 Except in the logistics/industrial leases, there is an optional provision requiring the Tenant to replace any damaged glass.

7.5 The repairing and redecorating obligations exclude damage by Insured Risks and Uninsured Risks.

7.6 The decorating obligation is as and when necessary, rather than at an artificially specified frequency. However, it must be undertaken in the last six months of the term. Where the Tenant must redecorate the exterior, there is an option for the Landlord to require external redecoration at regular intervals or as and when necessary.

7.7 The right for the Landlord to enter and carry out repairs is in Clause 4.10. There is no specified time limit before the Landlord can enter to carry out the repairs if the Tenant fails to do so; simply a reasonable time. The Tenant must then repay the costs as a debt on demand, optimising the Landlord's ability to recover the costs. These costs are covered by the interpretation provision, so no amendment is required to state that they must be reasonable and proper.

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1 This modifies the standard form of repairing obligation so that the Tenant's repairing obligation will be limited in respect of the parts of the Premises identified in the Schedule of Condition but will apply normally to the remainder of the Premises. It is important for the Schedule of Condition to be as detailed and comprehensive as possible to avoid disputes between the parties at the end of the Lease.

2 This is a limited form of repairing obligation. It is wider than requiring the Tenant to maintain the Premises in a "broom swept" condition as it requires the Tenant not to damage the Premises by action or inaction.

8. Clauses 4.11- 4.12 - Tenant's obligations - alterations and signage

8.1 The MCL allows the Tenant to install Electronic Communications Apparatus to facilitate its business at the Premises.

8.2 Following the Code for Leasing Business Premises (2021) ("**Lease Code**"), internal non-structural works that have no adverse impact on the environmental performance or the building systems do not require the Landlord's consent. Other alterations do require consent. While the Lease Code does not apply in Scotland, this is a sensible practical approach.

8.3 We have used the phrase "Permitted Works" for works that the Tenant is permitted to carry out to the Premises. This covers works for which no consent is required and works for which the Landlord's consent must be obtained. Where the Tenant is able to carry out works outside the Premises, for example to install plant on the roof of a building, we have used the phrase "External Works" to describe these works.

8.4 There are also various crossover references such as Aerials, Conducting Media, Plant and Wireless Data Services. It is worth an initial review of the definitions before you get into the detail of the clauses.

8.5 If the Landlord and the Tenant decide it is appropriate, Part 6 of the Schedule contains a streamlined protocol for the Landlord to grant consent to Permitted Works. It applies to any works that the Tenant can carry out without consent (for example, internal non-structural works), and also to External Works. It contains "good housekeeping" clauses with which any reasonably minded tenant would comply in any event. It can be used for more complicated works, but it is most likely to be used for run-of-the-mill works that tenants want to get on with quickly (and which are often done at the Tenant's risk simply because the process of licensing them takes too long).

8.6 In the lease of a shopping centre unit, Clause 4.12 allows the Tenant to display the sort of signage you would expect, such as signage approved by the Landlord, or normal trade signs. The obligation to display in or near the windows is in accordance with good retailing practice and this is as close as we get to a "keep open" clause. If you want a keep open clause, you will have to draft one and explain to the Tenant why you need it.

9. Clause 4.13 - Ending the contractual term normally

9.1 Clause 4.13 covers what the Tenant must do by the End Date. As you would expect they must remove:

- 9.1.1 tenant's and trade fixtures;
- 9.1.2 loose contents;
- 9.1.3 signage; and
- 9.1.4 Permitted Works.

The status of floor coverings may require to be addressed.

9.2 The Tenant's obligation is to remove all Permitted Works. We have decided to remove the provisions originally included in earlier versions of the MCL that allowed the Landlord to specify Permitted Works that the Tenant had to leave in place, as this proved to be very unpopular with landlords.

9.3 At the End Date, Clause 4.13.3 requires the Tenant to give the Premises back with vacant possession.

10. **Clause 4.14 - Tenant's obligations - user**

10.1 The user clause is a negative (not to use) obligation, not a positive obligation.

10.2 The traditional lengthy list of purposes for which the Tenant cannot use the Premises has been reduced considerably. If you want a longer list, you will need to put them back in and explain why you are doing so (e.g. immorality, indecency, pornography, manufacturing processes etc.)

10.3 Otherwise, much of the user clause deals with neighbourly matters, such as nuisance and interference. In the retail leases, there are some specific obligations such as collecting customer trolleys.

10.4 Leases of part also deal with how the Tenant exercises its rights, and how it uses, for example, parking spaces.

11. **Clause 4.15 - Tenant's obligations - alienation**

11.1 There is the usual prohibition of assignation and other dealings in part. Sub-letting is catered for in Part 9 of the Schedule.

11.2 There is no offer-back (or pre-emption) clause (except in the context of those leases which contain turnover provisions).

11.3 There is a condition that the rent has been paid.

11.4 There are no other potentially controversial conditions or circumstances, such as not assigning to an immune diplomatic entity, or to an assignee based in a location where enforcement may be difficult. That sort of circumstance is left to reasonableness, which is where many leases end up anyway.

11.5 Although there is no mandatory provision for a guarantor and/or a rent deposit, the PSG Guarantee and/or Deposit Agreement can be used, as appropriate.

11.6 The alienation clause allows the Tenant to charge the whole of the Premises to a genuine lending institution without consent. This recognises modern business reality and how rarely a landlord can legitimately object to such an arrangement.

11.7 The MCL automatically allows group sharing and (optionally) sharing with a Service Provider, such as a catering, cleaning or other outsourced service. The usual safeguards apply.

11.8 The Tenant must provide the Landlord with details of any document of transfer etc, but there is no requirement for a fee to be paid.

11.9 Sub-letting is dealt with in Part 9 of the Schedule. This makes it easy to remove the sub-letting provisions where sub-letting is prohibited.

11.10 There is optional wording so that you can restrict the number of occupiers within the Premises if they are capable of being sublet in parts.

12. **Clause 4.17 - Tenant's obligations: letting the Landlord in**

12.1 We have already mentioned the Landlord's rights of entry to carry out repairs in Clause 4.10 (see paragraph 7.7 above).

12.2 There is a remarketing provision in Clause 4.17, which allows the Landlord entry for prospective buyers and tenants.

12.3 Part 2 of the Schedule contains the corresponding Landlord reserved rights.

13. **Clauses 4.18 - 4.24 - Tenant's obligations: good housekeeping and statutory compliance**

13.1 The Tenant must tell the Landlord as quickly as possible after it receives a notice (Clause 4.18).

13.2 The Tenant's obligation to comply with statute is in Clause 4.19. Clause 4.20 expands that obligation in relation to the Planning Acts. If, as a landlord, you have a property where it is appropriate to make the Tenant give you security before it implements a planning permission, you will need to explain that and insert appropriate provisions.

13.3 Clause 4.21 requires the Tenant to preserve the property by not allowing any rights or servitudes to be acquired over it. Any action that the Landlord requires is at the Landlord's cost, and cannot be adverse to the Tenant's business interests. This seems a fair default position, but if you think it is not right for your property, explain that and amend it.

13.4 Clause 4.22 contains general management obligations. You should check them carefully and see if anything else is needed.

13.5 If the Tenant makes an application to the Landlord for consent, Clause 4.24 requires it to provide such information as the Landlord may require.

14. **Clause 5 - Landlord's obligations**

14.1 They are usual, apart from the repayment of rent requirement in Clause 5.4.

14.2 There are express provisions protecting the Tenant if the Landlord needs to enter the Premises. These entry safeguards at Clause 5.5 are normal, but you should check them carefully.

14.3 The turnover information in Clause 5.7 of the retail leases is optional so is in square brackets.

14.4 Extensions or other modifications to the extent of the Centre or Estate can prove controversial. Therefore, under Clause 5.8, the Landlord must tell the Tenant if there is a change. The change must not result in a material increase in the amount of Service Charge or prejudice how the Tenant can use the Premises.

14.5 In leases of part, where the Landlord has the right to designate specific Common Parts for the Tenant's use, Clause 5.7 introduces a general obligation to ensure that the Landlord must include those Common Parts reasonably required for the use and enjoyment of the Premises. If no designation is made, the Tenant has the right to use all Common Parts required for the use and enjoyment of the Premises.

14.6 In leases of part, Clause 5.8 allows the Landlord to require the relocation of any External Works installed by the Tenant.

14.7 In leases of part, Clause 5.9 introduces a new obligation on the Landlord to enter into wayleaves with a telecommunications operator where the Tenant needs to install cabling through the Common Parts of the Building. Operators frequently require the Landlord to grant a wayleave to permit the installation of their cabling.

14.8 In the lease of a shopping centre unit, optional provisions are included in Clause 5.11 for use where the Landlord has agreed sightlines or exclusion zones.

15. **Clause 6 - General provisions**

15.1 The irritancy (forfeiture) provision in Clause 6.1 is normal. Rent etc must be unpaid for 14 days, but otherwise non-compliance (not material non-compliance) is the trigger. An opportunity to remedy is afforded in Clauses 6.1.1/6.1.2 analogous to that afforded in terms of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. Provision is also made for a notice of default to be served on any secured creditor and affording an Insolvency Practitioner a six month period in which to assign the Lease.

15.2 Clause 6.2 contracts out of *rei interitus* so that the Lease does not automatically terminate if the Premises or the Building are damaged or destroyed.

15.3 Clause 6.3 deals with servitude acquisition and works to adjoining property and is in normal form.

15.4 The notices clause has been slightly modified so that there is a reference to special delivery rather than recorded delivery or registered post.

15.5 The MCL notices clause includes an option for service by e-mail but given the difficulties of proving service by e-mail and the difficulties highlighted in this footnote[3] the PSG have not included service by e-mail in the draft leases. If, after careful consideration, service of notice by e-mail is permitted here is suggested wording:

6.5.4 A formal notice served by e-mail will be treated as delivered [1] hour[s] after the date and time that the e-mail is sent by the person serving the notice unless the recipient can prove that the e-mail has not been received by the recipient. The following are the specified e-mail addresses for service:

(a) whilst the Landlord remains [NAME OF LANDLORD] – [E-MAIL ADDRESS]; and

(b) whilst the Tenant remains [NAME OF TENANT] – [E-MAIL ADDRESS]

6.5.5 If the identity of the Landlord changes, the new Landlord must give formal notice of its e-mail address for the service of notices under Clause 6.5 as soon as is reasonably practicable after becoming Landlord. The other parties must acknowledge receipt of the new e-mail address as soon as reasonably practicable after receipt of that notification.[4]

15.6 Where service by e-mail is a permitted form of service for formal notices, the first line of Clause 6.5.2 should read:

"Unless served by e-mail, a formal notice served on: "

15.7 Clause 6.6 deals with Energy Performance Certificates (EPCs) and Action Plans. The Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 (www.legislation.gov.uk/ssi/2016/146/contents/made) apply from 1 September 2016 on the sale or new lease of a non-exempt building, or building unit with a floor area of more than 1,000 square metres. In addition to the requirement for an EPC, the Landlord must obtain an "Action Plan" containing a programme for implementation of measures to improve the

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3 There are risks associated with the service of notices by e-mail. The e-mail may be delayed or not delivered at all, for example through server failure, data overload, failure of telecommunications services, interception by spam filters, or an incorrectly typed address. Failure notices are not always sent or may be delayed. If the relevant e-mail address is no longer used (for example it is the e-mail address of a person who has left the organisation) service by e-mail will not be possible. Note that where e-mail addresses are used it is better not to include the e-mail address of individuals to avoid potential issues in relation to the GDPR as well as avoiding the need to notify the other parties of a new e-mail address if the individual leaves the organisation.

4 If the lease is assigned the new tenant's e-mail address can be included in the licence to assign so separate notification is not required. On a sale of the Landlord's right in the Lease the new Landlord's e-mail address could be included in the rent authority letter but separate notification may be preferable.

energy performance of the Premises, and reduce associated emissions from it. Energy performance and emissions targets are set, and recommended improvement measures are specified in the Action Plan. The Landlord must either carry out the improvement measures within the statutory timeframe of 42 months, or alternatively implement operational rating measures, assessing and recording the actual energy consumption of the Premises and documenting the results in an annual display energy certificate.

15.8 Where the Regulations apply to the Premises being let, the Action Plan must be exhibited to the Tenant. It will be a matter for discussion and negotiation between the parties how the terms of the Action Plan will be complied with and the Lease will need to be amended to reflect the approach the parties have agreed to adopt. As drafted, the Landlord has rights of entry to carry out Recommended Improvement Measures or Operational Rating Measures and the cost can be recovered under the Service Charge (see Part 4 of the Schedule). Amend as appropriate for your transaction.

15.9 Clause 6.6 provides that the Tenant must not commission an EPC in respect of the Premises unless required to do so under legislation. The Tenant must assist the Landlord by providing copies of plans or providing information which will assist in commissioning an EPC and/or Action Plan and must allow the Landlord (or his energy assessors) access to the Premises to produce EPCs and Action Plans. Under Clause 4.25, the Tenant must provide the Landlord with data about energy performance to enable the Landlord to comply with operational ratings measures if that is the option chosen by the Landlord. The Landlord's reserved rights include the right to enter the Premises to:

15.9.1 review or measure the Environmental Performance of the Premises;

15.9.2 commission an EPC or Action Plan; and

15.9.3 carry out or implement any Recommended Improvement Measures, Operational Rating Measures or any other works or measures in implement of any Action Plan.

15.10 Clause 6.7 provides additionally for the parties to be bound by Part 8 of the Schedule relating to Sustainability. See the notes below on Part 8 of the Schedule.

16. **Clause 7 - Ending the contractual term early**

16.1 There is a specific optional break clause at Clause 7.

16.2 Best practice is to specify the calendar date for the break and to make the break clause the day before a rent payment date (rather than the rent payment date itself). This ensures the tenant is not legally obliged to pay a full month's or quarter's rent on the day the Lease ends.

16.3 The conditions for exercising the break are simply payment of the rent up to the Break Date and the return of the Premises to the Landlord free of the occupation by the tenant and any other occupier. Again this complies with the Lease Code.

16.4 Other provisions are as you would expect, including a clause that time is of the essence.

16.5 Importantly, however, there is a repayment of rent obligation in Clause 5.4. This clause applies regardless of how the Lease ends (unless due to tenant default), but it is particularly appropriate for break clauses. It requires any Rent and Insurance Costs paid in advance to be refunded. A similar provision relating to Service Charge is in Part 4 of the Schedule.

17. **Parts 1 and 2 of the Schedule – Tenant's Rights and Landlord's Reserved Rights**

17.1 Tenant's Rights are in Part 1 of the Schedule. Landlord's Reserved Rights are in Part 2 of the Schedule.

17.2 In many buildings, and particularly a shopping centre, there will almost certainly be some other rights that you need to grant. Indeed, some of the rights in the MCL may need to be modified or may not be appropriate, and so a number of them are in square brackets.

18. **Part 3 of the Schedule - Rent Review**

18.1 This is a neutral rent review clause (which anticipates a traditional open market valuation – as opposed to, say, any form of index linking) and is not intended to achieve a headline rent.

18.2 You will need to consider how you deal with break clauses, the length of the assumed term, and the frequency of rent reviews (the default is five years).

18.3 The market rent is not best rent, nor best rent reasonably obtainable, but simply the rent for which the Premises might reasonably be expected to be let.

18.4 There is a qualification to the assumption that the Landlord's obligations have been complied with where the Landlord has been in material or persistent breach.

18.5 The disregards specifically address tenant's initial fitting out works and (in the retail leases) any mezzanine floor areas. You will need to check them carefully.

18.6 A choice needs to be made now on whether the rent review surveyor will act as an expert or arbitrator. The Landlord does not have the choice of deciding later.

18.7 There is a simple arbitration provision if that is the choice you make – though do carefully consider whether any of the non-mandatory Arbitration (Scotland) Act 2010 rules should be disapplied. Otherwise there is an expert alternative.

18.8 As it has not been relevant for 30 years, and may or may not be for the next 30 years, we have not drafted for rent restriction legislation, not least as any rent restriction legislation will probably cater for existing leases.

18.9 Interest is due, but at base rate on the Rent once it has been reviewed and only for the period since each increased rent payment became payable.

18.10 Time is expressly not of the essence.

18.11 The PSG Index Linked Rent Review Clause can be used to replace Part 3 of the Schedule, where the Landlord has agreed that rent reviews will be by reference to a percentage increase in an agreed index.

19. **Part 4 of the Schedule - Services and Service Charge**

19.1 **Structure**

19.1.1 The Service Charge is split into four/five sections: administrative, Landlord's obligations, actual services and Service Charge exclusions and (for retail leases of an estate or centre) weighting.

19.1.2 Consideration should be given as to whether there should be a service charge cap.

19.2 **Service charge - administrative**

19.2.1 The Landlord must try to supply the Service Charge Statements within four months after the end of each Accounting Period.

19.2.2 There are provisions for reconciliation once the Service Charge has been calculated and for dealing with a surplus or a deficit. The Tenant has rights to inspect the service charge paperwork. There is a dispute resolution mechanism. The Landlord must vary the Tenant's Proportion if the extent of the Building changes. The guiding rule is that adjustments must be fair and reasonable, having regard to the relative degree of benefit obtained by the Tenant and other tenants. Voids are expressly catered for.

19.3 **Service charge - Landlord's obligations**

The Landlord must supply the Services in an efficient manner, acting reasonably. Although it is an absolute obligation, there are the usual protective provisions for interruption of supply. There is no obligation to comply with all of the Chartered Surveyors professional statement "Service charges in commercial property" (1st edition, September 2018). However, where it is sensible to do so, the Landlord must take into consideration its administrative, accounting, procurement management and operational provisions.

19.4 **Service charge - Services**

19.4.1 There is a long list of services and also charges for the Services. You should check them carefully with your clients. You will need to ensure that the Services to be provided are appropriate for the particular building, centre or estate.

19.4.2 Previous versions of the Lease did not sufficiently distinguish between services that the Landlord **must** provide and services that the Landlord **may** provide. The new version of the Lease separates the Services into mandatory and discretionary services. Which services appear in each category will need to be discussed between the Landlord and its lawyers when the first draft of the Lease is prepared. The division between mandatory and discretionary services in the template can be amended to suit the requirements of the Landlord. For landlords who do not want to make a distinction between mandatory and discretionary services, the changes have been made in a way that enables all services to be mandatory without significant editing of the service charge provisions.

19.4.3 It may not always be appropriate to audit the Service Charge, so the checking process allows for examinations. They will often be the first step.

19.4.4 If the Landlord uses its own capital to provide the Services (in advance of being paid), it can charge an amount equal to what it would have incurred had it borrowed to do so.

19.5 **Service charge - exclusions**

19.5.1 There is a list of the sort of exclusions a well-advised tenant might require. They do not refer expressly to inherent defects in the original construction being irrecoverable. However, item 2 (capital costs of constructing or re-developing) may implicitly cover that. So consider whether to include.

19.5.2 Upgrading is always a problematic area. We have addressed it by saying that general upgrading and improvement is not allowed. However, in certain circumstances it may be sensible to upgrade, innovate or improve, and so we have also provided for circumstances where, on balance, that could be fair.

19.5.3 In the context of leases of shopping centre units, promotional and advertising costs are specifically excluded. You should take instructions on whether that is the right thing to do for your centre. Similarly, car parking charges are in square brackets, as different landlords approach car parking in different ways.

20. **Part 5 of the Schedule - Insurance**

20.1 The Landlord must insure the whole of the Building, Centre or Estate. So, where the Lease is a lease of part, that includes the Premises. But it expressly does not include insurance and reinstatement of tenant’s fixtures. They will therefore remain the Tenant's responsibility to insure and reinstate if necessary. The Landlord must also insure the Rent (and Service Charge) for the Risk Period and may (reasonably) opt for between three and five years. You will need to discuss the appropriate period with your client.

20.2 The list of Insured Risks has been "modernised" using feedback from the BPF Insurance Committee. Some old favourites like "tempest" are gone. We have also adopted the common practice of including terrorism as an insured risk rather than its technically correct status as an exclusion.

20.3 There are no qualifications on the excesses, limitations and exclusions that the insurers may impose. However, the Insurer must be a reputable insurer (paragraph 2.1).

20.4 Tenants must comply with the Insurers' requirements, but not its recommendations.

20.5 We have continued the common practice of double insurance for public liability risks, with the Tenant being required to insure its public liability risks relating to the Premises and the Landlord doing the same for the Building/Centre. While technically inconsistent and leading to double insurance for liability for the Premises, it never seems to be an issue in practice.

20.6 The Landlord must insure against terrorism (if cover is available). The Landlord cannot choose not to insure against it.

20.7 Again in accordance with current practice, there is an obligation on the Landlord to procure that the Tenant's interest is noted, either specifically or generically. Most insurance policies do this as a matter of course. However, the obligation to procure a waiver of subrogation requires reasonable steps only, as policies do not seem to be consistent on this point.

20.8 As part of good housekeeping, the Landlord must tell the Tenant of any material variations to the policy and give the Tenant a summary of its main terms on the Tenant's request. This is important as the Tenant's insurance managers will need to know the key terms.

20.9 Insurance premiums must be reasonable and proper in amount and reasonably and properly incurred - see the interpretation provision in Clause 2.12. Even with that provision, and due to the controversial nature of insurance commissions, paragraph 2.9 in Part 5 of the Schedule re-states that insurance premiums must be reasonable and proper and reasonably and properly incurred, and only on that basis will the Landlord be able to retain insurance commissions. This reflects the Lease Code.

20.10 If the Building, Centre or Estate is damaged by an Insured Risk, so that the Premises are unfit for occupation or use, various tenant protections apply (always subject to vitiation not having occurred). So:

20.10.1 the suspension of the Rent starts;

20.10.2 the Landlord must refund advance payments of the Rent; and

20.10.3 the Landlord must obtain any consents required and then apply the insurance proceeds to the reinstatement. For lettings of parts of a building, while the Landlord must reinstate the Building, there is no obligation to reinstate individual lettable parts of the Building other than the Premises. For lettings on an Estate, reinstatement is limited to the relevant building on the Estate and, if necessary the means of access to it. For shopping centres, the obligation is to reinstate the Centre.

20.11 Uninsured risks are more controversial. The MCL gives the Tenant all the benefits it would have if damage were caused by an Insured Risk except that the Landlord has a choice as to whether to reinstate. It must make this choice by telling the Tenant within 12 months of the damage whether or not it wishes it reinstated. If it does not, the Lease will end after that 12 month period. These provisions are only a starting point, as standard practice continues to evolve on the detail. So you will need to take specific instructions on this provision, as different landlords will have different approaches.

21. **Part 6 of the Schedule – Permitted Works**

21.1 You need to take specific instructions on this Part of the Schedule. Many landlords will think it is a good idea to have a Permitted Works structure to streamline things in the Lease. Some will not. Those who do may still want to look at this carefully to see whether (for example) it applies to External Works.

21.2 If this Part of the Schedule is retained, the Landlord will be able to give consent to the Tenant’s works (where consent is required) by a simple consent letter setting out any additional obligations to be imposed that are not already included in this Part of the Schedule.

22. **Part 7 of the Schedule- Sustainability**

22.1 We have included sustainability as a separate Part of the Schedule because not all landlords will wish to include these sustainability provisions. While Part 7 of the Schedule deals with some of the "lighter" sustainability matters, various other clauses within the MCL attempt to address the potentially more significant issues introduced by the Assessment of Energy Performance of Non-Domestic Buildings (Scotland) Regulations 2016 ("**AEP Regulations**").

22.2 This Part of the Schedule is "light green". It imposes only obligations that are administrative in nature. Clearly you will need to take specific instructions on whether you want to go "darker green" than this, or indeed whether to include it at all. The existing provisions should be strengthened where, for example, the Building is likely to require improvement works under the AEP Regulations in order to enhance its energy performance (the MCL provides for the Landlord's ability to assess and improve the Building, and to recover associated costs in this instance).

23. **Part 8 of the Schedule – Sub-letting**

23.1 Part 8 of the Schedule covers sub-letting and allows sub-letting at a market rent, rather than at the higher of market rent and the passing rent. This is consistent with the Lease Code.

23.2 It defines the Approved Sub-lease as a sublease in a form that includes various different provisions (which some landlords may wish to modify) but which ultimately do not require the Approved Sublease to be on exactly the same terms as the Lease.

23.3 For convenience, the form may well be the same, but some provisions may not be appropriate. Reviewing the rent at the same intervals as the Lease (although not necessarily on the same dates) is provided for.

23.4 The Tenant can end any Approved Sub-lease without the Landlord's consent, but variation and surrender need the Landlord's (reasonable) consent.