

SUBLEASES

GUIDANCE NOTES



1. Introduction

The suite of Subleases currently consists of two subleases of whole. They are available for use as follows:

- 1.1 the MCL compatible version which can be used in conjunction with the PSG/MCL suite of leases; and
- 1.2 the Non-MCL compatible version which can be used in conjunction with a lease that is not in the form of the PSG/MCL suite of leases.
- 1.3 Both versions apply in the context of a sub-letting of the whole Premises let (as opposed to a sub-letting of only part of the Premises let). Subleases of Part are to follow.

The Sublease uses the expressions Mid-landlord and Subtenant to distinguish from the Landlord and the Tenant under the Lease.

The approval of the Landlord – and possibly also the Landlord's secured lender – may be required before the Sublease can be granted and so the parties should not enter into the Sublease until the relevant consents have been obtained.

The Sublease is suitable for use in situations where the Mid-landlord wishes to assign the Lease but is unable to do so because for example, the Landlord has refused consent to assign or the prospective subtenant is not prepared to commit itself to the entire residue of the term of the Lease.

2. Preamble

Provision should be made for a guarantor, where relevant.

3. Clauses 1 and 2 – Definitions and Interpretation

- 3.1 To streamline the MCL compatible version of the Sublease the draft:

- 3.1.1 adopts various definitions which derive from the PSG/MCL suite of leases; and
 - 3.1.2 incorporates the salient clauses of the PSG/MCL suite of leases, by reference,

which avoids repeating already defined terms/each individual clause (as the case may be).

- 3.2 The Non-MCL compatible version includes various definitions (e.g. Business Day, Insurance Costs, Interest Rate, VAT Supply) which allows the Sublease to function on more of a "standalone" basis.

4. Clause 4.2 – Monetary obligations

Consider which monetary sums due under the Lease are to be passed down to the Subtenant.

5. Clause 5.1 – Non-monetary obligations

Consider whether the parties intend to pass on to the Subtenant all the Tenant's non-monetary obligations under the Lease without modification or dilution for example:

- 5.1 it may be appropriate to include provision for a schedule of condition as regards repairs;
- 5.2 the use clause may need to be limited or constrained;
- 5.3 more bespoke drafting may be needed for alterations as, on the one hand, the Mid-landlord may seek additional qualifications on alterations above and beyond those contained in the Lease and, on the other hand, a Subtenant may not want to assume responsibility for reinstating alterations for which it was not responsible;
- 5.4 the Subtenant may wish to restrict its obligations as regards reinstatement of alterations on expiry of the Sublease, especially if such alterations pre-dated the Sublease being entered into.

6. Clause 5.4 – Alienation

It may be appropriate to expand the alienation provisions to cater for occupancy by the Subtenant's related companies/concessionaires.

7. Clause 5.5 – User

It may be appropriate for the permitted use to be more restrictive than the corresponding use provisions in the Lease.

8. Clause 6 – Mid-landlord's obligations

The assumption is that (facing the Landlord) the Mid-landlord will remain responsible for all monetary payments - as otherwise there is the risk of the Lease being irritated.

Any additional obligations to be imposed on the Mid-landlord should be included in this clause.

9. Clause 8 – Landlord's rights

This clause may be included if the parties want to give the Landlord the right to enforce the Sublease directly against the Subtenant. Clause 15 dealing with the Contract (Third Party Rights) (Scotland) Act 2017 will need to be amended to carve out this clause if it is included in the Sublease.

10. Clause 9 – Suspension of Rent

The clause is intended to pass on to the Subtenant the benefit of any rent cessor afforded to the Mid-landlord.

11. Clause 12 – Continuance of Sublease

Replicating the Lease, this clause contracts out of *rei interitus* so that the Sublease does not automatically terminate if the Premises are damaged or destroyed.

Consider whether this is the desired outcome, especially if the Sublease is of a relatively short duration.

12. Clause 14 – Break clause

If the parties have agreed that the Sublease may be terminated early and this does not tie in with a break clause under the Lease, this optional break clause may be included in the Sublease.

13. Schedule – rent review

The rent review schedule assumes:

- 13.1 a contemporaneous review of rent under the Lease and the Sublease, and
- 13.2 for any increase to be passed on to the Subtenant.

Amend the drafting if this is not what the parties have agreed. If the Lease permits (or the Landlord otherwise agrees) the Sublease rent could be made subject to a separate open market or indexed review protocol.

The drafting assumes that each party pays its own expenses in relation to the ascertainment of the revised rent.