

OFFER TO GRANT A LEASE

Guidance Notes



Introduction

This offer to grant a lease mirrors the PSG offer to sell. It is intended that a draft lease (using one of the suite of PSG leases) is annexed to the offer. The offer provides optional wording:

- for a side agreement to be issued on the grant of the Lease
- for the tenant carrying out fitting out works in accordance with the terms of the draft PSG Licence for Works annexed to the offer
- for a rent deposit to be paid and documented using the PSG Deposit Agreement
- for a Guarantor of the Tenant's obligations using the PSG Guarantee
- for a rent free period
- for suspensive conditions.

There is alternative wording to use depending on whether the grant of the lease will trigger automatic plot registration and depending on whether the lease is registrable or not. See the notes below for more information.

We have drafted the offer on the basis that if there is a Guarantor they will execute a separate Guarantee and will not be a party to the Lease.

We have provided that if the Lease is registrable the Tenant will be responsible for registration of the Lease in the Land Register and in the Books of Council & Session. If the Lease is not registrable the Landlord will be responsible for registration of the Lease in the Books of Council & Session.

If the Landlord is offering some sort of financial incentive to the Tenant to take the lease you must take specialist tax advice on the VAT implications of the payment. The offer does not provide for a premium to be paid.

1 Clause 1 Definitions and Interpretation

In the same way as in the offer to sell we have used defined terms to streamline the text of the clauses in the Offer. Ideally any terms which are defined should appear in the Definitions section rather than within the body of the offer. Delete any definitions which do not apply.

"Advance Notice" is required only if the lease is a registrable lease.

"Automatic Plot Registration" is needed if the lease is a registrable lease and the Landlord's title is recorded in the General Register of Sasines, otherwise it can be deleted.

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"Disclosed Documents" see the comments on Clause 4.1 below.

"Letter of Undertaking" is only required if the Lease is **not registrable**.

"Rent Free Period" the payment of a rent of £1 (if asked) is provided to ensure that the Lease meets the requirements for a lease to be created under Scots Law.

2 Clause 2 Suspensive Conditions

There is optional wording for suspensive conditions for example obtaining the Landlord's heritable creditor's consent to the Lease. Insert any additional suspensive conditions in Clause 2.1.2. As the heritable creditor's consent is for the benefit of both Landlord and Tenant neither party may unilaterally waive this condition. Clause 2.2.2 deals with waiving the other suspensive conditions and can be tailored depending on whether the conditions are for the Landlord's or the Tenant's benefit. If the suspensive conditions are for the benefit of both parties Clause 2.2.1 may be amended to include the additional suspensive conditions and Clause 2.2.2 deleted. Clause 2.2.3 provides that both parties must assist each other to enable the suspensive conditions to be purified.

3 Clause 3.3 Initial Payment

Property transactions are seen as a fertile source of money laundering activity. If the Initial Payment is paid direct from the Tenant to the Landlord's Solicitors there may be a delay whilst the Landlord's Solicitors comply with the anti-money laundering regulations. To prevent this we have provided that where funds are paid to the Landlord's Solicitors, the relevant funds must come from a firm of solicitors. The Tenant and its solicitor are on notice to route the funds in the appropriate way.

The Initial Payment is due to be paid on the Term Start Date. If there is no rent-free period delete references to the Rent Commencement Date. If there is a short rent-free period (for example, so that the Rent Commencement Date falls before the next Rent Day) the landlord may want the first instalment of rent to be paid on the Term Start Date. If that is the case, include Clause 3.3.3(a) referring to the Rent Commencement Date. For longer rent-free periods, it is likely that the landlord will expect the first instalment of rent to be paid on the Rent Commencement Date. If that is the case, Clause 3.3.3(a) may be deleted.

4 Clause 3.4 LBTT Requirements

It is assumed that the effective date will be the Term Start Date. If that is not the case, Clause 3.4 will need to be amended. The offer requires the Tenant to file a LBTT return and pay any LBTT due within [5] Business Days of the effective date. This is because the Lease cannot be registered until any necessary LBTT return has been submitted and arrangements satisfactory to Revenue Scotland are made for the payment of LBTT. The Tenant must indemnify the Landlord for any loss suffered as a result of the Tenant failing to submit the LBTT return timeously.

5 Clause 3.5 Signing and Registering the Lease and Other Documents

There are alternative clauses depending on whether the Lease is registrable or not. Amend as appropriate.

6 Clause 3.7 Guarantee

The acceptance of the offer must be issued on behalf of the Guarantor, as well as on behalf of the Tenant, so that the Guarantor will be a party to the Missives.

7 Clause 4 Title

Clause 4.1 Tenant Satisfied with Title

The Tenant is expected to satisfy itself on title before Missives are concluded. There are two options for Clause 4.1.1.

Option 1 is a simple statement that the Tenant is deemed to have satisfied itself on title and makes no reference to Disclosed Documents. This is subject to the Tenant seeing clear legal reports and other searches at the Term Start Date.

Option 2 relies on the Landlord listing all of the title deeds and other documents provided to the Tenant as Disclosed Documents in the Schedule to the offer. This clause provides that any Disclosed Documents are deemed to have been examined by the Tenant, and that it accepts that it is leasing the Property having satisfied itself on all matters disclosed in them. Again this is subject to the obligation on the Landlord to provide legal reports and other searches at the Term Start Date.

Clause 4.2 Documents to be Disclosed

This clause provides for Title Deeds, property enquiry certificates, coal mining search and other usual documentation to be exhibited to the Tenant as soon as reasonably practicable after the date of conclusion of Missives if it has not already been exhibited.

The ninety day time limit for coal authority reports is based on current Law Society guidance. There is no equivalent guidance for Property Enquiry Certificates. The PSG consider that a sixty day expiry limit for PECs is a reasonable balance, since there are different risks associated with the information contained in PECs and coal authority reports. In all cases it will depend on the circumstances whether either expiry limit is appropriate, depending upon the nature of the Property, the terms of the information contained in the report and the Tenant's proposed use of the Property.

The Tenant may resile from the Missives during the period allowed, if the Title Deeds and any other matters disclose anything materially prejudicial. However once the period of time has elapsed without the Tenant resiling, all of the items exhibited will become Disclosed Documents for the purposes of the Missives and the deeming provision in clause 4.1 will apply.

Clause 4.4 Reports and Searches

There are two versions of Clause 4.4.1 depending on whether the Lease is a registrable lease or not. Use the first option for a non-registrable lease. Clause 4.4.3 is only required if the Lease is registrable.

Clause 4.5 Letter of Undertaking or Advance Notices

Select which version of Clause 4.4 is appropriate depending on whether the Lease is registrable (include the Advance Notices clause) or not (include the Letter of Undertaking clause).

Advance Notices: An advance notice (AN) is a notice in the Registers of Scotland that protects an intended deed between two or more parties for a 35 day period. Only the person who may validly grant the intended deed (or someone with that person's consent) can apply for the AN. The AN protects the intended grantee against competing deeds registered within the 35 day protected period and against the granter being inhibited within the 35 day protected period. The protected period will begin on the day after the AN appears in the application record. An AN expires at the end of the 35 day period, unless discharged earlier.

The AN for the Lease must be in the form adjusted with the Tenant because the Tenant's Solicitors will want to ensure that the Tenant is correctly designed in the application for the AN and that the Lease is correctly identified. If the Tenant's name is incorrect the Lease will not be protected by the AN.

There is no statutory guidance on when the application for the AN should be submitted and it will be for the parties to consider what is an appropriate time in the circumstances of their transaction. We have suggested that the AN is entered on the application record no earlier than 5 Business Days prior to the later of (a) the Term Start Date and (b) the date on which the Landlord duly executes the Lease. This will provide the Tenant with around 30 days of protection after settlement in case there is any delay in the Lease being registered. Requisitions are very rare under the 2012 Act. The Keeper must reject any application which does not meet any of the general application conditions (set out in section 22 of the Act) or conditions of registration (set out in sections 23 to 28 of the Act) as at the date of application. This is known as the "one shot rule". The Tenant will need to have sufficient protection under the AN in case the application is initially rejected.

For an AN for a Lease inducing first registration and for some leases of part (where a plan is required for example) the application for the AN must be made on paper because electronic submission is not possible. This means that the Landlord will need to ensure that the application is submitted to allow for delivery by traditional mail, if necessary, to comply with whatever time period is specified in the missives.

The Landlord will receive an acknowledgement of the AN (electronically if submitted online and by traditional mail if submitted on paper). The Landlord may exhibit this to the Tenant as confirmation that the AN has been submitted, and in addition the Tenant has the comfort that the Landlord must exhibit property searches at the Term Start Date disclosing the AN for the Lease.

The Tenant needs the Landlord's consent before it can apply for an AN for any deeds that it intends to grant over the Lease such as standard securities or sub-leases.

Clause 4.6 and 4.7 Land Register Requirements and Post Completion

These clauses are only required if the Lease is registrable. They mirror the provisions in the PSG Offer to Sell and include a co-operation clause if the application to register the Tenant's right to the Lease is rejected.

Clause 4.8 Automatic Plot Registration

In terms of section 24(2) and section 25 of the 2012 Act, if a registrable lease is granted and the Landlord's title is Sasine recorded, the grant of the lease will trigger automatic registration of the Landlord's title to the extent of the lease demise.

When submitting a lease for registration which triggers automatic plot registration, the onus is on the applicant (ie the Tenant) to ensure the application contains sufficient information to enable the Keeper to make up the title sheet for the Landlord's previously unregistered plot. The Tenant's solicitor must send the Keeper the documents required under s.22 and s.25 of the 2012 Act which will include a plan capable of being mapped, any burdens writs and any deeds creating servitudes (see the one shot rule checklist on the Registers website). We have been advised by Registers that copies of the Landlord's title deeds will suffice, but that any plans must be coloured copies.

The fee payable by the Tenant for registration of the Lease will be calculated in the usual way regardless of the fact that automatic plot registration is triggered. Since registration of the Landlord's plot of land is induced by the same application, no additional fee will be payable.

The Tenant's solicitors will want to check the Landlord's title to ensure that they can complete the application form correctly.

Normally the grantor's solicitors will not approve the application form prepared by the grantee. However the Landlord's solicitors will need to make sure that all of the questions on the application form relating to the Landlord's title have been correctly answered so that the Landlord obtains a title sheet with no exclusion or limitation of warranty and containing the correct title conditions.

The Landlord will want an email address for it or its solicitors to be included on the application form so that the Keeper can notify them about the automatic registration of the Landlord's title to the Property.

8 Clause 5 Statutory Matters

This clause deals with compliance with statute, statutory repairs notices, energy performance and community asset transfer requests. With regard to statutory repairs notices liability remains with the Landlord until the Term Start Date.

Asset transfer requests were introduced by Part 5 of the Community Empowerment (Scotland) Act 2015 and may be made to relevant authorities by a community in relation to any land owned or leased by that authority. "Relevant authority" is defined by reference to a list of bodies in Schedule 3 to the Act, and includes local authorities, Scottish Ministers, Scottish Enterprise, Highlands and Islands Enterprise, local Health Boards, National Park authorities and others.

An asset transfer request must come from a "community transfer body", and can be made at any time. Once a relevant authority receives an asset transfer request, it must not sell, lease or otherwise dispose of the land to which the request relates to anyone other than the community transfer body. Any contract concluded after an asset transfer request is received is void.

The community transfer body is not required to register an interest or satisfy a public interest test and the authority must agree to the transfer request unless there are reasonable grounds for refusing it.

However the prohibition on sale, letting or disposal does not apply if the land in question has already been advertised or exposed for sale or let, or negotiations for the sale or letting are already underway.

Therefore a prospective purchaser or tenant needs the relevant authority to confirm that it has not received an asset transfer request for the property concerned before the negotiations for the sale or letting began.

This clause is only required where the Seller is a relevant authority. Delete if not relevant.

9 Clause 8 Damage or Destruction

This wording mirrors the wording in the Offer to Sell. In determining what is material damage we have suggested damage which at common law would entitle a tenant to an abatement of rent exceeding 20% of the rent. If there is material damage on this basis either party may resile from the Missives. However this clause needs to be considered carefully for properties for which there is a high rent where 20% of the rent would be a significant amount and the parties may wish to agree a lower figure after taking appropriate professional advice.

10 Clause 9- Tenant's Works

There is intentionally no obligation on the Tenant to carry out the Tenant's Works to ensure there is no impact on rent review because the rent review clause provides that improvements carried out by the Tenant will be disregarded on rent review, unless they are carried out pursuant to an obligation to the Landlord.

If there were an obligation on the Tenant to carry out the Tenant's Works the Short Lease Premium Rules (section 7 of Corporation Tax Act 2009) may apply if the works will increase the Landlord's reversionary value (eg if the works are not to be reinstated on lease expiry). The Tenant's Works may be treated as a lease premium, meaning the Landlord would be liable to income tax on their value. You should take specialist tax advice.

11 Clause 10 Costs

Clause 10 includes alternatives – it caters for each party bearing their own legal etc costs and it provides for alternative wording in cases where the Tenant is bearing the whole or a contribution towards the costs of the transaction. If the Tenant is to pay the whole of those costs, delete the words "[a contribution of [] (£[]) POUNDS STERLING (exclusive of VAT, which will be payable by the Tenant in addition) towards]".

12 Clause 12 Confidentiality

Consider if it is appropriate to have a confidentiality clause in the Missives given that when the lease is registered either in the Books of Council & Session or in the Land Register it will be a public document. If the parties want to register the Missives you should delete this clause.

13 Clause 14 Supersession

Consider carefully if it is appropriate to include a supersession clause. If for any reason the lease is not executed within the two year period the Missives will cease to have effect and the parties will not be able to rely on Clause 3.10 (terms of lease binding as if lease had been duly executed). See *Gilcomston Investments Limited v Speedy Hire (Scotland) Limited* (Sheriff Court 14 September 2012 CA/2/12) where the Sheriff held there was no lease once Missives ended.

14 Clause 18 Consent to registration

Be aware of the potential conflict between this clause and the confidentiality clause (Clause 12). If the parties want to keep the terms of the Missives confidential then it is not appropriate to register the Missives in the Books of Council and Session which is a public register.